

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

DONALD HUCKANS,

Plaintiff,

v.

WAL-MART STORES, INC., a Delaware
corporation,

Defendant.

ENTERED ON DOCKET

DATE 1-20-98

Case No. 96-cv-855-H ✓

FILED

JAN 16 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This matter came before the Court on a Motion for Summary Judgment by Defendant and a Motion to Remand by Plaintiff. The Court duly considered the issues and rendered a decision in accordance with the order dated January 15, 1998.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Defendant and against Plaintiff as to Plaintiff's claims under the Americans with Disabilities Act. Plaintiff's remaining state law claims are hereby remanded to the District Court of Tulsa County, Oklahoma.

IT IS SO ORDERED.

This 16TH day of January, 1998.



Sven Erik Holmes
United States District Judge

27

ENTERED ON DOCKET

DATE 1-20-98

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

LERA THOMAS,

Plaintiff,

v.

TULSA JOB CORPS,

Defendant.

No. 97-CV-186-H

FILED

JAN 16 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes before the Court on the status hearing held in this action on June 12, 1997. At that hearing, Plaintiff stated that she had not yet served the proper Defendant in this case. The Court ordered that Plaintiff was to serve the proper Defendant no later than June 26, 1997, or the case would be dismissed. Plaintiff has not served the proper Defendant, thus failing to obey the Court's order.

Rule 41(b) of the Federal Rules of Civil Procedure allows the Court to dismiss an action "[f]or failure of the plaintiff to prosecute or to comply with these rules or any order of court." See also Stanley v. Continental Oil Co., 536 F.2d 914, 917 (10th Cir. 1976) (stating that a court has inherent authority to dismiss for failure to prosecute). Plaintiff has not complied with the Court's order directing Plaintiff to serve the proper Defendant. Thus, Plaintiff's action is hereby dismissed without prejudice.

IT IS SO ORDERED.

This 16TH day of January, 1998.


Sven Erik Holmes
United States District Judge

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

JACK L. MEDICK,

Plaintiff,

vs.

BIOMET, INC., an Indiana
Corporation;
CHARLES HESS; and
RONALD PAPA,

Defendants.

ENTERED ON DOCKET

DATE

1-20-98

Case No. 96-CV-584-H

FILED

JAN 16 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This breach of contract action was tried to the Court on August 4-5, 1997. Plaintiff Jack L. Medick claims that Defendants Biomet, Inc. ("Biomet"), Charles Hess, and Ronald Papa breached the terms of a 1982 distributorship agreement among the parties by failing to pay Mr. Medick certain long term commissions that are described in that agreement.

Upon consideration of the evidence and arguments presented at trial, the Court hereby adopts the following Findings of Fact and Conclusions of Law.

Findings of Fact

1. Plaintiff Jack Medick is a citizen of Texas and Defendant Charles Hess and Defendant Ronald Papa are citizens of Oklahoma. Defendant Biomet is an Indiana corporation with its principal place of business in Indiana. The amount in controversy exceeds \$75,000.
2. Until early 1982, Mr. Medick, Mr. Hess, and Mr. Papa were all sales employees of Zimmer Hoffman Associates, a distributor of orthopedic implants.
3. On February 26, 1982, Mr. Hess and Mr. Papa entered into an agreement with Biomet, a manufacturer of orthopedic surgical implants and medical supplies, for the exclusive right to sell Biomet products in a specific territory.

60

4. On April 1, 1982, Mr. Medick became a party to the agreement. At the same time, Addendum No. 3 to the agreement was amended by striking the word "dual" and replacing it with the word "triple" (this agreement, as amended and executed by Plaintiff, hereinafter referred to as the "1982 Distributorship Agreement"). Following execution by Mr. Medick, the "Distributor," as defined under the 1982 Distributorship Agreement, was each of Mr. Medick, Mr. Papa, and Mr. Hess. Pursuant to the terms of the 1982 Distributorship Agreement, Biomet granted Mr. Medick, Mr. Papa, and Mr. Hess a distributorship to sell Biomet products (such distributorship granted pursuant to the 1982 Distributorship Agreement, hereinafter referred to as the "Distributorship").

5. At the time of the 1982 Distributorship Agreement, Biomet was a start-up company that wanted to employ proven medical equipment salesmen to grow its distributorship network. The 1982 Distributorship Agreement was one of a group of early distributorship agreements entered into by Biomet which contain various provisions more favorable to distributors than were normal in the industry at the time.

6. Paragraph 1 and Schedule A of the 1982 Distributorship Agreement provided that the original territory of the Distributorship was Oklahoma, Arkansas, and Southern California.¹

7. Paragraph 8 of the 1982 Distributorship Agreement provided in its entirety as follows:

Distributor may not assign this agreement without prior written approval of Biomet, with the exception that distributor may operate his business through a corporation of which distributor is the controlling shareholder.

8. Paragraph 9 of the 1982 Distributorship Agreement provided that Biomet would pay certain long term commissions ("Long Term Commissions") that could be initiated at the discretion of the "distributor" once the "distributor" vested in the program. Paragraph 9(b), as set

¹ Early on, California was deleted, and Arizona and New Mexico were added to the territory covered by the 1982 Distributorship Agreement. Effective April 1, 1986, West Texas was added to the territory.

forth in the body of the contract, provided a "distributor" was vested after ten years of continuous service to Biomet, and upon attaining the age of 55. Addendum No. 3 to the 1982

Distributorship Agreement provided in its entirety as follows:

Because of the triple [previously "dual"] partnership being Charles Hess and Ron Papa operating this distributorship, the "long term commission program" will be considered valid at that time in which Ron Papa, alone, fulfills the required 55 years of age with ten years or more continuous service. In the event that Ron Papa would die, terminate, or otherwise discontinue this partnership before the ten year service period and age of 55 were attained, the continuation and considerations of the time frames outlined in this contract would be the same for Charles Hess as that of Ron Papa if he had lived, or remained a functional member of the partnership. Therefore, on April 9, 1996, when Ron Papa will or would have reached the age of 55 years, Charles Hess will be eligible for full benefits and compensation outlined in this contract for "long term commission program," even though he will be only 45 years of age.

9. Under the 1982 Distributorship Agreement, Long Term Commissions are to be calculated on the basis of current commissions for each territory. According to Paragraph 9(d), Long Term Commissions are to be calculated as follows:

1. One and one-quarter percent (1-1/4%) of the total "net sales" are to be paid to the distributor, up to a maximum income of fifty thousand dollars (\$50,000) per year.
2. One-half (1/2) of one percent (1%) of "net sales," above the sales level from which the first fifty thousand dollars (\$50,000) in income was calculated, are to be paid to the distributor, per year, with no maximum income level.

10. The Biomet Long Term Commission program was created by Dane Miller and Jerry Ferguson, two of the founders of the company. The intent was that when an original distributor "retired," his or her Long Term Commissions were to be taken out of the succeeding distributor's current sales commissions. The Long Term Commission program contemplates that the person initiating Long Term Commissions is no longer active in the business from which those Long Term Commissions are derived. Stated another way, the Long Term Commission program is a reward for past service that is measured by future sales in the subject territory. David L. Montgomery, the current Vice President of Sales and Marketing, testified that there have only been two distributors on these type of original distributorship agreements who have initiated their

Long Term Commission programs, and that in both instances, the Long Term Commissions have been taken out of the successor or continuing distributor's "current" commissions, so that in effect, there is no net difference to Biomet, i.e., Biomet pays the same amount of commissions on the sales of its products, but the former distributor gets his or her Long Term Commission off the top, and the successor distributor gets whatever commission remains.

11. Paragraph 12 of the 1982 Distributorship Agreement provided that such agreement "shall be construed under and be controlled by the laws of the state of Indiana."

12. Paragraph 13(c) of the 1982 Distributorship Agreement provided in its entirety as follows:

This agreement contains the entire agreement of the parties. It may not be changed orally but only by an agreement in writing signed by the party against whom enforcement of any waiver, change, modification, extension or discharge is sought.

13. Mr. Hess, Mr. Papa, and Mr. Medick signed the 1982 Distributorship Agreement in their individual capacities. The agreement is a Biomet form contract with a blank line, generally intended to be filled-in with one individual name as "distributor." In this case, however, the parties inserted three individual names as "distributor." In 1982, there were no other distributorship agreements in which there were multiple parties inserted as "distributor."

14. In October of 1982, Mr. Hess, Mr. Papa, and Mr. Medick created an Oklahoma corporation, High-Tec Surgical Systems, Inc. ("High-Tec"). Each of the three parties owned one-third of the shares of High-Tec. The sole purpose for the incorporation of High-Tec was to operate the Distributorship granted pursuant to the 1982 Distributorship Agreement. Although the rights of the "Distributor," as defined in the 1982 Distributorship Agreement, were never assigned to High-Tec, Mr. Hess, Mr. Papa, and Mr. Medick operated the Distributorship through High-Tec, and such method of conducting the business of the Distributorship was allowed by Biomet.

15. During the period 1982 to 1992: (1) all commissions owed by Biomet to the "Distributor" under the 1982 Distributorship Agreement were paid to High-Tec; (2) all salary and bonuses received by Mr. Hess, Mr. Papa, and Mr. Medick, respectively, for work in connection with the Distributorship were paid by High-Tec; (3) Mr. Medick received no commissions directly from Biomet; (4) High-Tec reported on its tax returns the financial operations associated with the Distributorship, including the current commissions; and (5) as president of High-Tec, Mr. Medick periodically signed contracts on behalf of High-Tec with other vendors and manufacturers.

16. Biomet required all subsequent agreements amending the 1982 Distributorship Agreement to be signed by each of Mr. Hess, Mr. Papa, and/or Mr. Medick in their individual capacities. Daniel Hann, the corporate counsel for Biomet, explained:

Q: Has it been your understanding that it's been a policy of Biomet that they want to have the signatories to the distributorship agreement be individuals as opposed to a corporation?

A: Generally, yes.

Q: And why is that, sir?

A: We view these as personal service agreements and relationships.

Q: So, being a personal service agreement, you want the individuals to be the party to the agreement as opposed to a corporate entity?

A: Correct.

According to Mr. Montgomery, Biomet would sometimes use "High-Tec" as a shorthand reference for the Distributorship, but Biomet did not intend to mean that High-Tec was a party to the 1982 Distributorship Agreement.

17. Through the years, agreements with other companies were signed by the corporation High-Tec, rather than by Mr. Hess, Mr. Papa, and Mr. Medick, in their individual capacities.

18. By 1992, conflict had arisen between Mr. Hess and Mr. Medick. Mr. Medick was approached by Joel Pratt about the fact that a distributorship in the Dallas area would soon be

open. Mr. Medick had brief discussions with Mr. Hess and Mr. Papa regarding whether they could add the Dallas territory to the Distributorship. This option was rejected, however, because Biomet wanted the distributor in the Dallas territory to live in Dallas, and neither Mr. Hess nor Mr. Papa was willing to move. Thereafter, Mr. Medick negotiated and obtained the Dallas distributorship for himself.

19. In 1992, Mr. Medick entered into a separate distributorship agreement with Biomet (the "Dallas Distributorship Agreement") covering North Central Texas, Dallas County, Texas, and Northeastern Texas (hereinafter the "Dallas Territory"). The Dallas Distributorship Agreement was effective April 20, 1992, but was signed some months later. Mr. Medick actually began operating as the Biomet distributor in the Dallas Territory in April 1992. The Dallas Distributorship Agreement contained a Long Term Commission program similar to that contained in the 1982 Distributorship Agreement, except that the Dallas Distributorship Agreement also contained disability benefits.

20. Paragraph 1 of the Dallas Distributorship Agreement provided in its entirety as follows:

Biomet hereby appoints Distributor as its exclusive distributor and Distributor hereby accepts such appointment for described territory(s). (See Schedule A for distributorship territory(s) definition). The parties agree that the Distributor shall have the exclusive rights to the distribution and sale of Biomet products in said territory(s) and to the receipt of commissions for same as hereinafter provided. The parties further agree that no commissions are due Distributor for sales outside of said territory(s) and that Distributor will not directly or indirectly effect sales or receive commissions for Biomet products shipped or intended for shipment outside of the territory(s) without the prior written consent of Biomet.

(emphasis added).

21. Paragraph 12 of the Dallas Distributorship Agreement provided in its entirety as follows:

This Agreement shall be construed under and be controlled by the laws of the State of Indiana, as they may exist from time to time.

22. Paragraph 13(c) provided in its entirety as follows:

This Agreement contains the entire agreement of the parties for the Territory outlined in Schedule A. It may not be changed orally, but only by an agreement in writing signed by the party against whom enforcement of any waiver, change, modification, extension or discharge is sought.

23. Once Mr. Medick received the Dallas Distributorship early in April, 1992, Mr. Hess and Mr. Papa directed their attorney, Mitchell Kramer, to draft a stock sale agreement whereby Mr. Medick would end his relationship with High-Tec. Mr. Medick had no contact with Mr. Kramer regarding this agreement at any time prior to its being signed.

24. Effective May 22, 1992, Mr. Medick entered into an agreement with High-Tec (the "5/22/92 Stock Purchase Agreement") whereby Mr. Medick sold his High-Tec stock back to High-Tec for \$50,000, agreed to a non-compete provision (with respect to Oklahoma, Arkansas, and West Texas) for which he was paid \$60,800, received a life insurance policy and a country club membership, and resigned his positions as an officer, employee, and member of the Board of Directors of High-Tec. Biomet was not a party to the 5/22/92 Stock Purchase Agreement. Mr. Hess signed the 5/22/92 Stock Purchase Agreement on behalf of High-Tec. Both Mr. Hess and Mr. Papa signed the 5/22/92 Stock Purchase Agreement in their individual capacities solely as guarantors of High-Tec's performance under the promissory notes described in that agreement.

25. Paragraph 5 of the 5/22/92 Stock Purchase Agreement provided in its entirety as follows:

Medick agrees that for two (2) years after the date of this Agreement he will not either directly or indirectly compete with the business of High-Tec within the states of Oklahoma, Arkansas, or the Western portion of Texas which areas are those in which High-Tec presently acts as a distributor for Biomet, Inc. Medick further agrees that within the said territory for the said two (2) year period he will neither act as an employee, owner, investor, creditor, representative, consultant, or in any other business capacity with any person, partnership or business entity which competes with the business of High-Tec within the said territory with the exception that Medick may act as a manufacturer's representative or distributor of a manufacturer that competes with High-Tec's business so long as Medick's territory for such a manufacturer does not overlap with the territory of High-Tec as specified above.

26. Paragraph 8 of the 5/22/92 Stock Purchase Agreement provided in its entirety as follows:

In consideration of the mutual promises made herein, and excepting only the obligations of the parties to this Agreement as set forth in this Agreement, Medick and High-Tec, for themselves and any and all of their successors, assigns, heirs, administrators and executors hereby release, remise and forever discharge the other from any and all manner of action or actions, causes and causes of action, in law or equity, whether foreseen or unforeseen, matured or unmatured, known or unknown, accrued or not accrued, direct, indirect and derivative, suits, debts, assessments, dues, claims, losses, damages, judgments, executions, defaults, covenants, contracts, controversies, agreements, promises, attorneys fee, costs, interest payments and expenses and demands of any kind whatsoever, which either had, now has or hereinafter can, shall or may have against the other for or by reason of any event, matter, cause or thing, whatsoever from the beginning of the world to the date of execution of this Agreement. These releases will run to the benefit of and shall bind all officers, directors and employees and affiliates of High-Tec and all heirs, administrators, successors and assigns of Medick.

27. Paragraph 9 of the 5/22/92 Stock Purchase Agreement provided in its entirety as follows:

All Agreements whether oral or written between High-Tec and Medick, made heretofore, are void and superseded by this Agreement. This Agreement may only be amended or modified by a written agreement signed by both of the parties hereto.

28. Paragraph 10 of 5/22/92 Stock Purchase Agreement provided in its entirety as follows:

This Agreement is being delivered and is intended to be performed in accordance with the laws of the State of Oklahoma and shall be construed and enforced in accordance with the laws of that State.

29. A draft of the 5/22/92 Stock Purchase Agreement between Mr. Medick and High-Tec prior to execution also reflected a typed paragraph numbered 7(a), which stated as follows:

In the event that Biomet, Inc. pays any monies pursuant to the "Long Term Commission Program" established in the Distributorship Agreement entered into on February 26 1982 between Biomet and Hess, Papa and Medick, Medick will be entitled to one-third of such payments. Nothing in this Agreement, however, will be construed as requiring the distributor (as defined in the February 26, 1982 Agreement) to initiate the Long Term Commission Program at any given time or from ever initiating that program.

This paragraph, however, was stricken through, marked "VOID," and initialed by each of Mr. Hess, Mr. Papa, and Mr. Medick.

30. Following the execution of the 5/22/92 Stock Purchase Agreement, Mr. Medick performed no services for High-Tec, nor did he help develop the territories assigned to the Distributorship operated by Mr. Hess and Mr. Papa.

31. Effective May 27, 1992, Biomet, Mr. Hess, Mr. Medick, and Mr. Papa entered into an agreement to reduce the territory of the Distributorship (the "5/27/92 Territory Reduction Agreement"). Pursuant to the 5/27/92 Territory Reduction Agreement, the Arizona and New Mexico territories were deleted from the 1982 Distributorship Agreement, in consideration of which Mr. Hess and Mr. Papa each individually received \$121,895.50 in cash (for a total of \$243,791) plus stock options and Mr. Medick received the appointment as Biomet distributor for the Dallas Territory (defined above).

32. Paragraph 1.2 of the 5/27/92 Territory Reduction Agreement provided in its entirety as follows:

It is expressly understood and agreed that the long term commission program provided for in Section 9 of the Distributorship Agreement shall only apply to the Modified Territory [Arkansas, Oklahoma and West Texas] and that Hess, Papa and Medick shall have no right to participate in such program as it relates to the State of Arizona and New Mexico (except as shown in Schedule A).

33. Paragraph 1.3 of the 5/27/92 Territory Reduction Agreement provided in its entirety as follows:

Each of the parties to this Agreement hereby release and discharge the other parties to this Agreement and their respective employees, affiliates, successors and assigns from and against any and all claims, debts, demands, losses, agreements, actions, accounts, causes of action, damages and liabilities whatsoever, whether in law or in equity, resulting from, respecting, relating to or arising out of any fact, occurrence, or omission existing on or prior to the date of this Agreement which any party hereto now has or may later discover in connection with or arising out of any and all matters, transactions, or things including, but not limited to, all matters arising out of or in connection with the Distributorship Agreement, the distributor relationship or the States of Arizona and New Mexico (except as shown in Exhibit A) removed from the Territory. Specifically excluded from [sic] this release are the provisions of the agreement dated May 22, 1992 between HTSS, Inc. and

Medick and the obligations created in that agreement. Further, this release will not be applicable to claims by third parties for product liability.

34. Paragraph 2.2 of the 5/27/92 Territory Reduction Agreement provided in its entirety as follows:

Effective April 20, 1992, Medick shall be appointed as the Biomet distributor for the Dallas County, Texas, Northcentral Texas, and Northeast Texas territories on terms and conditions set forth in a separate distributorship agreement to be entered into between Medick and Biomet.

35. Paragraph 3.5 of the 5/27/92 Territory Reduction Agreement provided in its entirety as follows:

This Agreement contains the entire agreement of the parties hereto with respect to the subject matter hereof and shall be deemed to supersede all prior agreements, whether of written or oral, and the terms and conditions of any such prior agreements shall be deemed to have been merged into this Agreement, with the exception of the Distributor Agreement dated February 26, 1982 between Biomet and Hess, Papa, and Medick except to the extent that this Agreement specifically modifies or amends the said February 26, 1982 agreement. Nothing in this Agreement is intended to or will modify those stock options granted by Biomet, Inc. to Hess, Papa, and Medick prior to the date of this Agreement.

(emphasis added).

36. By letter to Mr. Medick dated February 1, 1993, Mr. Pratt of Biomet acknowledged receipt of the signed Dallas Distributorship Agreement, and stated:

This presents an unusual situation in that Biomet presently has two distributorship contracts with you, one for the Oklahoma/Arkansas territory and one for the northern section of Texas.

This was the only case where Biomet had two contracts with a single distributor simultaneously.

37. According to Mr. Pratt, Mr. Medick had rights to Long Term Commissions under the 1982 Distributorship Agreement and those rights were modified by the 5/27/92 Territory Reduction Agreement to embrace only the modified territory of Oklahoma, Arkansas, and West Texas (the "Modified Territory"). Mr. Pratt was not able to identify any agreement between Mr. Medick and Biomet whereby Mr. Medick relinquished his rights to Long Term Commissions in that Modified Territory. Furthermore, Mr. Pratt, as Biomet's negotiator on the 5/27/92 Territory

Reduction Agreement, believed that the 5/27/92 Territory Reduction Agreement stated that Mr. Medick had continuing rights to Long Term Commissions in the Modified Territory, that there was nothing in that agreement which extinguished or released Mr. Medick's rights to Long Term Commissions in the Modified Territory, and that it was not Biomet's intent to effect any release of Mr. Medick's Long Term Commissions in that agreement.

38. Mr. Pratt was Biomet's primary negotiator on the Dallas Distributorship Agreement and also negotiated the 5/27/92 Territory Reduction Agreement that eliminated Arizona and New Mexico from the 1982 Distributorship Agreement. Mr. Hann, the corporate counsel for Biomet, was also involved in drafting the 5/27/92 Territory Reduction Agreement. Mr. Kramer, as the attorney for Mr. Hess and Mr. Papa, reviewed the 5/27/92 Territory Reduction Agreement, and added language to the release clause referencing the 5/22/92 Stock Purchase Agreement. Biomet's legal department approved both the Dallas Distributorship Agreement and the 5/27/92 Territory Reduction Agreement. Mr. Medick had no part in negotiating the 5/27/92 Territory Reduction Agreement, and was only later sent an otherwise fully executed copy to sign.

39. In 1995, Mr. Hess and Mr. Papa negotiated a further territory reduction to the 1982 Distributorship Agreement, deleting Northwest Texas from the territory. In consideration of relinquishing their rights in the Northwest Texas territory, Mr. Hess and Mr. Papa each individually received from Biomet \$325,000 (for a total of \$650,000) in cash plus stock options pursuant to a contract signed by Mr. Hess, Mr. Papa, and Biomet. In addition, Mr. Hess and Mr. Papa each personally received \$100,000 (for a total of \$200,000) in cash and received a \$219,000 stock credit with Biomet pursuant to a contract signed by Mr. Hess, Mr. Papa, and Terry Henrie (the new Northwest Texas distributor). Mr. Medick was not a party to the 5/27/92 Territory Reduction Agreement.

40. Mr. Hess, Mr. Papa, Biomet, and High-Tec entered into a hold harmless agreement dated July 27, 1995, to indemnify Biomet against Mr. Medick's current claims (the "Hold Harmless Agreement"). Under the terms of the Hold Harmless Agreement, Mr. Hess, Mr. Papa, and High-Tec agreed to "defend, indemnify and hold Biomet harmless from and against any claims, damages and expenses" arising out of Mr. Medick's claims, including "any interest claimed in the Distributorship Agreement" and "any claim that Medick may assert pursuant to the Long Term Commission Program described in Section 9 of the Distributorship Agreement."

41. By letters dated March 15, 1996 and April 9, 1996, Mr. Medick requested Biomet to initiate the Long Term Commission program under the 1982 Distributorship Agreement.

42. By letter dated April 30, 1996, Biomet denied Mr. Medick's request to initiate the Long Term Commission program. Thereafter, Mr. Medick brought this action to seek a declaration of his rights with respect to those commissions.

43. By agreement effective April 3, 1997, among Mr. Hess, Mr. Papa, and Biomet (the "4/3/97 Agreement"), Mr. Hess and Mr. Papa, as "distributor," sold their rights under the 1982 Distributorship Agreement and other intangible assets. Paragraph 1 of the 4/3/97 Agreement provided in its entirety as follows:

The Distributorship Agreement and all other oral or written agreements or understandings relating to the sale of products of Biomet and / or its subsidiaries by the Distributor are terminated effective as of May 31, 1997, provided, however, that the Long Term Commission Program provided for in Section 9 of the Distributorship Agreement shall survive such termination in accordance with the terms and conditions set forth therein and such program shall apply to the Territory. It is understood that the amounts payable under the Long Term Commission Program shall be equally divided between Charles Hess and Ronald Papa unless the pending litigation between Distributor and Jack Medick would result in a different division of the Long Term Commission payments.

44. Paragraph 9 of the 4/3/97 Agreement provided in its entirety as follows:

The Hold Harmless Agreement entered into among Biomet, High-Tec Surgical Systems, Inc., Charles Hess and Ronald Papa, dated July 27, 1995, shall remain in full force and effect, and Biomet's rights thereunder shall not in any way be limited or affected by the terms of this Agreement.

45. Mr. Hess and Mr. Papa have initiated Long Term Commissions under the 1982 Distributorship Agreement for Oklahoma and Arkansas.

46. In a letter to Mr. Medick dated April 30, 1996 from Mr. Montgomery, Biomet responded to Mr. Medick's request to initiate his Long Term Commissions under the 1982 Distributorship Agreement stating in part:

As you will recall, last summer a dispute arose among you, Charlie Hess and Ron Papa following Biomet's decision to remove west Texas from the territory assigned to Hess and Papa's distributorship. As you will further recall, in the spring of 1992 you withdrew from active involvement in the Hess-Papa-Medick distributorship covering the States of Arkansas, Arizona, New Mexico, Oklahoma and Northwest Texas. At that time, Biomet and the three of you agreed to reorganize our relationship whereby Hess and Papa continued to represent Biomet in the States of Arkansas, Oklahoma and the western portion of Texas, and you were appointed Biomet's sole distributor (without Hess and Papa) for central and northern Texas. It was at this time that you entered into a separate distributorship agreement for the central and northern Texas territories and the original Hess-Papa-Medick Distributorship Agreement was amended to eliminate Arizona and New Mexico from the distributorship. It was Biomet's understanding at the time that you were to remain on the Distributorship Agreement and that the Long Term Commission Program provided for in Section 9 of that agreement would apply to the modified territory retained by Hess and Papa. As far as Biomet was aware, the three of you were to remain as partners under the original Distributorship Agreement, but that you would not remain involved in the operations of the distributorship.

Unbeknownst to Biomet, on or about the same time Biomet, Hess, Papa and you were modifying our relationship, Hess, Papa and you entered into that certain Agreement which purportedly involved your withdrawal from the Hi-Tech (sic) corporation in which the three of you were shareholders (the "Dissolution Agreement"). Admittedly, the Dissolution Agreement is ambiguous and its intent is uncertain to Biomet. To add to this uncertainty, the section which addressed the Long Term Commission Program was crossed out and voided. As you are aware, this became an issue last summer when Biomet made its decision to remove the west Texas territory from the Distributorship Agreement. It was at this time that a dispute arose between Hess, Papa and you concerning the interpretation of the Dissolution Agreement. Because Biomet needed to make certain business decisions and move forward, we relied on the representations of Hess and Papa that the intent of the Dissolution Agreement was to remove you from the Hess-Papa-Medick distributorship and eliminate your participation in the Long Term Commission Program under the Distributorship Agreement. Further, as you are aware, Biomet has been indemnified by Hess and Papa in the event of a dispute between the parties concerning your eligibility to participate in the Long Term Commission Program.

47. During the pendency of this lawsuit, Mr. Hess and Mr. Papa sold their remaining distributorship interest (relating to the Oklahoma and Arkansas territories) back to Biomet. In the earliest draft of the sales agreement, the entire exchange was accomplished in one transaction between Biomet and "Charles Hess, Ronald Papa and High-Tech Surgical Systems, Inc. (collectively the "Distributor")." However, in a letter of April 10, 1997, Mr. Hess requested two separate agreements to accomplish the transaction: "[t]he first agreement will encompass the sale of surgical instruments, computers, office equipment and supplies by High-Tec to Biomet"; and "[t]he second agreement to include the transfer of the rights pursuant to the distributorship agreement, and the various other tangible and intangible assets owned by myself and Ron." Thereafter, two "SALES OF ASSETS AGREEMENTS" were drafted by Biomet. Under the first agreement, High-Tec (defined as the "distributor") sold to Biomet "all of its Surgical Instruments, Computer, Office Equipment and Supplies" for \$100,000. Under the second agreement, Charles Hess and Ronald Papa as individuals (defined as "collectively the 'Distributor'") sold to Biomet the "Distributorship Agreement and Rights" together with intangible assets for \$700,000. Also, under the second agreement, Mr. Hess and Mr. Papa specifically retained their individual rights in the Long Term Commission program provided for under paragraph 9 of the 1982 Distributorship Agreement, and stated that the Long Term Commissions "shall be equally divided between Charles Hess and Ronald Papa unless the pending litigation between Distributor and Jack Medick would result in a different division of the Long Term Commission payments."

II. Conclusions of Law

1. This is an action for declaratory judgment pursuant to Fed. R. Civ. P. 57 and 28 U.S.C. § 2201, *et seq.* Federal jurisdiction is proper under 28 U.S.C. § 1332. Venue is proper under 28 U.S.C. § 1391(a).

2. The parties agree that the fundamental principles of contract interpretation applicable to this case are the same under both Oklahoma and Indiana law. Under both Oklahoma and Indiana law, a court's objective in interpreting a contract is to determine the true intent and purpose of the parties. Buck v. Banks, 668 N.E.2d 1259, 1261 (Ind. Ct. App. 1996); Amoco Prod. Co. v. Lindley, 609 P.2d 733, 741 (Okl. 1980); McDowell v. Droz, 64 P.2d 1210 (Okl. 1937); Kelso v. Kelso, 225 F.2d 918 (10th Cir. 1955).

3. The rules of contract construction are merely aids to the court in reaching this objective. A court will not apply the rules of construction in such a way as to defeat the parties' ascertainable intent. First Fed. Sav. Bank & Key Markets, Inc., 559 N.E.2d 600, 603 (Ind. 1990); Universal Underwriters Ins. Co. v. Bush, 272 F.2d 675, 678 (10th Cir. 1960).

4. It is settled law that when a contract's terms are not ambiguous, the interpretation of those terms is an issue for the Court. Indiana Erectors, Inc. v. Trustees of Ind. Univ., 686 N.E.2d 878, 880 (Ind. Ct. App. 1997); Mitchell v. Vogele, 256 P. 906, 907 (Okl. 1927); Department of Highways v. Martin, 572 P.2d 611, 613 (Okl. Ct. App. 1977).

5. It is also settled law that the initial determination of ambiguity is to be made by the Court. Harden v. Monroe Guaranty Ins. Co., 626 N.E. 2d 814, 817 (Ind. Ct. App. 1993); Dodson v. St. Paul Ins. Co., 812 P.2d 372, 376-77 (Okl. 1991).

6. It is not well-settled, however, how the Court is to determine whether, as an initial matter, the terms of a contract are ambiguous. As a general rule, a contract is ambiguous when its terms are reasonably susceptible to more than one meaning. Christensen v. Sears, Roebuck & Co., 565 N.E.2d 1103, 1108-09 (Ind. Ct. App. 1991); International Environmental Corp. v. IT&T, 397 F. Supp. 253, 255 (W.D. Okl. 1975); Cinocca v. Baxter Laboratories, Inc., 400 F. Supp. 527, 532 (E.D. Okl. 1975).

7. If a contract is ambiguous, the Court is to determine the intent of the parties by considering the contract language, the circumstances surrounding the making of the contract

(including negotiations preceding the agreement), the nature and subject matter of the contract, the relationship between the parties, and the parties' apparent purpose in making the contract. In re Doty, 129 B.R. 571, 592-93 n.3 (Bankr. N.D. Ind. 1991) (applying Indiana law); Public Serv. Co. v. Home Builders Ass'n of Realtors, Inc., 554 P.2d 1181, 1184-85 (Okl. 1976); see also Okl. Stat. tit. 15, § 163.

8. A court should determine and adopt any practical construction placed upon the contract by the parties' subsequent conduct. DeHaan v. DeHaan, 572 N.E.2d 1315, 1323 (Ind. Ct. App. 1991); Jerry Chambers Exploration v. Headington Penn Corp., 878 P.2d 385, 389 (Okl. Ct. App. 1994).

9. There are at least two categories of extrinsic evidence particularly relevant in this case. First, the Court may consider extrinsic evidence regarding the purpose of the contract and the circumstances surrounding its execution and performance. English Coal Co. v. Durcholz, 422 N.E.2d 302, 308 (Ind. Ct. App. 1981); Amoco Prod. Co. v. Lindley, 609 P.2d 733, 741 (Okl. 1980); First Nat'l Bank v. Rozelle, 493 F.2d 1196, 1200 (10th Cir. 1974); Okl. Stat. tit. 15, § 163. In other words, the Court must place itself as far as reasonably possible in the position of the parties when the contract was executed. Bicknell Minerals, Inc. v. Tilly, 570 N.E.2d 1307, 1313 (Ind. Ct. App. 1991); Cities Serv. Oil Co. v. Geograph Co., 254 P.2d 775, 779 (Okl. 1953). The only way the Court can obtain this contextual feeling is to consider extrinsic evidence on the issue. The Restatement states this principle as follows:

It is sometimes said that extrinsic evidence cannot change the plain meaning of a writing, but meaning can almost never be plain except in a context Any determination of meaning or ambiguity should only be made in the light of the relevant evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties But after the transaction has been shown in all its length and breadth, the words of an integrated agreement remain the most important evidence of intention.

Restatement (Second) of Contracts § 212 cmt. b (1979).

10. Second, the Court may consider extrinsic evidence tending to show that there is a latent ambiguity. A seemingly unambiguous contractual term is latently ambiguous when extrinsic facts render its meaning uncertain. By definition, the Court would be unaware of a latent ambiguity absent extrinsic evidence. Thus, even if the language used in the contract seems clear, extrinsic evidence may be admitted to show the existence of a latent ambiguity. Eckart v. Davis, 631 N.E.2d 494, 497-98 (Ind. Ct. App. 1994); In re Estate of Sharp, 512 P.2d 160, 161-64 (Okl. 1973); Sunray Packing Co. v. Wilson, 268 P.2d 264, 267 (Okl. 1954); 3A C.J.S. Ambiguity, at 409-10. See generally Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co., 442 P.2d 641, 646 n.8 (Cal. 1968). The Restatement states a similar principle as follows:

Words, written or oral, cannot apply themselves to the subject matter Even though words seem on their face to have only a single possible meaning, other meanings often appear when the circumstances are disclosed.

Restatement (Second) Contracts § 214 cmt. b (1979).

11. Because there are multiple parties to the contracts at issue here, any construction of the various agreements in the instant case is subject to section 297(1) of the Restatement (Second) of Contracts, which provides in applicable part as follows:

Where a party to a contract makes a promise to two or more promisees or for the benefit of two or more beneficiaries, the manifested intention of the parties determines whether he promises the same performance to all, a separate performance to each, or some combination.

Restatement (Second) Contracts § 297(1) (1979).

12. Applying the above-described principles to the instant case, the Court finds that the parties to the 1982 Distributorship Agreement intended for Biomet to be obligated to Mr. Medick for Long Term Commissions separate and apart from any obligation owed by Biomet to each of Mr. Hess and Mr. Papa. Addendum No. 3 expressly contemplated a “triple partnership” operating the Distributorship that is the subject of the 1982 Distributorship Agreement and that the members of that partnership, other than Mr. Papa, would vest in their Long Term Commission rights at the same time and under the same conditions as Mr. Papa.

13. Pursuant to and in accordance with the 1982 Distributorship Agreement, the three partners formed High-Tec, which thereafter operated the business pursuant to a grant by each partner to High-Tec of a beneficial interest in the Distributorship. This grant of a beneficial interest in the Distributorship was for the sole purpose of operating the Distributorship and did not constitute an assignment of Mr. Medick's Long Term Commissions under the 1982 Distributorship Agreement. Accordingly, the fact that High-Tec operated the business did not disturb the obligations of Biomet to Mr. Medick under the Long Term Commission provisions of the 1982 Distributorship Agreement.

14. Mr. Medick relinquished all of his rights to any new Long Term Commissions earned by the Distributorship under the terms of the 5/27/92 Territory Reduction Agreement and the Dallas Distributorship Agreement. Under the 5/27/92 Territory Reduction Agreement, Mr. Medick expressly received as consideration for his share of the reduction in territory an appointment of the Dallas Distributorship and the provisions of the Dallas Distributorship Agreement are incorporated by cross-reference. Specifically, in Article II of the 5/27/92 Territory Reduction Agreement, entitled "Consideration to Hess, Papa and Medick," section 2.2 stated as follows:

Effective April 20, 1992, Medick shall be appointed as the Biomet distributor for the Dallas County, Texas, Northcentral Texas and Northeast Texas territories on terms and conditions set forth in a separate distributorship agreement to be entered into between Medick and Biomet.

Moreover, paragraph 1 of the Dallas Distributorship Agreement expressly stated as follows:

The parties further agree that no commissions are due Distributor for sales outside of said territory(s) and that Distributor will not directly or indirectly effect sales or receive commissions for Biomet products shipped or intended for shipment outside of the territory(s) without prior written consent of Biomet.

Accordingly, the Court concludes that the parties intended that these agreements in 1992 would terminate all obligations by Biomet to pay any future Long Term Commissions earned outside the Dallas Territory. This terminated any claim by Mr. Medick to future Long Term Commissions

earned by the Distributorship in the "territory" in which the Distributorship was operating pursuant to its agreement with Biomet.

15. Defendants assert that the termination of Mr. Medick's claim to any future Long Term Commissions earned by the Distributorship in the "territory" should also operate to terminate Mr. Medick's claim to any previously earned Long Term Commissions earned by the Distributorship in the "territory." The Court concludes that a proper construction of the various agreements does not support this assertion. First, the express release of any commissions set forth in paragraph 1 of the Dallas Distributorship Agreement refers only to future sales, just as the non-compete provisions contained in the same paragraph refer only to future sales. There is simply no way to construe the word "sales" to mean past sales in the first part of the sentence and future sales later in the same sentence.

Second, Defendants' reliance on the 5/22/92 Stock Purchase Agreement is misplaced. Paragraph 8 of that agreement provides in applicable part that each of Mr. Medick and High-Tec shall mutually release each other from any and all claims. However, notwithstanding the fact that the recitals of this agreement contain a general reference to the Dallas Distributorship Agreement, there is nothing in the 5/22/92 Stock Purchase Agreement that relieves Biomet of its obligations to Mr. Medick for Long Term Commissions, nor could there be, since Biomet is not a party to this agreement. The only document to which Biomet is a party that addresses Biomet's obligations for Long Term Commissions is the Dallas Distributorship Agreement which, as noted above, applies only to Biomet's obligation to pay Long Term Commissions earned in the future. Moreover, in addition to the limitation on future Long Term Commissions in paragraph 1 of the Dallas Distributorship Agreement discussed above, paragraph 1.2 of the 5/27/92 Territory Reduction Agreement provided in applicable part as follows:

It is expressly understood and agreed that the long term commission program provided for in Section 9 of the Distributorship Agreement shall only apply to the Modified Territory and that Hess, Papa and Medick shall have no right to

participate in such program as it relates to the State of Arizona and New Mexico (except as shown in Schedule A).

This agreement, to which all the parties to this lawsuit are a party, clearly contemplates that Biomet will be obligated to pay Long Term Commissions of some kind to Mr. Medick following the execution of the agreement.

16. Following the execution of the 5/27/92 Territory Reduction Agreement, pursuant to paragraph 1.2 referenced above, the only territory with respect to which Biomet was obligated to pay Long Term Commissions of any kind to Mr. Medick was in the "Modified Territory," consisting of Arkansas, Oklahoma and Northwest Texas. As noted previously, pursuant to the Dallas Distributorship Agreement, Mr. Medick released Biomet of this obligation with respect to any Long Term Commissions earned in the future.

17. Reading together the terms of the Dallas Distributorship Agreement, the 5/22/92 Stock Purchase Agreement, and the 5/27/92 Territory Reduction Agreement, which the Court must do by virtue of the various references to the other agreements contained in each document, the Court concludes that the intent of the parties was to release any obligation by Biomet to pay Mr. Medick any Long Term Commissions on future sales in Arkansas, Oklahoma, and Northwest Texas (the "Modified Territory"). Mr. Medick further relinquished all claims to Long Term Commissions on future sales by the Distributorship, since Mr. Medick received consideration for such relinquishment in the form of the Dallas Distributorship. Accordingly, the only issue remaining is whether at any time Mr. Medick relinquished his rights to Long Term Commissions payable under the 1982 Distributorship Agreement for sales in the states of Arkansas, Oklahoma and Northwest Texas from the effective date of such agreement until the date upon which Mr. Medick released his claim to all future sales pursuant to paragraph 1 of the Dallas Distributorship Agreement. The Court concludes that there is no evidence in the record to support the claim that Mr. Medick ever agreed to terminate his rights to Long Term Commissions on sales that occurred

in the Modified Territory prior to April 20, 1992, the effective date of the Dallas Distributorship Agreement.

18. In light of the above, the Court concludes that Mr. Medick is entitled to a percentage of his 1/3 share of the Long Term Commissions. This percentage is based upon sales that occurred during the period of time Mr. Medick performed services for the Distributorship and thus should be calculated with reference to the period of time between February 26, 1982 (the date of the 1982 Distributorship Agreement) and April 20, 1992 (the date on which Mr. Medick relinquished all his rights to any commissions on future sales outside of his new territory in Texas). Applying these principles, Mr. Medick's entitlement to such Long Term Commissions may be represented by the following formula:

$$(1/3) \times \frac{\text{(Number of Days in Distributorship (2/26/82 - 4/20/92))}}{\text{(Total Number of Days Distributorship Existed (2/26/82 - 4/3/97))}} \times$$

(Total Long Term Commissions Payable to the Distributorship by Biomet for Oklahoma, Arkansas, and Northwest Texas)

Plaintiff is hereby directed to submit an agreed upon form of judgment consistent with these Findings of Fact and Conclusions of Law no later than two weeks from the file date of this order.

IT IS SO ORDERED.

This 16TH day of January, 1998.


Sven Erik Holmes
United States District Judge

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

FILED

JAN 16 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DONALD HUCKANS,

Plaintiff,

v.

WAL-MART STORES, INC., a Delaware
corporation,

Defendant.

Case No. 96-cv-855-H

ENTERED ON DOCKET

DATE 1-20-98

ORDER

This matter comes before the Court on a motion for summary judgment by Defendant Wal-Mart Stores, Inc. ("Wal-Mart") (Docket # 12) and a motion by Plaintiff Donald Huckans to remand any remaining state law claims to the District Court of Tulsa County, Oklahoma, should Defendant prevail on summary judgment on the federal claims (oral motion of August 15, 1997). For the reasons set forth below, Defendant's motion is granted in part and Plaintiff's motion is granted.

I

Plaintiff Huckans, a former employee of Defendant, originally filed this action in the District Court of Tulsa County, Oklahoma. His petition alleged that Defendant had violated the Americans with Disabilities Act, 42 U.S.C. § 12101-12213, and that he was terminated in violation of the Oklahoma Workers' Compensation Act, Okla. Stat. tit. 85, § 1 et seq., and the Oklahoma Anti-Discrimination Act, Okla. Stat. tit. 25, § 1302 et seq. On September 18, 1996, Defendant removed the action to this Court, alleging federal question subject matter jurisdiction.

For purposes of this motion, the parties agree to the following:

1. Plaintiff was employed at Sam's Wholesale Club ("Sam's") as a forklift operator/night stocker.

26

2. Around December 29, 1993, Plaintiff strained his back and neck while on the job.¹
3. Dr. Kenneth R. Trinidad, Plaintiff's physician, executed a Medical Statement of Ability to Work around May 25, 1994, which was sent to the Oklahoma Employment Security Commission. This report indicated that Plaintiff was unable to bend, stoop, or lift; that Plaintiff was released for light duty work with a 30 pound weight restriction on May 15, 1994; that Plaintiff was unable to engage in his usual type of work; and that this should not interfere with Plaintiff's possible employment.
4. Plaintiff endorsed the Medical Statement of Ability to work.²
5. On May 26, 1994, (after being released for work with restrictions) Plaintiff filed his Form 9 in the Worker's Compensation court, asking that a trial be set to determine permanent partial disability and requesting vocational retraining based on Dr. Trinidad's findings.³
6. Around June 10, 1994, the Oklahoma Employment Security Commission granted Plaintiff unemployment benefits from May 21, 1994, finding that Defendant had no work available for Plaintiff.
7. The order approving the Joint Petition and settling Plaintiff's worker's compensation case was entered on June 21, 1994.
8. At the worker's compensation proceedings, Plaintiff testified that through negotiations with his attorney, Plaintiff and Defendant had reached a settlement agreement where he was going to settle his claim with regard to permanent disability and vocational rehabilitation for the sum of \$10,000.
9. Plaintiff further testified that by settling his worker's compensation case, it was a full, final and complete settlement of any and all claims Plaintiff had against Sam's.⁴
10. Plaintiff also testified that Dr. M.A. Hayes told him that he should not be doing the lifting that he was doing at Sam's. Plaintiff does not agree with Dr. Hayes' assessment.

¹ Plaintiff also claims that he had other medical problems as well.

² Plaintiff contends that he never agreed with Dr. Trinidad's statement and believed that, after medical release, he could have returned to his former position.

³ Plaintiff contends he never authorized his attorney to seek vocational rehabilitation on his behalf.

⁴ Plaintiff contends that he believed that he was only settling his worker's compensation claim, not any claims under the ADA or any worker's compensation retaliation claim.

11. Plaintiff also testified that he was aware that Sam's does not have work that is not warehouse work and Plaintiff's attorney was going to write a letter to that effect. Plaintiff contends that he never believed this but acknowledges that he was told this by a Sam's representative.⁵
12. Plaintiff contends Defendant advertised for help for which he was qualified.
13. Plaintiff testified at the hearing that he was looking for employment elsewhere.
14. Plaintiff was not forced into entering into this Worker's Compensation settlement. Plaintiff was not coerced into signing off on the documents or to go to court in front of the judge and acknowledge the settlement.
15. Plaintiff now works as a general manager for Little Caesar's Pizza and has worked there for over a year.
16. Plaintiff testified that for his current job, he works 55 hours a week, stands for 13-14 hours a day, lifts 70-pound bales of flour, 40-pound cases of cans, 30-pound cases of boxes, cooks, runs the cash register, occasionally delivers, does all of the different jobs and duties to keep Little Caesar's in operation.
17. Plaintiff does not believe he currently has any limitations with respect to his physical abilities to work. This includes no weight restrictions or limitations.
18. Plaintiff does not consider himself to have any limitations on the physical activity he can perform in his job.
19. Plaintiff does not consider himself to be disabled or handicapped.

In addition, Plaintiff asserts the following facts, which Defendant disputes:

⁵ At the worker's compensation proceeding, Mr. Huckans testified as follows:

Q. As Mr. Weeks has explained to you, this letter that you and I have discussed and he has discussed is forthcoming, explaining that there is no position available for you at this time at Sam's. You are aware of that?

A. Yes

Q. Okay. You are looking for other employment right now?

A. Yes.

Pl. Resp., Ex. I at 8.

20. In Oklahoma Workers' Compensation Court, a settlement was reached upon a permanent partial disability rating.
21. It is undisputed that Defendant would not allow Plaintiff to work after he was released from his doctor to work.⁶
22. The Exit Interview, which was mailed to Plaintiff by Sam's general manager, Mr. Cleeves, states that the reason for termination was "workers' comp."
23. Plaintiff could have continued to perform the essential functions of his position with Sam's after he was released. Plaintiff could perform many of the functions of his position with no accommodations at all. He can work 55 hours a week. He can stand up to 13 or 14 hours a day. He can lift up to 70 pounds. He can supervise employees and do all the different jobs required to run a Little Caesar's unit. He is and was at the time of his termination fully qualified to do a wide range of positions for Defendant such as working as a forklift driver, cashier, baker, supervisor, greeter, customer service, overnight stocker, sales clerk, and produce clerk. Defendant has treated him as if he was disabled from the time of his injury to the present. Defendant has not allowed him to work in any capacity after his injury.
24. Defendant terminated Plaintiff because of worker's compensation and the fact that it believed that Plaintiff was unable to perform any classification of jobs at Sam's. It repeatedly told Plaintiff there was no available work for him when he was clearly qualified to do a wide range of jobs for Sam's.
25. Plaintiff has continued to mitigate his damages by working in an area which proves he could have continued to work for Defendant. Defendant has never offered Plaintiff reinstatement after his termination.
26. Plaintiff properly filed his charge to the Oklahoma Human Rights Commission, and that he filed his case in federal court within the statute of limitations period.

II

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 Ins. Corp., 805 F.2d 342, 345 (10th Cir. 1986), cert. denied, 480

⁶ Defendant states that it agrees only that it was not disputed that, pursuant to doctor's findings, Plaintiff did not return to work at his hired position at Sam's.

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

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

477 U.S. at 322.

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

Summary judgment is only appropriate if "there is [not] sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. at 250. The Supreme Court stated:

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

Id. at 252. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); Anderson, 477 U.S. at 250 ("[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." (citations omitted)).

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

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

III

Plaintiff's Petition alleges five causes of action under both state and federal law. Underlying each of the five claims is Plaintiff's contention that Defendant terminated his employment because Plaintiff injured his back on the job. First, Plaintiff claims that he was wrongfully terminated under Oklahoma worker's compensation law. Second, Plaintiff claims Defendant violated public policy and the Oklahoma Anti-Discrimination Act when it terminated him because of his disability. Third, Plaintiff claims that his termination was in retaliation for his filing a complaint with the EEOC and the OHRC, also violative of the Oklahoma Anti-Discrimination Act. Fourth, Plaintiff claims that Defendant discharged him because it thought or perceived him to be disabled, in contravention of the ADA. Lastly, Plaintiff claims that Defendant refused to rehire or reemploy him in retaliation for his filing a claim under the ADA. Plaintiff seeks compensatory damages, including lost wages and damages for emotional distress, as well as punitive damages. Defendant has moved for summary judgment as to all Plaintiff's claims. The Court addresses first the federal questions raised by Plaintiff under the ADA that provided the basis for this Court's jurisdiction over the subject matter of this case.

IV

The ADA prohibits an employer from discriminating "against a qualified individual with a disability because of the disability of such individual in regard to . . . discharge of employees" and other terms, conditions, and privileges of employment. 42 U.S.C. § 12112(a). To establish a prima facie case under the Act, a plaintiff must show: (1) that he is a disabled person within the meaning of the ADA; (2) that he is qualified, that is, he can perform the essential functions of the job, with or without reasonable accommodation; and (3) that the employer took an adverse employment action under circumstances which give rise to an inference that the action was based

on his disability. Morgan v. Hilti, 108 F.3d 1319, 1323 (10th Cir. 1997); White v. York Int'l Corp., 45 F.3d 357, 360-61 (10th Cir. 1995). "The plaintiff must present evidence that, if the trier of fact finds it credible, and the employer remains silent, she would be entitled to judgment as a matter of law." Morgan, 108 F.3d at 1324.

The term "disability" under the ADA means (1) having a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (2) having a record of such impairment; or (3) being regarded as having such an impairment. A "major life activity" means functions such as walking, seeing, hearing, speaking, breathing, learning, and working. Bolton v. Scrivner, Inc., 36 F.2d 939 (10th Cir. 1994). However, a person is not disabled in the life activity of working merely because he or she is unable to perform one particular job. Instead, to meet the definition of disabled, a person must be restricted from performing either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. Bolton v. Scrivner, Inc., 36 F.3d at 942.

Thus, to recover under the ADA, Plaintiff here must prove first that he is "disabled." Plaintiff's own admissions here exclude any possibility that he has an "actual disability," that is, that he is in fact substantially limited in the major life activity of working. Accordingly, Plaintiff asserts in his brief that he was regarded by Defendant as disabled. Pl.'s Resp. at 10. The law defines the phrase "regarded as having such impairment" as follows:

- (1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;
- (2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
- (3) Has none of the impairments defined in paragraph (h)(1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.

29 C.F.R. § 1630.2(1). Just as an impairment must affect an individual's ability to perform a class of jobs or broad range of jobs rather than a single job to be a "disability," for an employee to meet the "regarded as disabled" standard, the employer must perceive that the employee has an

impairment which interferes with more than the individual's ability to perform one job. Of controlling significance in this case, an impairment that an employer perceives as limiting an individual's ability to perform only one job is not a disability cognizable under the ADA. Sutton v. United Airlines, ___ F.3d ___, 1997 WL 732520 (10th Cir. Nov. 26, 1997) (No. 96-1481); Bolton, 838 F. Supp. 787 (citing Welsh, 977 F.2d at 1410), aff'd Bolton, 36 F.3d 939 (10th Cir. 1994).

Plaintiff claims that he was discharged from Defendant's employment because Defendant regarded him as disabled -- that Defendant perceived him to be substantially impaired in the life activity of working. Pl.'s Resp. at 12. However, Plaintiff "does not allege his disability has made it impossible to work, quite the contrary." Pl.'s Resp. at 12. Plaintiff claims that, at the time of his worker's compensation proceeding, contrary to his testimony there, he was not disabled after his doctor released him for work. Further, Plaintiff claims that he is not limited in any manner at the present time. Thus, Plaintiff claims that although he was capable of performing any number of jobs that Defendant had to offer, at the time his employment with Sam's ended, and at the present time, Defendant, believing him to be disabled, refused to allow him to continue to work there, or to return to work there at a later date.⁷

⁷ The Court notes at the outset the inconsistency of Plaintiff's proof regarding his allegation that Wal-Mart inappropriately perceived him to be disabled under the ADA immediately after his worker's compensation case concluded. Plaintiff represents now in litigation that he could have performed his duties as a stocker and wished to continue them and only did not do so because Wal-Mart would not permit it. Although Defendant contends that Plaintiff should be estopped from taking now a position inconsistent with the one he took at his worker's compensation proceeding, the Court finds that cases relied upon by Defendant are inapposite. In those cases, see e.g., Cline v. Western Horseman, Inc., 922 F. Supp. 442, 448 (D. Colo. 1996); Garcia-Paz v. Swift Textiles, Inc., 873 F. Supp. 547 (D. Kan. 1995), plaintiffs claimed to be totally and permanently disabled in order to receive either public benefits or proceeds from an insurance carrier. Here, Plaintiff never claimed total disability, but instead claimed partial disability based on his back injury. The Court concludes, however, that Plaintiff's representations during his worker's compensation case are relevant in determining whether Plaintiff is disabled and qualified as those terms are used under the ADA.

As evidence that Defendant regarded Plaintiff as disabled, Plaintiff offers that Defendant would not let him return to work as a forklift operator. This fact is not in dispute. However, that alone does not establish "disability" under the ADA because Defendant would have to consider Plaintiff disabled for more than one particular job. Sutton, 1997 WL 732520, * 10. Accordingly, without more, Plaintiff's ADA claim must fail.

Plaintiff further claims that Defendant refused to consider him for other jobs that it had available because it thought he was disabled. However, Plaintiff has not offered any evidence whatsoever that the reason he was not considered for other jobs was because he was perceived to be disabled. Defendant informed Mr. Huckans that it had nothing other than warehouse work available at Sam's; and Mr. Huckans was told this fact during his worker's compensation proceedings. Mr. Huckans accepted the fact that there were no other positions available for him at Sam's during his testimony at his worker's compensation proceeding:

Q. As Mr. Weeks has explained to you, this letter that you and I have discussed and he has discussed is forthcoming, explaining that there is no position available for you at this time at Sam's. You are aware of that?

A. Yes

Q. Okay. You are looking for other employment right now?

A. Yes.

Pl.'s Resp. at 4.⁸ Plaintiff has not offered any evidence whatever to suggest that Defendant believed Plaintiff to be physically unable to perform any other job at Sam's. Instead, the record contains only Plaintiff's conclusory statements to that effect, and such is not sufficient to raise an issue of fact and to defeat summary judgment. Cone v. Longmont United Hosp. Ass'n, 14 F.3d 526, 530 (10th Cir. 1994) (conclusory allegations will not suffice to create a material issue of fact to defeat summary judgment). Thus, Plaintiff has presented no evidence that Sam's took any

⁸ Plaintiff, although disputing the veracity of whether Sam's had other positions, acknowledges that he was told that Sam's had no work other than warehouse work.

employment action prohibited under the ADA because it regarded him as disabled for a class of jobs or a broad range of jobs. Simply stated, the record clearly establishes that Plaintiff was physically able to do most any of the jobs at Sam's and the record provides no support for the claim that Defendant believed otherwise or treated Plaintiff as if he was unable to do so. Plaintiff also claims that Defendant acted in violation of the ADA when it failed to hire him at one of its Wal-Mart Stores. The Court finds the record equally devoid of any evidence that Defendant failed to hire Plaintiff at those locations because it perceived him to be disabled.

In light of the above, the Court concludes that Plaintiff is not "disabled" as that term is defined by the ADA. Specifically, the record does not support any claim that the Defendant "regarded" Plaintiff as disabled under the Act.⁹ Accordingly, under the authority of Sutton, Plaintiff's Claim IV under the ADA is hereby dismissed.

V

Plaintiff also claims that Defendant wrongfully retaliated against him when it "refused to reemploy or rehire Plaintiff because he had opposed a discriminatory practice or because he filed a complaint against it under the provisions of the ADA." Pl. Comp. at 8. To establish a prima facie case of retaliation under the ADA, Plaintiff must show (1) protected employee action, (2) adverse action by an employer either after or contemporaneous with the employee's protected action; and (3) a causal connection between the employee's action and the employer's adverse action. Morgan v. Hilti, 108 F.3d 1319, 1324 (10th Cir. 1997). The Court finds that Plaintiff has failed to establish a prima facie case actionable under the ADA. First, even assuming that Plaintiff

⁹ Even assuming Plaintiff were able to establish a prima facie case, Plaintiff would yet have to present evidence to prove that Defendant's position -- that it did not terminate Plaintiff but that Plaintiff left its employment once he became injured, realized he could not perform his old job, realized there were no other jobs available, and received a worker's compensation settlement -- was pretextual rather than a legitimate reason for its actions. Plaintiff has presented no evidence of pretext whatsoever in this case. "Although all doubts concerning pretext must be resolved in plaintiff's favor, a plaintiff's allegations alone will not defeat summary judgment." Morgan v. Hilti, 108 F.3d at 1324.

contends that the protected action at issue here is either his charge before the Oklahoma Human Rights Commission or the filing of his complaint here, Plaintiff has failed to demonstrate that Defendant took any adverse action in relation to him. While it is true that Defendant did not rehire Plaintiff in its stores after his injury, as discussed above, Defendant was not obligated under the ADA to do so. As a result, Plaintiff has failed to demonstrate any connection whatsoever between his protected action and any action by Defendant. Accordingly, Plaintiff's fifth cause of action is hereby dismissed.

VI

In this case, the Court finds that the remaining issues are best left for resolution in the state court under applicable state law. Federal courts should be circumspect in considering a series of state law claims on the basis of a single federal question that is unable to survive a dispositive motion. United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966); Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 (1988). Applying these principles to the instant case, the Court hereby declines to accept jurisdiction of the remaining state claims. Therefore, Plaintiff's motion to remand is hereby granted.

IT IS SO ORDERED.

This 15TH day of January, 1998.



Sven Erik Holmes
United States District Judge

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

FILED

JAN 16 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MICHAEL J. WARD,

Petitioner,

v.

THE UNITED STATES ARMY,

Respondent.

Case No. 96-C-943-H

ENTERED ON DOCKET

DATE 1-20-98

ORDER

This matter comes before the Court on a motion for summary judgment filed by Respondent United States Army (the "Army") on November 10, 1997 (Docket # 24). Plaintiff Michael J. Ward filed his response to the motion on December 9, 1997 (Docket # 28). The Court heard argument on Respondent's motion at a hearing on January 9, 1998. For the reasons set forth below, Respondent's motion is granted.

I

Petitioner is a former member of the military who is a parolee under the supervision of the United States Disciplinary Barracks, located in Fort Leavenworth, Kansas. The record reflects that while stationed in Saudi Arabia during Operation Desert Shield and Desert Storm, Petitioner sold stolen U.S. military supplies to Saudi Arabian Nationals. The value of the stolen property was approximately \$2,000,000, for which Petitioner received approximately \$259,275. Petitioner filed this petition for habeas corpus relief, challenging his 1993 guilty pleas and resulting general court-martial conviction for violating a lawful general regulation, making false official statements, and unlawfully selling military property in violation of Articles 92, 107, and 108 of the Uniform

Code of Military Justice ("UCMJ"), 10 U.S.C. §§ 892, 907, and 908. As a result of his court-martial, Petitioner was sentenced to dismissal from the Army, confinement for seven years, total forfeitures of pay and allowances, and a fine of \$65,000.¹ Although he had served in the military of twenty years, Petitioner lost his eligibility to collect military retirement benefits.

On July 21, 1994, the Army Court of Military Review ("ACMR") affirmed the findings of guilt and approved the sentence from Petitioner's general court-martial. United States v. Ward, ACMR 9300643 (A.C.M.R. July 21, 1994) (per curiam) (unpub.). On October 17, 1994, Petitioner filed a Petition for Grant of Review of the ACMR decision with the Court of Appeals for the Armed Forces ("CAAF"). On November 16, 1994, Petitioner filed a Supplemental Petition with the CAAF. On January 24, 1995, the CAAF denied Petitioner's Petition for Review. United States v. Ward, 42 M.J. 98 (No. 95-0047, Jan. 24, 1995). On June 12, 1995, the United States Supreme Court denied Petitioner's Writ of Certiorari. Ward v. United States, 115 S. Ct. 2567 (1995). Petitioner filed the instant action on October 16, 1996 (Docket # 1).

II

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

[t]he plain language of Rule 56(c) mandates the entry of summary judgment, after

¹ As part of a pretrial agreement, the convening authority disapproved the fine and reduced the forfeitures to \$2,137.00 per month for seven years, but otherwise approved Petitioner's sentence.

adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 322.

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

Summary judgment is only appropriate if "there is [not] sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. at 250. The Supreme Court stated:

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

Id. at 252. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); Anderson, 477 U.S. at 250 ("[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." (citations omitted)).

In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must

prevail as a matter of law." Anderson, 477 U.S. at 250. In its review, the Court construes the record in the light most favorable to the party opposing summary judgment. Boren v. Southwestern Bell Tel. Co., 933 F.2d 891, 892 (10th Cir. 1991).

III

This Court has jurisdiction over habeas corpus petitioners who claim that they are confined pursuant to sentence received by a military court which is in violation of their Constitutional rights. 28 U.S.C. § 2241. However, a district court may only review a petitioner's claim on the merits if the claim was raised in the military court. Watson v. McCotter, 782 F.2d 143, 154 (10th Cir. 1986). Even where a claim has been raised in the military courts, "it is not open to a Federal civil court to grant the writ simply to reevaluate the evidence" as long as the military court system has dealt "fully and fairly" with the petitioner's claims. Burns v. Wilson, 346 U.S. 137, 142 (1953). The role of the district court is to "to determine whether the military [courts] have given fair consideration to each of [the petitioner's] claims. Burns, 346 U.S. at 144; Lips v. Commandant, U.S. Disciplinary Barracks, 997 F.2d 808, 811 (10th Cir. 1993). The court may find that the military court has given full and fair consideration to a claim if it has been fully presented to the military court, even if that court summarily disposes of the claim. Watson, 782 F.2d at 144.

Additionally, the following four factors are considered helpful in determining whether a district court should review a petitioner's claims:

1. The asserted error must be of constitutional dimension.
2. The issue must be one of law rather than of disputed fact already determined by the military tribunals.
3. Military considerations may warrant different treatment of constitutional claims.

4. The military courts must give adequate consideration to the issues involved and apply proper legal standards.

Dodson v. Zelez, 917 F.2d 1250, 1252-1253 (10th Cir. 1990) (citations omitted).

IV

Petitioner asserts four contentions of error in his petition:

1. Due to the false statements by officers of the Court, Petitioner was denied due process of law;
2. Due to negligent error, jurisdiction of the military over Petitioner expired;
3. The military court unlawfully retained Petitioner on active duty by allowing his order to expire and illegally recalling him to active duty;
4. The sentence of confinement is unlawful under R.C.M. 705.

At the hearing, Petitioner also asserted that his dismissal from the military which resulted in his loss of eligibility for retirement benefits after over twenty years of service constituted a fine and cruel and unusual punishment.

Every argument raised by Petitioner was raised in great detail before the military tribunals, except for his last raised for the first time at the hearing on January 9, 1998. Because Petitioner failed to raise his contention that his dismissal results in an improper fine before the military tribunal, this Court will not consider it on the merits. Watson, 782 F.2d at 154. Petitioner's first argument, that the terms of an alleged agreement between the United States Attorney's Office and counsel for his wife that she would not face criminal prosecution was not disclosed to the military court at Petitioner's guilty plea conference, was raised in Petitioner's first level of review in the military tribunals through a Grostefon submission.² See Resp. Br., App. E. The same is true for Petitioner's second and third claims, which contend that the military improperly extended his

² United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982) allows an appellant to personally submit issues for review by a military tribunal in the event appellant's counsel believes such issues to be without merit.

orders, once his criminal enterprise was uncovered, in order to retain jurisdiction over him. See Resp. Br., App. E. Petitioner's fourth claim, which alleges that military authorities failed to confer with civilian authorities prior to Petitioner's guilty plea, was raised in his Assignment of Errors and Brief on Behalf of Appellant in his first review before the ACMR. The military court concluded as to these issues, "[w]e have reviewed the assertions of error, to include those personally raised by the appellant pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982), and find them also to be without merit." United States v. Ward, ACMR 9300643 at 3 (A.C.M.R. July 21, 1994) (per curiam) (unpub.). Lastly, Petitioner's claim that his dismissal is cruel and unusual punishment in that it strips him of his retirement benefits was extensively briefed in Petitioner's Supplement to Petition for Grant of Review filed with the CAAF on November 16, 1994. That Petition was denied on January 24, 1995. United States v. Ward, 42 M.J. 98 (No. 95-0047, Jan. 24, 1995) At the hearing on January 9, 1998, Petitioner agreed that all grounds he presents now in his Petition were fully presented and considered by the military tribunals.

The Court concludes that in accordance with the authority of Burns, Dodson, and Watson, the military tribunals have given full and fair consideration to each of Petitioner's claims and that further review by this Court is inappropriate. Additionally, no factor cited by the Tenth Circuit in Dodson compels this Court to revisit Petitioner's claims on the merits. Petitioner's first claim, although in it he contends he was denied due process of law, is essentially a factual dispute as to the existence of an alleged sub rosa agreement which was fully and fairly considered by the military tribunals. Accordingly, this Court refuses to reconsider the issue. Petitioner's second and third claims, also contain factual issues with respect to a series of orders compelling him to remain in the military. These factual disputes, as well as their implication under applicable law,

were fully and fairly considered by the military courts. Accordingly, no further review by this Court is proper under the controlling authorities discussed above. Petitioner's fourth claim, that military authorities failed to confer with their federal civil counterparts, amounts to a claim that Petitioner's sentence is unlawful under a military requirement, rather than under the Constitution. To the extent that this is a question of fact, Dodson counsels against review by this Court. Further, this claim was fully and fairly considered in the military courts. Finally, the Court concludes that Petitioner's claim that his dismissal amount to cruel and unusual punishment does not merit review by this Court as it too was fully and fairly considered by the military tribunal.

For the reasons set forth above, Respondent's motion for summary judgment is granted and Petitioner's petition for a writ of habeas corpus is denied.

IT IS SO ORDERED.

This 15th day of January, 1998.


Sven Erik Holmes
United States District Judge

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

FILED
JAN 16 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

MICHAEL J. WARD,

Petitioner,

v.

THE UNITED STATES ARMY,

Respondent.

Case No. 96-C-943-H

ENTERED ON DOCKET
DATE 1-20-98

JUDGMENT

This matter came before the Court on a Motion for Summary Judgment by Respondent. The Court duly considered the issues and rendered a decision in accordance with the order filed on January 15, 1998.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Respondent and against Petitioner and that Petitioner's Petition for a Writ of Habeas Corpus is denied.

IT IS SO ORDERED.

This 16TH day of January, 1998.


Sven Erik Holmes
United States District Judge

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

FILED

JAN 16 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

SAMSON HYDROCARBONS COMPANY,
A Delaware corporation, successor by name
change to SNG PRODUCTION COMPANY,
a corporation,

Plaintiff,

v.

MICHIGAN CONSOLIDATED GAS
COMPANY,

Defendant.

Case No. 97-CV-691-H

ENTERED ON DOCKET

DATE 1-20-98

ADMINISTRATIVE CLOSING ORDER

This matter comes before the Court on the parties' joint motion to stay any further formal activity in this case. The Court deems the parties' joint motion as a request for an administrative closing order.

In their joint motion, the parties state that they have "reached a tentative agreement and anticipate that a formal settlement agreement will be signed within a week to ten days." The parties report that the agreement also attempts to resolve the dispute between the parties before the Michigan Public Service Commission ("MPSC"). Settlement before the MPSC requires formal approval by the MPSC, which the parties anticipate will take five to six weeks. As a result, the parties request that this matter be stayed for a period of sixty days.

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

13

If, by March 28, 1998, the parties have not reopened this case for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED.

This 15TH day of January, 1998.

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

Sven Erik Holmes
United States District Judge

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

PERCY L. PALMER,

Plaintiff,

v.

MARVIN T. RUNYON, Postmaster
General of the UNITED STATES
POSTAL SERVICE,

Defendant.

No. 96-CV-1190-H ✓

ENTERED IN COURT

JAN 16 1998

DATE

FILED

JAN 15 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes before the Court on the four cases brought by pro se Plaintiff Percy L. Palmer: case numbers 96-C-1190-H, 97-C-259-H, 97-C-260-H, and 97-C-261-H. On May 23, 1997, the Court consolidated all four cases into case number 96-C-1190-H and ordered Plaintiff to file a single amended complaint by June 13, 1997, to reflect the four cases that he has filed. Plaintiff did not file the amended complaint by this deadline.

On December 15, 1997, the Court ordered Plaintiff to file the single amended complaint covering all four cases no later than January 5, 1998, notifying Plaintiff that failure to do so would result in dismissal of his action for failure to prosecute. On January 2, 1998, the Court granted Plaintiff until January 12, 1998 to file such an amended complaint. Plaintiff has not filed the amended complaint covering the four cases, thus failing to obey the Court's orders.

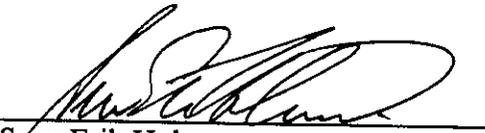
Rule 41(b) of the Federal Rules of Civil Procedure allows the Court to dismiss an action "[f]or failure of the plaintiff to prosecute or to comply with these rules or any order of court." See also Stanley v. Continental Oil Co., 536 F.2d 914, 917 (10th Cir.1976) (stating that a court has inherent authority to dismiss for failure to prosecute). Plaintiff has not complied with three

(8)

separate Court orders directing Plaintiff to file a single amended complaint. Thus, Plaintiff's action is hereby dismissed without prejudice.

IT IS SO ORDERED.

This 15th day of January, 1998.


Sven Erik Holmes
United States District Judge

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

ROBERT L. WIRTZ,
Plaintiff,

vs.

LINDA LAZELLE, et al.,
Defendants.

)
)
)
)
)
)
)
)
)
)
)

No. 93-CV-1143-H ✓

ENTERED
DATE **JAN 16 1998**

FILED

JAN 15 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is Plaintiff's "motion to alter or amend judgement dated October 30, 1997 pursuant to rules 59 and 60, FRCP" (Docket #113). Plaintiff's motion is, in effect, a motion requesting that the Court reconsider its Order filed October 30, 1997 (Docket #111), denying Plaintiff's earlier "motion for Court to direct Defendants to comply with terms of settlement agreement." See Haines v. Kerner, 404 U.S. 519, 520-21 (1972) (holding that a pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers). Whether to grant or deny a motion for reconsideration is committed to the Court's discretion. Hancock v. Oklahoma City, 857 F.2d 1394, 1395 (10th Cir. 1988). The Court finds, in its discretion, that Plaintiff's motion for reconsideration should be granted and the October 30, 1997 Order vacated. However, for the reasons discussed herein, Plaintiff's motion for Court to direct Defendants to comply with terms of settlement agreement should nonetheless be denied.

114

DISCUSSION

On July 24, 1997, Plaintiff executed a document entitled "General Release and Agreement in Full Settlement of All Claims" evidencing his agreement to dismiss the instant civil rights lawsuit with prejudice in exchange for the payment of \$250.00 "to Wirtz." On the same day, Plaintiff also executed a "dismissal with prejudice." On September 29, 1997, Plaintiff filed his "motion for court to direct defendants to comply with terms of settlement agreement" and informed the Court that in spite of his "good faith" efforts, he had not yet received the money promised to him by Defendants. Plaintiff further indicated that he had received a letter from counsel for Defendants stating that, pursuant to Okla. Stat. tit. 57, § 566.1, the \$250.00 had been placed in Plaintiff's inmate account maintained by the Oklahoma Department of Corrections ("ODOC") and that it was going to be disbursed to satisfy court costs and fees assessed in other matters. Plaintiff responded to the letter, voicing numerous objections to the actions taken by Defendants. After receiving no response to his letter from Defendants' counsel, Plaintiff filed his motion requesting that the Court direct Defendants to comply with the terms of the settlement agreement.

On October 14, 1997, Defendants filed their response to plaintiff's motion (Docket #108) as well as a stipulation of dismissal executed by counsel for Defendants (Docket #110), and the Dismissal with Prejudice executed by Plaintiff on July 24, 1997 (Docket #111). In their response, Defendants argued that this Court lacks jurisdiction to resolve this dispute, that the interception of the settlement proceeds by the ODOC is mandated by Okla. Stat. Ann. tit. 57, § 566.1 (1996), and that Plaintiff's claim constitutes a claim against the State of Oklahoma, a claim barred by Eleventh Amendment immunity.

On October 30, 1997, based on Defendants' arguments, the Court denied Plaintiff's motion due to lack of jurisdiction. However, because Plaintiff filed his motion requesting the Court to direct Defendants' compliance *prior* to the filing of the Stipulation of Dismissal by Defendants, the agreed-upon dismissal had not yet become effective. See Orsini v. Kugel, 9 F.3d 1042, 1045 (2d Cir. 1993); McCall-Bey v. Franzen, 777 F.2d 1178, 1185 (7th Cir. 1985). As a result, this Court has jurisdiction to hear Plaintiff's motion. Therefore, Plaintiff's motion to reconsider should be granted and the Court's Order of October 30, 1997 should be vacated.

However, after reviewing the documentation and the relevant law, the Court concludes that Defendants have in fact fully performed the settlement agreement. This conclusion is based on the fact that Okla. Stat. tit. 57, § 566.1 requires the settlement funds in this case be used to satisfy previous assessments of court costs and other fees involving Plaintiff's criminal convictions. Section 566.1 provides, in pertinent part, as follows:

Any inmate in a penal institution as defined in [Okla. Stat. tit. 57, § 566] who successfully obtains a final court order or settlement agreement awarding damages for any cause of action in any federal or state proceedings against the state, a state agency, the Department or any political subdivision, or any employee thereof, shall pay or satisfy from the award any previous assessment of court costs or fines involving the criminal convictions of the offender, victims compensation assessments, restitution awards, probation or parole fees, child support or alimony, civil judgments, and any deficiencies of debts not paid of which the Department of Correction has notice by lien, garnishment, or other appropriate process.

According to Defendants, Plaintiff's previous assessments involving his criminal convictions include court costs of \$250 and a fine of \$500 in Tulsa County Case No. CF-92-1004; court costs, CLEET fees and victim's compensation award totaling \$199 in Payne County Case No. CRF-91-248; court costs and fees totaling \$224.28 in Payne County Case No. CRF-91-160; and court costs and fees totaling \$239.00 in Payne County Case No. CRF-91-225.

Plaintiff contends that the terms of the settlement agreement specify that the settlement proceeds be paid "to Wirtz" and that the interception of the settlement proceeds by ODOC fails to comply with the unambiguous terms of the agreement. Plaintiff further argues that Section 566.1 is inapplicable in the instant case since the ODOC had no "notice by lien, garnishment, or other appropriate process" of the alleged previous assessments owed by Plaintiff as required by the statute. Finally, Plaintiff contends that, even if Section 566.1 applied and justified Defendants' actions, each of the assessments cited by Defendants has either been discharged or waived.

Existing applicable law is a part of every contract, the same as if expressly referred to or incorporated in its terms. Dillard & Sons Constr., Inc. v. Burnup & Sims Comtec, Inc., 51 F.3d 910, 915 (10th Cir. 1995). In this case, Oklahoma statutory law requires that any settlement proceeds received by Plaintiff while he is an inmate in a penal institution, including a Colorado Department of Corrections facility, shall be used to satisfy any previous assessments of court costs or fines involving Plaintiff's criminal convictions. See Okla. Stat. tit. 57, §§ 566, 566.1. Defendants delivered the settlement funds "to Wirtz" in the manner provided by law, i.e., pursuant to Okla. Stat. tit. 57, § 566.1, the settlement proceeds were deposited in Plaintiff's inmate account to be used to satisfy previous assessments of court costs or fines of which ODOC had notice.¹ The Court finds, therefore, that Defendants have fully performed pursuant to the settlement agreement. As a result, the parties' stipulated dismissal is in full force and effect.

In addition, Plaintiff's claim that each of the assessments cited by Defendants has been either discharged or waived raises issues separate and apart from those related to Defendants'

¹The Judgment and Sentence entries from Plaintiff's criminal convictions in Tulsa and Payne Counties provide ODOC with the requisite notice.

performance of the settlement agreement. While Plaintiff may claim in a separate action that ODOC has misapplied these settlement proceeds, this Court lacks jurisdiction to consider that claim in this lawsuit. See Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 381-82 (1994).

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Plaintiff's motion to alter or amend judgment (Docket #113) is **granted**.
2. The Court's Order filed October 30, 1997, is **vacated**.
3. Plaintiff's motion to direct Defendants to comply with terms of settlement agreement (Docket #107) is **denied**.
4. Pursuant to the Stipulation of Dismissal With Prejudice (Docket #110) and the Dismissal With Prejudice (Docket #109), this action is **dismissed with prejudice**.

IT IS SO ORDERED.

This 15TH day of January, 1998.


Sven Erik Holmes
United States District Judge

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

STRICKLAND TOWER MAINTENANCE,)
INC., an Oklahoma corporation,)
)
Plaintiff,)
)
vs.)
)
AT&T COMMUNICATIONS, INC.,)
a Delaware corporation,)
)
Defendant.)

ENTERED
JAN 16 1998

Case No. 94-CV-1015H ✓

FILED

JAN 15 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

**ORDER DISMISSING CASE AND
EXONERATING SUPERSEDEAS BOND**

Now on this 15TH day of January, 1998, there comes before this Court the Application of Defendant, AT&T Communications, Inc., and Plaintiff, Strickland Tower Maintenance, Inc. requesting the Court to enter an Order exonerating the Bond for Stay of Execution on Appeal, Bond No. JU6625, filed herein on December 3, 1996, and releasing the St. Paul Fire and Marine Insurance Company, from its obligations as surety on said bond. For cause shown, the Court finds that said Application should be granted.

The Court further finds that the parties have jointly filed a Satisfaction of Judgment and Joint Stipulation of Dismissal reflecting that all sums due under the Judgment of this Court have been paid and the Judgment has been fully satisfied, and advising that this case should be dismissed and the Court file should be closed for all purposes.

IT IS THEREFORE ORDERED that the Bond for Stay of Execution on Appeal, Bond No. JU6625, filed herein by Defendant AT&T Communications, Inc., on December 3, 1996,

1/15/98

180

is fully exonerated, that St. Paul Fire and Marine Insurance Company is released from its obligations as surety on said bond for all purposes, and that the above styled action is dismissed for all purposes and the Court file is hereby closed.


Sven Eric Holmes, United States District Judge

APPROVED:


Craig Hoster
BAKER & HOSTER L.L.P.
321 S. Boston Ave., Suite 500
Tulsa, Oklahoma 74103
(918) 592-9800

ATTORNEYS FOR PLAINTIFF
STRICKLAND TOWER MAINTENANCE, INC.


Jonathan C. Neff
BRUNE & NEFF, P.C.
401 S. Boston Ave., Suite 230
Tulsa, Oklahoma 74103
(918) 599-8600

ATTORNEYS FOR DEFENDANT
AT&T COMMUNICATIONS, INC.

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

FILED

JAN 15 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT



Civil Action No. 97-CV-1068H (J)

ENTERED
JAN 15 1998

WILLIAM R. RILEY,
Plaintiff,
vs.
MICHAEL G. HAWS,
Defendant.

§
§
§
§
§
§
§
§
§
§

ORDER OF DISMISSAL

Before the Court is the Joint Stipulation of Dismissal with Prejudice filed by William R. Riley, Plaintiff (herein so called), and Michael G. Haws, Defendant (herein so called).

IT IS THEREFORE ORDERED that the above styled and numbered civil action is hereby DISMISSED with prejudice to the rights of Plaintiff or Defendant to refile all or any part thereof.

IT IS FURTHER ORDERED that all costs of court are taxed to the party incurring the same.

JANUARY 15, 1998
Dated: ~~December~~, 1997.


United States District Judge

3

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
on behalf of Rural Housing Service,)
formerly Farmers Home Administration,)

Plaintiff,)

v.)

THE UNKNOWN HEIRS, EXECUTORS,)
ADMINISTRATORS, DEVISEES,)
TRUSTEES, SUCCESSORS AND)
ASSIGNS OF MARTHA J. EVANS)
aka Martha Jeane Evans, DECEASED;)
DORINDA SANDERS;)
SPOUSE, if any, OF DORINDA SANDERS;)
SHARON VILES;)
SPOUSE, if any, OF SHARON VILES;)
CHUCK EVANS;)
SPOUSE, if any, OF CHUCK EVANS;)
LARRY WAYNE EVANS;)
SPOUSE, if any, OF LARRY WAYNE EVANS;)
STATE OF OKLAHOMA *ex rel.*)
Oklahoma Tax Commission;)
COUNTY TREASURER, Washington County,)
Oklahoma;)
BOARD OF COUNTY COMMISSIONERS,)
Washington County, Oklahoma,)

Defendants.)

FILED

JAN 15 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JAN 16 1998

) CIVIL ACTION NO. 96-CV-827-H

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 15th day of JANUARY,

1997. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney; the Defendants, County Treasurer, Washington County, Oklahoma, and Board of County Commissioners, Washington County, Oklahoma, appear by Thomas Janer, Assistant District Attorney, Washington County, Oklahoma; that the Defendant, State of Oklahoma *ex rel.* Oklahoma Tax Commission, appears by Kim D. Ashley, Assistant General Counsel; that the Defendants, The

12

Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Martha J. Evans aka Martha Jeane Evans, Deceased; Dorinda Sanders; Spouse, if any, of Dorinda Sanders; Sharon Viles; Spouse, if any, of Sharon Viles; Chuck Evans; Debra Evans, Spouse of Chuck Evans; Larry Wayne Evans; Spouse, if any, of Larry Wayne Evans, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, Dorinda Sanders, executed a Waiver of Service of Summons on September 20, 1996; that the Defendant, Chuck Evans, executed a Waiver of Service of Summons on September 17, 1996; that the Defendant, Debra Evans, Spouse of Chuck Evans, executed a Waiver of Service of Summons on October 1, 1996; that the Defendant, Larry Wayne Evans, executed a Waiver of Service of Summons on September 20, 1996.

The Court further finds that the Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Martha J. Evans aka Martha Jeane Evans, Deceased; Spouse, if any, of Dorinda Sanders; Sharon Viles; Spouse, if any, of Sharon Viles; Spouse, if any, of Larry Wayne Evans, were served by publishing notice of this action in the Examiner-Enterprise, a newspaper of general circulation in Washington County, Oklahoma, once a week for six (6) consecutive weeks beginning March 27, 1997, and continuing through April 30, 1997, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(C)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Martha J. Evans aka Martha Jeane Evans, Deceased; Spouse, if any, of Dorinda Sanders; Sharon Viles; Spouse, if any, of Sharon Viles; Spouse, if any, of Larry Wayne Evans, and service cannot be made

upon said Defendants by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Martha J. Evans aka Martha Jeane Evans, Deceased; Spouse, if any, of Dorinda Sanders; Sharon Viles; Spouse, if any, of Sharon Viles; Spouse, if any, of Larry Wayne Evans. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting on behalf of Rural Housing Service, formerly Farmers Home Administration, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

The Court further finds that the Defendant, Spouse, if any, of Chuck Evans, is one and the same person as Debra Evans.

It appears that the Defendants, County Treasurer, Washington County, Oklahoma, and Board of County Commissioners, Washington County, Oklahoma, filed their Answer on September 27, 1996; that the Defendant, State of Oklahoma *ex rel.* Oklahoma Tax Commission, filed its Answer on October 11, 1996; that the Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Martha J. Evans aka Martha Jeane Evans, Deceased; Dorinda Sanders; Spouse, if any, of Dorinda Sanders; Sharon

Viles; Spouse, if any, of Sharon Viles; Chuck Evans; Debra Evans, Spouse, of Chuck Evans; Larry Wayne Evans; Spouse, if any, of Larry Wayne Evans, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon certain promissory notes and for foreclosure of mortgages upon the following described real property located in Washington County, Oklahoma, within the Northern Judicial District of Oklahoma:

LOT TWENTY-FIVE (25), EASTMAN SECOND ADDITION,
OCHELATA, WASHINGTON COUNTY, OKLAHOMA.

The Court further finds that this a suit brought for the further purpose of judicially determining the death of Martha Jeane Evans and judicially determining the heirs of Martha Jeane Evans.

The Court further finds that Martha J. Evans aka Martha Jeane Evans (hereinafter referred to by either name) became the record owner of the real property involved in this action by virtue of that certain Warranty Deed dated February 17, 1982, from Deborah J. McCormack, a single woman, to Martha J. Evans, a single woman, which Warranty Deed was filed of record on February 17, 1982, in Book 773, Page 893, in the records of the County Clerk of Washington County, Oklahoma.

The Court further finds that Martha Jeane Evans died on February 13, 1994, in Bartlesville, Washington County, Oklahoma. Upon the death of Martha Jeane Evans, the subject property vested in her surviving heirs by operation of law. A copy of Certificate of Death No. 5606 issued by the Oklahoma State Department of Health certifies Martha Jeane Evans' death.

The Court further finds that on March 8, 1979, Deborah J. McCormack executed and delivered to the United States of America, acting through the Farmers Home

Administration, now known as Rural Housing Service, her promissory note in the amount of \$26,500.00, payable in monthly installments, with interest thereon at the rate of 8.50 percent per annum.

The Court further finds that as security for the payment of the above-described note, Deborah J. McCormack, a single person, executed and delivered to the United States of America, acting through the Farmers Home Administration, now known as Rural Housing Service, a real estate mortgage dated March 8, 1979, covering the above-described property, situated in the State of Oklahoma, Washington County. This mortgage was recorded on March 8, 1979, in Book 720, Page 396, in the records of Washington County, Oklahoma.

The Court further finds that on February 17, 1982, Martha J. Evans executed and delivered to the United States of America, acting through the Farmers Home Administration, now known as Rural Housing Service, an assumption agreement assuming the liability for payment of the above-described note and mortgage. On December 7, 1994, the United States of America, acting through the Farmers Home Administration, now known as Rural Housing Service, released Deborah J. McCormack, a single person, from personal liability to the government for the indebtedness and obligation of the above-described note and mortgage.

The Court further finds that on February 17, 1982, Martha J. Evans executed and delivered to the United States of America, acting through the Farmers Home Administration, now known as Rural Housing Service, her promissory note in the amount of \$9,800.00, payable in monthly installments, with interest thereon at the rate of 13.25 percent per annum.

The Court further finds that as security for the payment of the above-described note, Martha J. Evans, a single woman, executed and delivered to the United States of

America, acting through the Farmers Home Administration, now known as Rural Housing Service, a real estate mortgage dated February 17, 1982, covering the above-described property, situated in the State of Oklahoma, Washington County. This mortgage was recorded on February 17, 1982, in Book 773, Page 894, in the records of Washington County, Oklahoma.

The Court further finds that Martha J. Evans aka Martha Jeane Evans executed and delivered to the United States of America, acting through the Farmers Home Administration, now known as Rural Housing Service, the following Interest Credit Agreements pursuant to which the interest rate on the above-described notes and mortgages was reduced.

| DOCUMENT | DATED | EFFECTIVE DATE |
|---------------------------|--------------|-----------------------|
| Interest Credit Agreement | | 02/17/82 |
| Interest Credit Agreement | 11/18/83 | 02/08/84 |
| Interest Credit Agreement | 01/10/85 | 02/08/85 |
| Interest Credit Agreement | 11/25/85 | 02/08/86 |
| Interest Credit Agreement | 11/19/86 | 02/08/87 |
| Interest Credit Agreement | 11/19/87 | 02/08/88 |
| Interest Credit Agreement | 11/21/88 | 02/08/89 |
| Interest Credit Agreement | 12/05/89 | 02/08/90 |
| Interest Credit Agreement | 12/22/90 | 02/08/91 |
| Interest Credit Agreement | 11/21/91 | 02/08/92 |
| Interest Credit Agreement | 01/08/93 | 02/08/93 |
| Interest Credit Agreement | 11/24/93 | 02/08/94 |

The Court further finds that Martha J. Evans aka Martha Jeane Evans, now deceased, made default under the terms of the aforesaid notes, mortgages, assumption agreement and interest credit agreements by reason of her failure to make the monthly

installments due thereon, which default has continued, and that by reason thereof Plaintiff alleges that there is now due and owing under the notes, mortgages, assumption agreement, after full credit for all payments made, the principal sum of \$23,618.42, plus accrued interest in the amount of \$2,688.01 as of August 15, 1995, plus interest accruing thereafter at the rate of \$6.607 per day until judgment, plus interest thereafter at the current legal rate until fully paid, and the further sum due and owing under the interest credit agreements of \$9,862.66, plus interest on that sum at the legal rate from judgment until paid, and the costs of this action in the amount of \$334.55 (\$324.55 publication fees, \$10.00 fee for recording Notice of Lis Pendens).

The Court further finds that Plaintiff, United States of America, is entitled to a judicial determination of the death of Martha Jeane Evans and to a judicial determination of the heirs of Martha Jeane Evans.

The Court further finds that the Defendant, State of Oklahoma *ex rel.* Oklahoma Tax Commission, has a lien on the property which is the subject matter of this action in the amount of \$457.88, together with interest and penalty according to law, by virtue of Tax Warrant No. ITI9600754400 dated April 25, 1996, and recorded on April 30, 1996 in the records of Washington County, Oklahoma.

The Court further finds that the Defendants, County Treasurer, Washington County, Oklahoma, and Board of County Commissioners, Washington County, Oklahoma, have a lien on the property which is the subject matter of this action by virtue of ad valorem taxes in the amount of \$286.05, plus penalties and interest, for the year 1996. Said lien is superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Martha J. Evans aka Martha

Jeane Evans, Deceased; Dorinda Sanders; Spouse, if any, of Dorinda Sanders; Sharon Viles; Spouse, if any, of Sharon Viles; Chuck Evans; Debra Evans, Spouse, of Chuck Evans; Larry Wayne Evans; Spouse, if any, of Larry Wayne Evans, are in default and therefore have no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the death of Martha Jeane Evans be and the same hereby is judicially determined to have occurred on February 13, 1994 in the City of Bartlesville, Washington County, Oklahoma.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the only known heirs of Martha Jeane Evans, Deceased, are Dorinda Sanders, Sharon Viles, Chuck Evans, and Larry Wayne Evans, and that despite the exercise of due diligence by Plaintiff and its counsel, no other known heirs of Martha Jeane Evans, Deceased, have been discovered and it is hereby judicially determined that Dorinda Sanders, Sharon Viles, Chuck Evans, and Larry Wayne Evans are the only known heirs of Martha Jeane Evans, Deceased, and that Martha Jeane Evans, Deceased, has no other known heirs, executors, administrators, devisees, trustees, successors and assigns; and the Court approves the Certificate of Publication and Mailing filed on May 12, 1997, regarding said heirs.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of Rural Housing Service, formerly Farmers Home Administration, have and recover judgment *in rem* against all known and unknown Defendants in the principal sum of \$23,618.42, plus accrued interest in the amount of \$2,688.01 as of August 15, 1995, plus interest accruing thereafter at the rate of \$6.607 per day until judgment, plus interest thereafter at the current legal rate of 5.34 percent per annum until fully paid, and the further sum due and owing under the interest credit agreements of \$9,862.66, plus interest on that sum at the current legal rate of 5.34 percent per annum

from judgment until paid, and the costs of this action in the amount of \$334.55 (\$324.55 publication fees, \$10.00 fee for recording Notice of Lis Pendens), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property, plus any other advances.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, State of Oklahoma *ex rel.* Oklahoma Tax Commission, have and recover judgment *in rem* in the amount of \$457.88, together with interest and penalty according to law, by virtue of Tax Warrant No. ITI9600754400 dated April 25, 1996, and recorded on April 30, 1996 in the records of Washington County, Oklahoma.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, County Treasurer, Washington County, Oklahoma, and Board of County Commissioners, Washington County, Oklahoma, have and recover judgment in the amount of \$286.05, plus penalties and interest, by virtue of 1996 ad valorem taxes.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Martha J. Evans aka Martha Jeane Evans, Deceased; Dorinda Sanders; Spouse, if any, of Dorinda Sanders; Sharon Viles; Spouse, if any, of Sharon Viles; Chuck Evans; Debra Evans, Spouse, of Chuck Evans; Larry Wayne Evans; Spouse, if any, of Larry Wayne Evans, have no right, title, or interest in the subject real property.

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

First:

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

Second:

In payment of the judgment rendered herein in favor of the Defendants, County Treasurer and Board of County Commissioners, Washington County, Oklahoma;

Third:

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

Fourth:

In payment of the judgment rendered herein in favor of the Defendant, State of Oklahoma *ex rel.* Oklahoma Tax Commission.

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

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



UNITED STATES DISTRICT JUDGE

APPROVED:

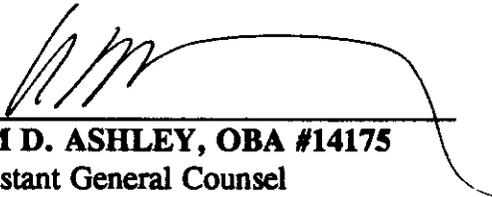
STEPHEN C. LEWIS
United States Attorney



PHIL PINNELL, OBA #7169
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103
(918) 581-7463



THOMAS JANER, OBA #11110
Assistant District Attorney
Washington County Courthouse
Fifth Street and Johnstone
Bartlesville, Oklahoma 74003
(918) 337-2860
Attorney for Defendants,
County Treasurer and Board of County Commissioners,
Washington County, Oklahoma



KIM D. ASHLEY, OBA #14175
Assistant General Counsel
P.O. Box 53248
Oklahoma City, Oklahoma 73152-3248
(405) 522-5555
Attorney for Defendant,
State of Oklahoma ~~ex~~ rel. Oklahoma Tax Commission

Judgment of Foreclosure
Case No. 96-CV-827-H (Evans)

PP:css

DATE 1-15-98

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

| | |
|---------------------------------------|---|
| ROBERT COWAN |) |
| |) |
| Plaintiff, |) |
| |) |
| vs. |) |
| |) |
| UNITED STATES OF AMERICA, DEPARTMENT |) |
| OF HEALTH AND HUMAN SERVICES, and the |) |
| FOOD AND DRUG ADMINISTRATION |) |
| |) |
| Defendants. |) |

Case No. 97-C-1124B(J) ✓

F I L E D

JAN 15 1998 *ML*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

REPORT AND RECOMMENDATION

On December 24, 1997, Plaintiff filed an Application for a Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction. [Doc. Nos. 3-1, 3-2, 3-3]. Defendants filed a Brief in Opposition to Plaintiff's Application on December 30, 1997. This motion for a Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction was referred by minute order dated December 29, 1997, to the assigned United States Magistrate Judge. A hearing was held on December 31, 1997. Plaintiff's doctor, Gary Davis, M.D., and Plaintiff testified at the hearing. At the hearing, all parties requested additional time to brief the issues. Plaintiff's brief was filed January 6, 1998, and Defendants' brief was filed January 9, 1998.

Plaintiff was represented at the hearing by Jeffrey Nix and Scott Scroggs. Defendants were represented at the hearing by Assistant United States Attorney Peter Bernhardt. After consideration of the arguments of the parties, the case law, the statutes, the testimony of the witnesses, and the pleadings, the United States

6

Magistrate Judge recommends that Plaintiff's Application for a Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction be **DENIED**.

The Issue

Plaintiff and Plaintiff's doctor testified that Plaintiff is terminally ill. Dr. Gary Davis, Plaintiff's doctor, testified that Plaintiff has AIDS and that Plaintiff cannot tolerate the "traditional" drug treatments for AIDS. Dr. Davis testified that he has developed a drug (containing antibodies obtained from the injection of the AIDS virus into a goat) that may be effective in treating AIDS (hereafter referred to as the goat neutralizing antibody drug^{1/}). Dr. Davis additionally testified that Plaintiff has been informed of the numerous potential risks associated with the injection of the goat neutralizing antibody drug, and that these risks include but are not limited to death or blindness. Plaintiff testified that Dr. Davis had informed him that the goat neutralizing antibody could cause blindness or death.

Dr. Davis applied to the Food and Drug Administration ("FDA") for approval to begin testing the goat neutralizing antibody drug in March of 1997. On April 9, 1997, Dr. Davis' application was placed on "clinical hold" by the FDA. An affidavit submitted by Richard M. Lewis of the FDA indicates that the FDA informed Dr. Davis of the reasons for the clinical hold and requested a meeting with Dr. Davis to clarify and suggest possible resolutions of the issues which led to the clinical hold. Dr. Davis testified that he has yet met with the FDA, and that he has not provided additional

^{1/} The characterization of this drug is based on Plaintiff's characterization in his brief of the specific treatment Plaintiff is seeking from Dr. Davis.

information to the FDA. The FDA has informed Dr. Davis that he does not have approval from the FDA to use the goat neutralizing antibody, and that he cannot use his experimental new drug absent approval.

Plaintiff requests that Dr. Davis be authorized to inject Plaintiff with the with the experimental goat neutralizing antibody drug and that the FDA be enjoined from interfering with Dr. Davis' treatment of Plaintiff.

The FDA and Regulation of Drug Use

The United States Supreme Court and the Tenth Circuit Court of Appeals have addressed the application of the Food, Drug, and Cosmetic Act (the "FDCA") to terminally ill individuals. The Courts have concluded that the FDCA contains no exception for terminally ill patients and that the FDCA is constitutional. United States v. Rutherford, 442 U.S. 544 (1979); Rutherford v. United States, 616 F.2d 455 (10th Cir. 1980). Recognizing these decisions, Plaintiff does not, in his briefs, specifically challenge the constitutionality of the FDCA. Plaintiff merely asserts that he meets an exception to the FDCA, and asks this Court to prohibit the FDA from interfering with the administration of the goat neutralizing antibody drug to Plaintiff. The Court must therefore interpret the statute and the exceptions argued by Plaintiff.

Investigational New Drug ("IND") Applications are governed by Part 312 of the Code of Federal Regulations. The regulations contain procedures which govern the use of investigational new drugs and which govern the review of IND Applications by the FDA. The regulations apply to all products which are "subject to section 505 or 507

[21 U.S.C. §§ 355, 357] of the Federal Food, Drug, and Cosmetic Act or to the licensing provisions of the Public Health Service Act.” 21 C.F.R. § 312.2(a).

Section 505 (21 U.S.C. § 355) governs the approval of new drugs. “Drug” is defined in 21 U.S.C. § 321 to include “articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals.” 21 U.S.C. § 321. The Magistrate Judge concludes that these sections apply to the goat neutralizing antibody drug which Plaintiff requests that he be permitted to take.

Section 312.20(b) of the regulations provides that a “sponsor shall not begin a clinical investigation subject to § 312.2(a)^{2/} until the investigation is subject to an IND which is in effect in accordance with § 312.40.” 21 C.F.R. § 312.20(b). In accordance with § 312.40, such a new drug may be used in a clinical investigation^{3/} only if the sponsor of the drug submits an IND to the FDA; the IND is “in effect;” and the sponsor has complied with the clinical investigation requirements of the regulations. 21 C.F.R. § 312.40(a)(1). Therefore, in accordance with these regulations, before a new drug can be used, the sponsor must first obtain an IND.

Plaintiff acknowledges the entire IND Application process. However, Plaintiff argues that an exception to this process exists under the “practice of medicine” exemption and under the regulations governing Institutional Review Boards (“IRB”). Plaintiff asserts that both of these exceptions apply and that an injunction should

^{2/} As noted above, § 312.2(a) applies to the new drug which Plaintiff is requesting he be permitted to use.

^{3/} “Clinical investigation means any experiment that involves a test article and one or more human subjects” 21 C.F.R. § 56.102(c).

therefore be issued prohibiting the FDA from interfering with his taking the goat neutralizing antibody drug.

Practice of Medicine Exception

Plaintiff argues that a “commonly recognized exception to the FDCA’s broad coverage” is the “practice of medicine exemption.” Plaintiff refers to several cases and cites some legislative history. Plaintiff initially refers to United States of America v. Algon Chemical Inc., 879 F.2d 1154 (3rd Cir. 1989). Plaintiff quotes some of the following language from the Algon case.

[W]hen practitioners “manufacture, prepare, propagate, compound, or process drugs or devices solely for use in the course of their professional practice,” they are not subject to the registration requirement that applies to others who engage in such activities.

Algon Chemical, 897 F.2d at 1159 (Plaintiff omits the relevant underlined language).

The Algon Court cites and relies upon 21 U.S.C. § 360 (g)(2) as establishing the “practice of medicine” exception. Section 360 is a registration requirement for producers of drugs or devices. In general, the statute requires that each person who owns or operates any establishment engaged in the manufacture, preparation, propagation, compounding or processing of a drug or a device must register his name and place of business with the Secretary. The statute also provides an exception to this registration requirement. The exception is in sub-section (g)(2), and exempts from the registration requirements those

practitioners licensed by law to prescribe or administer drugs and who manufacture, prepare, propagate, compound, or process drugs solely for use in the course of their professional practice.

21 U.S.C. § 360(g)(2). Consequently, the "medical practice exemption" referenced by Plaintiff is a very limited exemption from the registration requirements of the FDCA. Plaintiff's assertion that this exception provides a broad-based exemption to all physicians from the requirements of the Food, Drug, and Cosmetic Act is incorrect.

The Algon Court further explains that the limited "practice of medicine" exception is intended to permit doctors who acquire approved and legally available drugs to "compound" those drugs in the course of their practice without first obtaining FDA approval. Nothing in the FDCA or the case law suggests that the exception was intended to be expanded to permit doctors to test unapproved drugs.

Congress intended to authorize compounding with legally acquired drugs and not to create an exception to the Act's premarket approval process as explicated by the Supreme Court in United States v. Rutherford.

* * *

Thus, the medical practitioner exemptions by their terms afford no more than the right to be free from inspection and registration requirements when veterinarians and other practitioners compound medicine with legally acquired materials, not the right to acquire unapproved drug substances. Indeed, any other interpretation could not be squared with the Supreme Court's decision, and understanding of congressional intent, in United States v. Rutherford.

United States v. Algon Chemical, Inc., 879 F.2d 1154, 1159 (3rd Cir. 1989).

Plaintiff also relies on Chaney v. Heckler, 718 F.2d 1174 (D.C. Cir. 1983).

Chaney notes,

The better explanation for the practice-of-medicine exemption is that Congress did not want to interfere with physicians' treatment of their patients. New uses for drugs are often discovered after FDA approves the package inserts that explain a drug's approved uses. Congress would have created havoc in the practice of medicine had it required physicians to follow the expensive and time-consuming procedure of obtaining FDA approval before putting drugs to new uses. Thus Congress exempted the practice of medicine from the Act so as not to limit a physician's ability to treat his patients.

Chaney 718 F.2d at 1180. Chaney does not support Plaintiff's interpretation of the "practice of medicine" exemption.

Institutional Review Boards (IRB) Exception

The regulations governing IRBs are located in 21 C.F.R. Part 56. The regulations

contain the general standards for the composition, operation, and responsibility of an Institutional Review Board (IRB) that reviews clinical investigations regulated by the Food and Drug Administration under sections 505(i), 507(d), and 520(g) of the act

21 C.F.R. § 56.101. Therefore, IRB regulations recognize that the IRB reviews the clinical investigations which are regulated by the FDA.

Plaintiff asserts that Dr. Davis has effectively established an IRB which will review Dr. Davis' protocol in accordance with the regulations. Plaintiff notes that usually an IRB must approve the use of a drug before the drug is dispensed to patients. According to Plaintiff, however, an exception exists for an "emergency use" of a drug. Such an emergency use is permitted as long as the IRB is informed of the use within five days of the use of the drug. Plaintiff argues that his situation constitutes an

emergency use. Although Plaintiff correctly identifies an "emergency use" which permits the use of a drug followed by notification to the IRB within five days, the exception identified by Plaintiff in no way excepts the process from prior approval of the IND application.

As explained in the regulations, an IRB reviews clinical investigations which are regulated by the FDA. 21 C.F.R. § 56.101. Plaintiff argues that he meets the "emergency use" exception. However, Plaintiff does not explain how meeting the emergency use exception exempts him from the application of Part 312. Section 56.103 provides the "circumstances in which IRB review is required."

Except as provided in §§ 56.104 and 56.105, any clinical investigation which must meet the requirements for prior submission (as required in parts 312, 812, and 813) to the Food and Drug Administration shall not be initiated unless that investigation has been reviewed and approved by, and remains subject to continuing review by, an IRB meeting the requirements of this part.

21 C.F.R. § 56.103 (emphasis added). The exemption from IRB application which Plaintiff references is § 56.104(c) which provides that

[t]he following categories of clinical investigations are exempt from the requirements of this part for IRB review:

* * *

Emergency use of a test article, provided that such emergency use is reported to the IRB within 5 working days.

21 C.F.R. § 56.104(c) (emphasis added). Emergency use is also defined in the regulations as

the use of a test article on a human subject in a life-threatening situation in which no standard acceptable treatment is available, and in which there is not sufficient time to obtain IRB approval.

21 C.F.R. § 56.102(d) (emphasis added). Assuming Plaintiff is correct, and this exemption is applicable, application of the exemption does not further Plaintiff's cause. This exemption merely permits an exception from prior IRB approval during a clinical investigation, and requires Plaintiff's doctor to notify the IRB of any "emergency use" within five days of such a use. No exception is given that would excuse the required prior approval of the IND Application by the FDA.

Plaintiff also attempts to address the interaction between Part 312 (21 C.F.R. §312, Investigational New Drugs) and Part 56 (21 C.F.R. § 56, Institutional Review Boards). Plaintiff suggests that Part 312 recognizes the exemption for IRBs in 21 C.F.R. § 312.2(b). This section does provide a very limited exemption. The Section states:

(1) The clinical investigation of a drug product that is lawfully marketed in the United States is exempt from the requirements of this part if all the following apply:

(i) The investigation is not intended to be reported to FDA as a well-controlled study in support of a new indication for use nor intended to be used to support any other significant change in the labeling for the drug;

(ii) If the drug that is undergoing investigation is lawfully marketed as a prescription drug product, the investigation is not intended to support a significant change in the advertising for the product;

(iii) The investigation does not involve a route of administration or dosage level or use in a patient population or other factor that significantly increases the risks (or decreases the acceptability of the risks);

(iv) The investigation is conducted in compliance with the requirements for institutional review set forth in part 56 and with the requirements for informed consent set forth in part 50; and

(v) The investigation is conducted in compliance with the requirements of § 312.7.

21 C.F.R. § 312.2(b) (emphasis added). Plaintiff refers only to sub-section (iv) above, which does reference IRBs, and states that Plaintiff therefore meets the exemption. However, as noted in the preface to the exemption, all of the requirements (that is (i) - (v)) must be met before the exemption applies. Plaintiff does not argue and cannot establish that all of the requirements are met. The Magistrate Judge concludes that Plaintiff does not meet this exemption.

Plaintiff's final argument is that analogous regulations in Part 812 establish the "primacy of the Part 56 process." Part 812 regulates "medical devices." Plaintiff does not explain, or offer any reasons, why the regulation of medical devices is analogous to the use of experimental drugs. Regardless, even if "part 812 recognizes the primacy of the Part 56 process," the regulation of new drugs is regulated by Part 312 which requires that an IND Application must be approved before an IRB can oversee the conducting of clinical investigations.

The Court is sympathetic to Plaintiff's situation. However, the law is very clear, and under the current statutes and regulations, Plaintiff's physician may not administer

the goat neutralizing antibody drug absent prior approval of the FDA. In Court, Plaintiff argued that he should have the right to take whatever treatment he wishes due to his terminal condition regardless of whether the FDA approves the treatment as effective or safe, and that to prohibit him from taking the treatment he wishes violates his rights under the United States Constitution.^{4/} The United States Supreme Court previously addressed and rejected this argument in Rutherford. In Rutherford, cancer patients requested the right to use Laetrile, arguing, as does Plaintiff, that for terminally ill patients the effectiveness or safety of the proposed treatment is irrelevant since such treatment is a last chance effort. However, as identified by the Supreme Court in Rutherford, to permit terminally ill patients to seek any type of treatment regardless of the effectiveness of such treatment would create a cottage industry existing solely to provide potential panaceas to highly vulnerable patients. The language of the Supreme Court in rejecting the Laetrile argument is equally applicable here.

If history is any guide, this new market would not be long overlooked. Since the turn of the century, resourceful entrepreneurs have advertised a wide variety of purportedly simple and painless cures for cancer, including liniments of turpentine, mustard, oil, eggs, and ammonia; peat moss; arrangements of colored floodlamps; pastes made from glycerin and limburger cheese; mineral tablets; and 'Fountain of Youth' mixtures of spices, oil, and suet. In citing these examples, we do not, of course, intend to deprecate the sincerity of Laetrile's current proponents, or to imply any opinion on whether that drug may ultimately prove safe and effective for cancer treatment. But this historical experience does suggest why Congress could

^{4/} Plaintiff testified that he is guaranteed the right to "life, liberty, and happiness," and that if he died he would not be "happy."

reasonably have determined to protect the terminally ill, no less than other patients, from the vast range of self-styled panaceas that inventive minds can devise.

Rutherford, 442 U.S. at 558 (citations omitted).

This Court is in no way criticizing the intentions of Plaintiff and his physician or the potential effectiveness of the proposed treatment. Plaintiff's physician should pursue approval of his Investigational New Drug application as quickly as possible. Plaintiff's doctor must obtain appropriate approval through the proper regulatory authorities. As much as this Court may empathize with Plaintiff, the authority to provide some type of exemptions for individuals such as Plaintiff rests with Congress and not with this Court.

RECOMMENDATION

The undersigned United States Magistrate Judge recommends that the District Court **DENY** Plaintiff's request for a Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction.

OBJECTIONS

The District Judge assigned to this case will conduct a *de novo* review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of his/her review of the record, the District Judge will consider the parties' written objections to this Report and Recommendation. A party wishing to file objections to this Report and Recommendation must do so within ten days after being served with a copy of this Report and Recommendation. See 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b).

The failure to file written objections to this Report and Recommendation may bar the party failing to object from appealing any of the factual or legal findings in this Report and Recommendation that are accepted or adopted by the District Court. See Moore v. United States, 950 F.2d 656 (10th Cir. 1991); and Talley v. Hesse, 91 F.3d 1411, 1412-13 (10th Cir. 1996).

Dated this 15 day of January 1998.


Sam Joyner
United States Magistrate Judge

FILED

JAN 14 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

UNITED STATES OF AMERICA,)
)
)
 Plaintiff,)
)
)
 v.)
)
)
 REAL PROPERTY KNOWN AS:)
 ROUTE 2, BOX 51,)
 SPERRY, OKLAHOMA,)
 AND ALL BUILDINGS,)
 APPURTENANCES, AND)
 IMPROVEMENTS THEREON,)
)
)
 Defendant.)

CIVIL ACTION NO. 96-CV-668-B

ENTERED ON DOCKET

DATE 1-15-98

JUDGMENT OF FORFEITURE

This cause having come before this Court upon the Stipulation for Compromise and Settlement and for Forfeiture entered into by and between the plaintiff, United States of America, and the claimants, William A. Tracy, Connie S. Tracy, Stanley Roger Tracy and Sharon Lee Tracy, for the forfeiture of the sum of Thirty Thousand Dollars (\$30,000.00), representing the equity value of the acreage, in lieu of the defendant real property, to-wit:

Sixty (60.0) acres, more or less, located in Section Seventeen (17), Township Twenty-One (21) North, Range Twelve (12) East, Osage County, Oklahoma, more particularly described as follows:

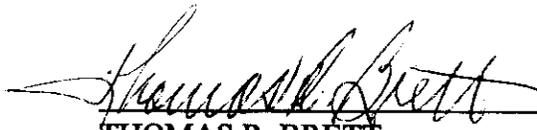
The Southwest Quarter of the Northwest Quarter (SW/4 NW/4); and the West Half of the Southeast Quarter of the Northwest Quarter (W/2 SE/4 NW/4); Section Seventeen (17), Township Twenty-One (21) North, Range Twelve (12) East of the I.B.M., Osage County, Oklahoma, also known as Route 2, Box 51, Sperry, Oklahoma 74043.

25

Claimants William A. Tracy, Connie S. Tracy, Stanley Roger Tracy and Sharon Lee Tracy have entered into a Stipulation for Compromise and Settlement and for Forfeiture in this action, wherein William A. Tracy, Connie S. Tracy, Stanley Roger Tracy and Sharon Lee Tracy agree to the payment of the sum of Thirty Thousand Dollars (\$30,000.00), for forfeiture to the United States of America in lieu of the defendant real property, pursuant to 19 U.S.C. § 1613.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED by the Court that judgment of forfeiture be entered against the sum of Thirty Thousand Dollars (\$30,000.00) paid by William A. Tracy, Connie S. Tracy, Stanley Roger Tracy and Sharon Lee Tracy, in lieu of the defendant real property, and that such sum be, and it is, forfeited to the United States of America for disposition according to law, pursuant to 19 U.S.C. § 1613.

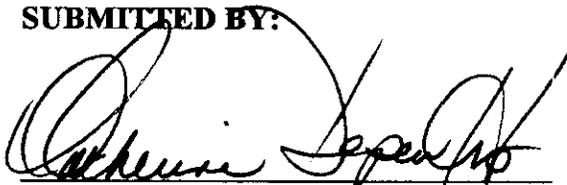
IT IS FURTHER ORDERED by the Court that the defendant real property be, and it is, hereby dismissed from this forfeiture action, with prejudice based on information known to the government at this time and without costs, and that within a reasonable time after the entry of this judgment the plaintiff will file a Release of Lis Pendens with the County Clerk of Osage County, Oklahoma, as to the defendant real property.



THOMAS R. BRETT

Judge of the United States District Court for the Northern District of Oklahoma

SUBMITTED BY:



CATHERINE DEPEW HART

Assistant United States Attorney

NAUDDALPEADEN\FORFEITUTRACYJUDGMENT.COM

ENTERED ON DOCKET

DATE 1-15-98

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

JAN 14 1998 *P*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

AMERCOOL MANUFACTURING, INC.,)
 a Texas corporation,)
)
 Plaintiff,)
)
 vs.)
)
 ODESSA INDUSTRIES, INC., a foreign)
 corporation; and UNIVERSAL COMPRESSION)
 SERVICES, a foreign corporation, aka)
 UNIVERSAL COMPRESSION SERVICES;)
 and TSI COMPRESSION, a foreign corporation,)
)
 Defendants.)

No. 96-C-1016-K ✓

ADMINISTRATIVE CLOSING ORDER

The Court, having been advised that the this action will not be pursued against the remaining Defendant, 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 January, 1998.


 TERRY C. KERN
 UNITED STATES DISTRICT JUDGE

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

DATE 1-15-98

INTERNATIONAL MARINE &)
GAMING, INC., a Delaware)
corporation, and 552129)
ONTARIO, LIMITED, an Ontario,)
Canada corporation,)

Plaintiffs,)

vs.)

HELVETIA FINANCE, S.A.B.V.I.,)
a British Islands corporation,)
HELVETIA FINANCE, S.A., a)
Swiss corporation,)
BURLINGAME AND FRENCH, a)
California partnership,)
DAISY BURLINGAME, an individual,)
ELLIE FRENCH, an individual,)
JACK B. STOOKEY, an individual,)
ANDRE MOERLEN, an individual, and)
CARL L. GODFREY, an individual,)

Defendants.)

F I L E D

JAN 14 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 95-C-626-K

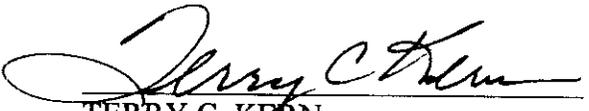
ADMINISTRATIVE CLOSING ORDER

The Court, having been advised that the parties to this action have reached an agreement in the above-captioned matter, 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 January, 1998.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

DATE 1-15-98

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

LPR ENTERPRISES, INC.,
a Texas corporation,

Plaintiff,

v.

RON LYON,

Defendant.

JAN 14 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96-CV-983-K

JUDGMENT

This matter comes on for hearing this 12th day of January, 1998, upon application of Plaintiff, LPR Enterprises, Inc., for judgment by default. The Defendant herein is in default pursuant to Order of the Court dated December 8, 1997, granting Plaintiff's motion for default judgment. It further appears upon testimony offered by the Plaintiff that Defendant is liable to Plaintiff in the sum of \$ 36,693.19 on Plaintiff's claim for breach of contract, breach of fiduciary duty and conversion. Defendant is not an infant or incompetent person and is not in the military service of the United States. The Court, having heard the argument of counsel and testimony on Plaintiff's claim for damages, and being fully advised, finds that judgment should be entered for the Plaintiff.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff recover from Defendant the sum of \$ 36,693.19, together with interest as allowed by law for which let execution issue. Plaintiff may file its application for attorney's fees and costs as provided by Local Rules 54.1 and 54.2.

JUDGMENT RENDERED THIS 13 DAY OF JANUARY, 1998.


UNITED STATES DISTRICT JUDGE

111812

ENTERED ON DOCKET
DATE 1-15-98

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,
on behalf of the Secretary of Veterans Affairs,

Plaintiff,

v.

JOHN H. GAMBLING, et al.,

Defendants.

F I L E D

JAN 14 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CIVIL ACTION NO. 97-CV-349-K (M)

CLERK'S ENTRY OF DEFAULT

It appearing from the files and records of this Court as of 1-14-98 and the declaration of Phil Pinnell, Assistant United States Attorney, that the Defendants, Raul Sandoval, Barbara Sandoval, and William Mack Kelly dba Mack Kelly Bail Bonding, against whom judgment for affirmative relief is sought in this action have 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 defendants.

Dated at Tulsa, Oklahoma, this 14 day of January, 1998.

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

By A. Schwebke
Deputy

F I L E D

JAN 14 1998 *PL*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

JOHN C. LOVE,)
)
 Plaintiff,)
)
 vs.)
)
 TOM E. FULTNER, and)
)
 McDONNELL DOUGLAS)
 CORPORATION,)
)
 Defendants.)

No. 96-CV-1173-K ✓

ENTERED ON DOCKET
DATE 1-15-98

ORDER

Before the Court is the Defendant McDonnell Douglas Corporation's (MD) motion for summary judgment.¹ Plaintiff has brought a claim under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §621 *et seq.*, claiming that the Defendant demoted him and cut his salary and refused to transfer him to its St. Louis facility after it decided to close its Tulsa facility, all based on his age. Plaintiff further claims that Defendant wrongfully discharged him in violation of an implied contract between Plaintiff and Defendant. Defendant contends that its demotion of and failure to transfer Plaintiff were based on business reasons, not Plaintiff's age. Defendant further contends that Plaintiff's employment was employment at will and thus terminable at anytime.

Statement of Facts

The Plaintiff began working as an hourly employee in the Production Control Department (PCD) of the Defendant's Tulsa plant in 1966. In 1978, Defendant promoted Plaintiff to a salaried

¹Defendant Tom Fultner was dismissed by stipulation of the parties on April 17, 1997.

position within its PCD. By 1992, the Plaintiff had risen to the position of Foreman in the PCD.² In November and December of 1992 Defendant reorganized its Tulsa plant. As part of its reorganization, Defendant eliminated the position of General Foreman and made all Foremen and General Foremen, including Plaintiff, "Group Managers." The change in title did not result in changes in salaries or responsibilities. At the time of the reorganization, Tom Fultner became the head of the Parts Supply Group and Nikki Hearne, a General Foreman, was promoted to Manager of Production Control. The reorganization also resulted in the PCD being placed under Defendant's Parts Supply Group. Defendant undertook a reduction in force (RIF) as part of its late 1992 reorganization. As a result of the RIF, Defendant reduced the number of Group Managers. Defendant laid off two Group Managers, ages 33 and 49, respectively. A Third Group Manager took a voluntary lay-off. Plaintiff was designated for lay-off as a Group Manager at some point between November 1992 and January 1993. Plaintiff continued working as a Group Manager until November 1993. On November 22, 1993, Defendant demoted Plaintiff to Production Control "Specialist." Plaintiff was fifty years old at the time. Plaintiff asserts that this demotion was based on his age in violation of the ADEA. Plaintiff further asserts that this demotion was based on a low evaluation he received in October 1993 from Hearne at the direction of Fultner. Plaintiff claims the low evaluation was given to justify his demotion and that he continued to receive the responsibilities of a Group Manager. Defendants claim that the demotion, with the corresponding salary cut, was actually the only manner in which it could avoid laying-off Plaintiff in accordance with its prior decision to downsize managers.

²Plaintiff had actually risen to the position of General Foreman by 1991, but was reclassified as Foreman in 1991 with no pay cut. General Foreman was a higher position than Foreman. Defendant classifies this reclassification as a demotion. The 1991 reclassification/demotion is not at issue in this suit.

On December 3, 1993 Defendant announced that it would close its Tulsa plant. Subsequent to the announcement of the Tulsa plant closing, but prior to the closing, Defendant placed a job posting notice for a job in Defendant's St. Louis plant for which Plaintiff applied. Defendant hired another Tulsa plant employee, Robert Lavendusky, age 39, for the St. Louis position. Plaintiff asserts that in Defendant's stated criteria for the filling the St. Louis position, educational attainment and work experience, Lavendusky was not better qualified than Plaintiff. Defendant notified Plaintiff of his failure to receive the St. Louis position by letter on May 31, 1994. Plaintiff alleges that his failure to receive a transfer to St. Louis was based on his age and in retaliation for a claim of discrimination he had filed relating to his November 1993 demotion.

Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) on May 8, 1994 concerning his demotion and his assigned duties. The charge of discrimination revolves around November 22, 1993, the date of the demotion, and December 10, 1993, the approximate date Plaintiff alleges that he received the duties of Group Manager while receiving the salary of Specialist. On June 6, 1994, Plaintiff sent a letter, along with additional information, to the EEOC regarding his failure to receive the transfer to St. Louis. *Pl. 's Resp. to Def. 's Mot. for Summ. J. , App. A. ex. 1.* The EEOC sent Plaintiff a notice dated April 4, 1995 stating that it had terminated its investigation and that Plaintiff had 90 days from the receipt of the notice in which to file suit. Subsequent to receiving notice from the EEOC, Plaintiff wrote two letters to the EEOC in which he asked for his EEOC file. In his letters, Plaintiff acknowledged that his time to file suit ended on July 4, 1995.³ Plaintiff received his file on June 16, 1995. At that time, Plaintiff

³Both parties agree that the actual deadline was July 5, 1995 because of the July 4th Holiday.

asserts that he discovered that the EEOC had not investigated his failure to receive the St. Louis position (the transfer issue). Plaintiff wrote a letter to the EEOC addressing this perceived failure on July 10, 1995. The EEOC replied that it had investigated the transfer issue at the same time it investigated the demotion issue in a letter date September 18, 1995. The EEOC letter stated, in relevant part:

Since the denial of transfer was investigated during the investigation of your original charge there is no reason to file another charge against the employer. We will keep the information you mailed us on July 13, 1995 open for sixty days. You have the right to appeal the decision during this sixty day period.

Pl. 's Resp. to Def. 's Mot. for Summ. J. , App. A. ex. 2. Ultimately, after he appealed to the EEOC, Plaintiff was issued a second charge of discrimination which he executed on November 30, 1995. The EEOC issued a right to sue letter in September of 1996. Plaintiff filed suit against Defendant in state court on November 26, 1996.

While employed by Defendant in 1993, Plaintiff was subjected to Defendant's Continuous Performance Improvement Program (CHIP) evaluation. CHIP evaluations were designed to measure an employee's current job performance against goals for the year established by the employee and his supervisor. CHIP evaluations included handbooks. Plaintiff alleges that the CHIP evaluations, including the handbooks, altered the at will employment relationship between himself and the Defendant and created an implied contract.

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 ADEA Claim

The ADEA prohibits discrimination against individuals over 40 years old in regard to hiring, discharge, compensation, and other terms, conditions, and privileges of employment. 29 U.S.C. § 623(a). A plaintiff cannot begin a civil action under the ADEA unless he has first filed a charge alleging unlawful discrimination with the EEOC. 29 U.S.C. § 626(d). Charges of discrimination must be filed with the EEOC within 300 days after the alleged unlawful practice occurred. 29 U.S.C. § 626(d). If a charge filed with the EEOC is dismissed or the proceedings of the EEOC are otherwise terminated, a plaintiff has 90 days after receiving notice of termination in which to file suit. 29 U.S.C. § 626(e).

Was Plaintiff's Suit Timely?

The EEOC notified Plaintiff, in a letter dated April 4, 1995, that it was had terminated its investigation. This termination caused the deadline for Plaintiff to file suit to fall on July 5, 1995. The EEOC letter informed Plaintiff that he had 90 days after receiving the letter to file suit. Plaintiff

failed to file suit during the 90 day time period. Under the terms of the statute, the Plaintiff is barred from suing on this claim.

Plaintiff argues that the Court should consider his second charge of discrimination in determining whether the suit was timely filed. Plaintiff further argues that “the EEOC’s failure to fully investigate [his] First Charge of Discrimination and its decision to allow Plaintiff to file the Second Charge of Discrimination requires equitable tolling of the 90-day period....” *Pl. ’s Resp. to Def. ’s Mot. for Summ. J.* 19.

The Tenth Circuit has set the standard for equitable tolling under the ADEA. “It is well settled that equitable tolling of the ADEA ...is appropriate only where the circumstances of the case rise to the level of *active deception* ... where a plaintiff has been lulled into inaction by her past employer, state or federal agencies, or the courts.” *Hulsey v. Kmart*, 43 F.3d 555, 557 (10th Cir.) (emphasis added) (citations and internal quotation marks omitted); *Gray v. Phillips Petroleum Co.*, 858 F.2d 610, 615 (10th Cir. 1988).

Here the EEOC did nothing to actively mislead Plaintiff. The EEOC letter terminating its investigation informed Plaintiff that “an ADEA lawsuit may be filed any time from 60 days after a charge is filed until 90 days after a receipt of notice that EEOC [sic] has completed action on the charge.” *Def. ’s Mot. Summ. J., App. H ex. 24*. The EEOC did nothing between the date of its termination letter on April 4, 1995 and the expiration of the 90 day limit on July 5, 1995 to lead Plaintiff to believe that he did not have to take action before the end of the 90 day time period. Any actions taken by the EEOC that arguably might have lulled Plaintiff into inaction were taken after the 90 day period expired and thus are not relevant in determining whether the time limits should be equitably tolled.

Plaintiff relies on *Martinez v. Orr*, 738 F.2d 1107 (10th Cir. 1984) to support its argument in favor of equitable tolling. In *Martinez*, the Tenth Circuit allowed equitable tolling of time limits under Title VII where the EEOC's notice to the plaintiff was unclear concerning the time limit in which he had to file a lawsuit or lose his right to sue. *Id.* at 1111. The notice in *Martinez* implied that the plaintiff could seek reconsideration by the EEOC without the statutory 30 day time limit running. *Id.* at 1111. *Martinez* sought such reconsideration within 30 days. When the EEOC affirmed its decision, *Martinez* sued within 30 days, which was beyond the 30 day limit of the first notice.

Martinez is not applicable to the current case. Unlike *Martinez*, the EEOC notice to Plaintiff in this case was clear. Plaintiff neither sought EEOC reconsideration nor filed suit before the 90 day limit expired. Even Plaintiff's assertion that his transfer claim may not have been fully investigated, was not made until July 10, 1995, *five days after the 90 day time limit had expired.*

Plaintiff's second charge of discrimination, the failure to transfer on May 31, 1994, is also untimely as it was filed in September of 1995, more than 300 days after the alleged discriminatory action took place. Plaintiff argues that he amended his first charge of discrimination on June 6, 1994 to include the transfer claim. As noted, however, Plaintiff is barred from suing on the first charge. In any event, Plaintiff's letter to the EEOC dated June 10, 1995 represented the transfer issue as a "new age discrimination request." *Def.'s Mot. Summ. J., App. H ex. 27.* Even Plaintiff's June 10, 1995 letter, however, is beyond the 300 day limit for filing a charge based on a failure to receive a transfer on May 31, 1994.

In view of the foregoing, Defendant's Motion for summary judgment is GRANTED as to Plaintiff's ADEA claim.

Plaintiff's Breach of Implied Contract Claim

Under Oklahoma law, an implied contract is “one, the existence and terms of which are manifested by conduct.” Okla. Stat. tit. 15 § 133. Oklahoma common law recognizes employee handbooks⁴ as capable of forming the basis of implied contracts if the four traditional elements of contract are met: (1) competent parties; (2) consent; (3) a legal object; and (4) consideration. *See e.g. Gilmore v. Enogex, Inc.* 878 P.2d 360, 368 (Okla. 1994). Oklahoma has developed two limitations on the scope of implied contracts based on employee handbooks. First, “the manual only alters the at will relationship with respect to *accrued* benefits- *it does not limit prospectively the power of either party to terminate the relationship at any time.*” *Id.* at 368 (first emphasis in the original, second emphasis added). Second, “the promises in the employee manual which may operate to restrict the employer’s power to discharge must be in definite terms- not in the form of vague assurances.” *Id.* at 368.

Plaintiff cannot establish an implied contract in the present case based on the CHIP handbook. Plaintiff bases his implied contract claim on the theory that Defendant terminated him in violation of the CHIP evaluation program and handbook. Plaintiff’s claim fails as a matter of law, however, because employee handbooks which form the basis of implied contracts under Oklahoma law cannot limit the power of either party to terminate the relationship. *See Gilmore* at 878 P.2d at 368. Additionally, Plaintiff, at best, asserts no more than vague assurances from Defendant that successful CHIP evaluations would result in continued employment. Vague assurances are not sufficient to

⁴ Defendant disputes whether the CHIP handbook is actually an employee handbook. Defendant instead seeks to characterize the CHIP handbook as a supervisor’s manual. Viewing this issue in a light most favorable to the nonmoving party, the Court will treat the CHIP handbook as an employee handbook.

support an implied contract of employment. *Id.*

In view of the foregoing, Defendant's Motion for summary judgment is GRANTED as to Plaintiff's breach of implied contract claim.

For the forgoing reasons, Defendant's Motion for Summary Judgment is GRANTED.

ORDERED this 13 day of January, 1998.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

GERALD L. FUSELIER,
SSN: 441-50-1322

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of Social Security Administration,^{1/}

Defendant.

JAN 14 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 96-C-1074-J

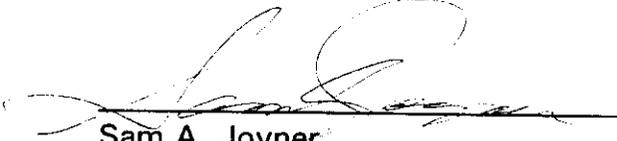
ENTERED

DATE JAN 16 1998

JUDGMENT

This action has come before the Court for consideration and an Order affirming the Commissioner's denial of benefits to Plaintiff has been entered. Judgment for the Defendant and against the Plaintiff is hereby entered pursuant to the Court's Order.

It is so ordered this 14th day of January 1998.


Sam A. Joyner
United States Magistrate Judge

^{1/} On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel, Commissioner of Social Security, is substituted for Shirley S. Chater as the Defendant in this action.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 14 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

GERALD L. FUSELIER,
SSN: 441-50-1322

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of Social Security Administration,^{1/}

Defendant.

No. 96-C-1074-J

ENTERED
JAN 15 1998
D/C

ORDER^{2/}

Plaintiff, Gerald L. Fuselier, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner denying Social Security benefits.^{3/} Plaintiff asserts that the Commissioner erred because (1) the ALJ's finding of Plaintiff's residual functional capacity was arbitrary and not supported by the evidence, and (2) the ALJ failed to pose a question to the vocational expert which adequately included all of Plaintiff's restrictions. For the reasons discussed below, the Court **AFFIRMS** the Commissioner's decision.

^{1/} On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel, Commissioner of Social Security, is substituted for Shirley S. Chater as the Defendant in this action.

^{2/} This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge.

^{3/} Administrative Law Judge Larry C. Marcy (hereafter "ALJ") concluded that Plaintiff was not disabled on September 11, 1995. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on September 17, 1996. [R. at 6].

15

L. PLAINTIFF'S BACKGROUND

Plaintiff was born on October 28, 1957, and was 47 years old at the time of his hearing before the ALJ. [R. at 37]. Plaintiff testified that he completed high school and attended a vocational/technical school for approximately nine months. [R. at 37].

Plaintiff testified that he sometimes had visitors, and that he was able to play dominoes for approximately 45 minutes to one hour, but that he was very tired after playing dominoes. [R. at 42]. Plaintiff stated that he could walk only three to four minutes before his legs began to tingle, and that he could stand for approximately fifteen minutes. [R. at 44, 63]. Plaintiff testified that he could lift only five pounds. [R. at 44]. According to Plaintiff he takes Motrin for pain and Methocarbamol as a muscle relaxer. Plaintiff stated that the side effects of his medications made him drowsy. [R. at 40]. Plaintiff additionally takes Amitriptyline to help him sleep at night. [R. at 40]. According to Plaintiff, his pain bothers him mostly at night. [R. at 40].

Plaintiff was injured in a car wreck, and was admitted to the hospital on November 25, 1963. Plaintiff was not released until January 25, 1964. [R. at 149]. Plaintiff was treated for a cerebral contusion and concussion, multiple facial contusions, a fracture of the maxilla, nose, and mandible, and a fracture of the right femur. [R. at 149]. Plaintiff additionally had arthroscopic surgery in February 1982 on his right knee. [R. at 205]. Plaintiff's prognosis was reported as "good." [R. at 207].

Plaintiff was examined on September 7, 1994. Plaintiff was described as a well-developed, well-nourished, tall man in no acute distress. [R. at 176].

Examination revealed no "joint deformities, redness, swelling, heat or tenderness" of Plaintiff's extremities. [R. at 176]. Plaintiff had some discomfort in the left shoulder and some discomfort at the hip "when abducted to 45 degrees on both sides." [R. at 176]. Extension and lateral bending of the back was reported as normal. [R. at 177]. Plaintiff was able to stand on one foot and maintain balance, but was "shaky and wobbly at times. . . ." [R. at 177]. Plaintiff was able to perform heel walking and toe walking, but "seemed to show some weakness." [R. at 177]. Plaintiff was able to manipulate a small object as well as usual tools. [R. at 177]. Plaintiff's hand grip strength, forearm muscle strength, arm strength, muscle strength of his feet, and muscle strength of the legs was reported as "five." [R. at 177]. Plaintiff was diagnosed as having probable arthritis of the lumbar spine and probable osteoarthritis of the hips. [R. at 177].

An X-ray on September 28, 1994, indicated a normal lumbar spine except for mild osteoarthritis in the lower lumbar spine, and advanced osteoarthritis involving the right knee. [R. at 183].

Plaintiff's "progress notes" reflect that he requested medication refills on June, 17, 1994, July 28, 1994, September 6, 1994, October 10, 1994, January 5, 1995, January 10, 1995, February 21, 1995, and April 8, 1995. [R. at 186-93, 199-202]. Plaintiff visited the doctor on June 8, 1994, and complained of pain in both legs and his left hip which radiated up to his leg. [R. at 193]. On November 17, 1994, Plaintiff reported that he fell down some steps approximately one and one-half weeks ago because his "leg gave out." [R. at 202]. An X-ray report on December 1, 1994,

indicated that the left shoulder was normal; the lumbar spine showed mild anterior subluxation at L4, but no acute fracture or compression of the vertebral bodies was noted; the right knee indicated "degenerative hypertrophic changes involving the articular margins of the right distal femur." [R. at 203]. No degenerative changes were noted in Plaintiff's hip joints. [R. at 203].

A Residual Physical Functional Capacity Assessment ("RFC Assessment") completed on October 12, 1994, indicates that Plaintiff can occasionally lift 20 pounds, frequently lift 10 pounds, stand or walk approximately six hours in an eight hour work day, sit approximately six hours in an eight hour work day, and push or pull an unlimited amount. [R. at 96, 102]. The RFC Assessment was affirmed as written on November 18, 1994. [R. at 102].

On September 12, 1994, Dr. Woodcock noted that "[i]n report he says gait is stable and safe. I don't know why Dr. Lee is saying he needs a cane." [R. at 84]. Dr. Lee noted in an "addendum" to his report that Plaintiff "was able to perform toe-walking and heel-walking without use of a cane for support. As he was leaving, he walked with a cane in his right hand for support. His pace was slightly slow. He walked with a limp." [R. at 178].

Plaintiff maintained that his "onset date" was July 14, 1992. [R. at 52]. Plaintiff also noted that his pain began when he was 46 years old. [R. at 39].

Plaintiff's current medications list indicates that he takes Motrin for arthritis, methocarbamol for muscle pain, Elavil for "sleep/depression," and medication for blood pressure. [R. at 240].

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

The Commissioner has established a five-step process for the evaluation of social security claims.^{4/} See 20 C.F.R. § 404.1520. Disability under the Social Security Act is defined as the

inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment

42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his

physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy. . . .

42 U.S.C. § 423(d)(2)(A).

The Commissioner's disability determinations are reviewed to determine (1) if the correct legal principles have been followed, and (2) if the decision is supported by

^{4/} Step One requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step Two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (Step One) or if claimant's impairment is not medically severe (Step Two), disability benefits are denied. At Step Three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to Step Four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Commissioner has the burden of proof (Step Five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

substantial evidence. See 42 U.S.C. § 405(g); Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Williams, 844 F.2d at 750.

The Court, in determining whether the decision of the Commissioner is supported by substantial evidence, does not examine the issues *de novo*. Sisco v. United States Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will not reweigh the evidence or substitute its judgment for that of the Commissioner. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994). The Court will, however, meticulously examine the entire record to determine if the Commissioner's determination is rational. Williams, 844 F.2d at 750; Holloway v. Heckler, 607 F. Supp. 71, 72 (D. Kan. 1985).

"The finding of the Secretary^{5/} as to any fact, if supported by substantial evidence, shall be conclusive " 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

^{5/} Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

This Court must also determine whether the Commissioner applied the correct legal standards. Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). The Commissioner's decision will be reversed when she uses the wrong legal standard or fails to clearly demonstrate reliance on the correct legal standards. Glass, 43 F.3d at 1395.

III. THE ALJ'S DECISION

In this case, the ALJ determined that Plaintiff was not disabled at Step Five of the sequential evaluation. The ALJ noted that Plaintiff was injured in an automobile accident in November 1964 and treated for contusions and fractures. [R. at 17]. In addition, Plaintiff had arthroscopic surgery in July 1981. The ALJ noted that Plaintiff had no additional medical records until he was treated at Morton Health Services in June 1994. [R. at 18]. The ALJ noted that X-rays of Plaintiff indicated mild osteoarthritis of the lumbar spine and osteoarthritis of the right knee. Based on the X-rays and the examinations of Plaintiff by physicians, the ALJ concluded that Plaintiff could perform work only at the light level which involved only occasional bending, would permit an individual to "alternate" between sitting and standing, and would require pushing or pulling of no more than five to ten pounds. [R. at 18]. The ALJ evaluated Plaintiff's complaints of pain, but concluded that Plaintiff's pain was not sufficiently severe to render Plaintiff disabled. Based on the testimony of a vocational expert, the ALJ concluded that Plaintiff was not disabled.

IV. REVIEW

Residual Functional Capacity

Plaintiff initially asserts that the ALJ's determination of Plaintiff's Residual Functional Capacity ("RFC") was arbitrary, incomplete, and not supported by substantial evidence.

Plaintiff notes that although the ALJ "for the most part thoroughly discusses the evidence," Plaintiff testified that his pain did not become serious until 1994, and the ALJ did not recognize this fact. Plaintiff's dates, in his brief, are a bit confused.

Plaintiff initially testified that his severe pain began in October 1993, and Plaintiff later testified that his severe pain began when he was 46 years old. [R. at 53, 39]. (Plaintiff was born in October 1947 [r. at 37], and as calculated by the Court, Plaintiff was therefore 46 years old in 1993. Therefore, Plaintiff's testimony is consistent on the issue of "when" his "severe pain" began.) The ALJ noted that although Plaintiff testified that he was experiencing severe pain, Plaintiff did not visit a doctor from July 1981 until June 1994.

Plaintiff's attorney argues that Plaintiff's pain was not severe until late 1994, "when Plaintiff was 46 years old," and that Plaintiff began visiting a doctor at that time. Plaintiff's attorney therefore asserts that the record of Plaintiff's visits to the doctor are consistent with Plaintiff's pain. However, as noted, Plaintiff testified that he began experiencing "severe pain" as early as October 1993. The ALJ, in considering Plaintiff's complaints of severe pain, merely noted that although Plaintiff testified he experienced severe debilitating pain, Plaintiff's visits to the doctor did not

substantiate Plaintiff's claims, and Plaintiff did not see a doctor from 1981 until June 1994. The record does not support Plaintiff's argument.

Plaintiff asserts that the objective evidence indicated that he has advanced arthritis in his right knee, that he walked with a limp, and that he required a cane to ambulate. Plaintiff notes that by late 1994 he suffered from a painful arthritic condition which impaired his abilities.^{6/} Plaintiff also argues that nothing supports the ALJ's conclusion that Plaintiff had the RFC to lift twenty pounds.

A Residual Physical Functional Capacity Assessment ("RFC Assessment") completed on October 12, 1994, indicated that Plaintiff can occasionally lift 20 pounds, frequently lift 10 pounds, stand or walk approximately six hours in an eight hour work day, sit approximately six hours in an eight hour work day, and push or pull an unlimited amount. [R. at 96, 102]. The RFC Assessment was affirmed as written on November 18, 1994. [R. at 102].

An examination on September 7, 1994 revealed that Plaintiff was a well-developed, well-nourished, tall man in no acute distress. [R. at 176]. Plaintiff was reported as being able to stand on one foot and maintain his balance, although he was "shaky and wobbly at times. . . ." [R. at 177]. Plaintiff was also able to perform heel walking and toe walking, but "seemed to show some weakness." [R. at 177].

^{6/} Once again, Plaintiff seems to be suggesting that his pain was not "disabling" until late 1994. As noted above, although Plaintiff's brief asserts the severe pain began in 1994, Plaintiff testified that he experienced severe pain in 1993. Regardless, Plaintiff maintains that his "onset" date for the purpose of disability is July 14, 1992. Plaintiff additionally testified that he was in pain at that time and was forced to quit his job. [R. at 52]. Plaintiff further testified that his pain really "started" in October 1993, even though he did not work, beginning in July 1992 due to his pain. [R. at 53]. Plaintiff additionally testified that his pain became serious when he was 46 years old (October of 1993). [R. at 39].

Plaintiff's hand grip strength, forearm muscle strength, arm strength, muscle strength of his feet, and muscle strength of the legs was reported as "five." [R. at 177]. Plaintiff was diagnosed as having probable arthritis of the lumbar spine and probable osteoarthritis of the hips. [R. at 177].

An X-ray on September 28, 1994, indicated a normal lumbar spine except for mild osteoarthritis in the lower lumbar spine, and advanced osteoarthritis involving the right knee. [R. at 183].

Plaintiff visited the doctor on June 8, 1994, and complained of pain in both of his legs and his left hip which radiated up to his leg. [R. at 193]. Plaintiff reported, on November 14, 1994, that he had previously fallen down some steps, approximately one and one-half weeks ago because his "leg gave out." [R. at 202]. An X-ray report on December 1, 1994, indicated that Plaintiff's left shoulder was normal, that Plaintiff's lumbar spine showed mild anterior subluxation at L4, but no acute fracture or compression, and that Plaintiff's right knee indicated "degenerative hypertrophic changes involving the articular margins of the right distal femur." [R. at 203]. X-rays on that date indicated no degenerative changes were present in Plaintiff's hip joints. [R. at 203].

On September 12, 1994, Dr. Woodcock noted that "[i]n report he says gait is stable and safe. I don't know why Dr. Lee is saying he needs a cane." [R. at 84]. Dr. Lee noted in an "addendum" to his report that Plaintiff "was able to perform toe-walking and heel-walking without use of a cane for support. As he was leaving, he

walked with a cane in his right hand for support. His pace was slightly slow. He walked with a limp." [R. at 178].

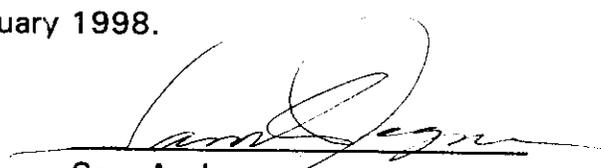
The RFC Assessment concludes that Plaintiff can stand or walk approximately six hours in an eight hour day, sit approximately six hours in an eight hour day, and lift 20 pounds. Contrary to Plaintiff's assertion, the record contains "substantial evidence" to support the opinion of the ALJ with respect to Plaintiff's RFC.^{7/}

Vocational Testimony

Plaintiff essentially argues that because the ALJ's finding with respect to Plaintiff's RFC was not supported by substantial evidence, the questions posed by the ALJ to the vocational expert were not supported by the record and therefore the vocational expert testimony cannot support the ALJ's conclusion that a sufficient number of jobs existed that Plaintiff could perform. However, as noted above, the ALJ's finding with respect to Plaintiff's RFC was supported by substantial evidence. Therefore, the testimony of the vocational expert, which was based on the RFC, supports the decision of the ALJ.

Accordingly, the Commissioner's decision is **AFFIRMED**.

Dated this 14th day of January 1998.


Sam A. Joyner
United States Magistrate Judge

^{7/} Plaintiff additionally asserts that the ALJ ignored Plaintiff's complaints of dizziness and drowsiness. The ALJ noted in his opinion that although Plaintiff stated he suffered from dizziness and drowsiness, Plaintiff was never treated for either condition and Plaintiff did not report such symptoms to his doctor.

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

WILLIAM BEN JOHNSON,
Individually and as a Shareholder
on behalf and for the benefit of
GENESIS FISHING, INC., an
Arkansas Corporation;

Plaintiff,

v.

GENESIS FISHING, INC.,
COTTON CORDELL; and
MICHAEL CORDELL,

Defendants.

FILED

JAN 14 1998
JAN 12 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

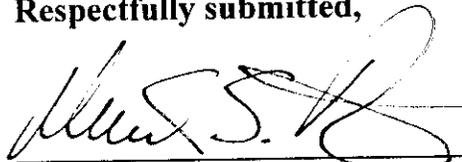
Case No. 97-CV-760-H (M) ✓

DISMISSAL WITHOUT PREJUDICE

The plaintiff, William Ben Johnson, Individually and as a Shareholder on behalf and for the benefit of Genesis Fishing, Inc., pursuant to Federal Rule 41(a)(1), dismisses the captioned case without prejudice and prior to the filing of any answers by the defendants, Genesis Fishing, Inc., Cotton Cordell, and Michael Cordell.

Dated: January 12, 1998.

Respectfully submitted,



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

Attorneys for Plaintiff,
William Ben Johnson

47

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

FILED

JAN 12 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

WILLIAM R. RILEY,

Plaintiff,

vs.

MICHAEL G. HAWS,

Defendant.

§
§
§
§
§
§
§
§
§
§

Civil Action No. 97-CV-1068H (J)

JAN 14 1998

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

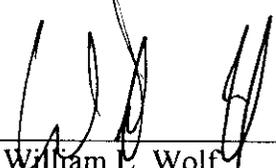
William R. Riley, Plaintiff (herein so called), and Michael G. Haws, Defendant (herein so called), file this Joint Stipulation of Dismissal with Prejudice pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure.

1. Plaintiff and Defendant no longer desire to prosecute the causes of action asserted in this civil action, and hereby stipulate that this civil action be dismissed with prejudice to the rights of Plaintiff or Defendant to refile all or any part thereof.

Respectfully submitted,

William L. Wolf, P.C.
5949 Sherry Lane, Suite 550
Dallas, Texas 75225
(214) 750-1395
Fax: (214) 368-1395

By:



William L. Wolf
State Bar No. 21854500
Michael A. Dover
State Bar No. 06062700

ATTORNEYS FOR WILLIAM R. RILEY

2

mail
old
file

Gourley & Proszek
2642 E. 21st St., Suite 296
Tulsa, Oklahoma 74114-1740
Telephone: (918) 748-7900
Fax: (918) 844-8699

By: Richard A. Paschal
Richard A. Paschal
State Bar No. 6927

ATTORNEYS FOR MICHAEL G. HAWS

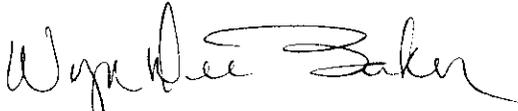
AGREED:

William R. Riley
William R. Riley

Michael G. Haws
Michael G. Haws

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney

A handwritten signature in cursive script that reads "Wyn Dee Baker". The signature is written in black ink and is positioned above the typed name of the signatory.

WYN DEE BAKER, OBA #465
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809

Handwritten mark

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

FILED

JAN 13 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MISHELLE P. ROWLAND,
SSN: 410-31-1566

Plaintiff,

vs.

KENNETH S. APFEL
COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

Case No. 97-CV-1012-BU

ENTERED ON DOCKET
DATE JAN 14 1998

ORDER

On November 25, 1997, the United States Magistrate Judge entered an order denying the motion of Plaintiff to proceed in forma pauperis and ordering Plaintiff to pay the required filing fee by December 17, 1997. On December 17, 1997, the United States Magistrate Judge entered an order denying the motion of Plaintiff to proceed in forma pauperis filed on December 15, 1997.

Presently before the Court is the motion of Plaintiff to withdraw action, which the Court construes as a motion to dismiss pursuant to Rule 41, Fed. R. Civ. P. Upon due consideration, the Court finds that Plaintiff's motion should be granted and Plaintiff's complaint should be dismissed without prejudice.

Accordingly, Plaintiff's complaint is hereby **DISMISSED WITHOUT PREJUDICE.**

ENTERED this 12th day of January, 1998.

Michael Burrage
MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

7

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

FILED

JAN - 9 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

FEDERAL DEPOSIT INSURANCE
CORPORATION,

Plaintiff,

vs.

JOSEPH A. FRATES, et. al.,

Defendants.

§
§
§
§
§
§
§
§
§
§
§

CASE NO. 93-C-0123-H

ENTERED ON DOCKET

DATE 1-13-98

**PLAINTIFF AND DEFENDANT ROBERT H. WESTFIELD'S
JOINT STIPULATION OF DISMISSAL OF ACTIONS WITH PREJUDICE
AGAINST ROBERT H. WESTFIELD ONLY**

Plaintiff, the Federal Deposit Insurance Corporation, as manager of the FSLIC Resolution Fund, and Defendant Robert H. Westfield respectfully notify the Court, pursuant to Fed.R.Civ.P. 41(a)(1), of their joint stipulation to *dismiss with prejudice* any and all claims and actions asserted against Defendant Robert H. Westfield in this action and any counterclaims asserted by Defendant Robert H. Westfield. The Plaintiff, the Federal Deposit Insurance Corporation, as manager of the FSLIC Resolution Fund, reserves any and all claims and actions pending against the remaining defendants in this litigation.

Plaintiff, the Federal Deposit Insurance Corporation, as manager of the FSLIC Resolution Fund, and Defendant Robert H. Westfield, will bear their respective costs and expenses in this action.

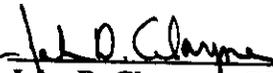
For these reasons, Plaintiff, the Federal Deposit Insurance Corporation, as manager of the FSLIC Resolution Fund, and Defendant Robert H. Westfield respectfully request that the Court show the claims, counterclaims and actions to be dismissed solely against and by Defendant Robert H. Westfield and to take such steps as are administratively necessary to terminate any further proceedings with respect to Defendant Robert H. Westfield and for such other and further relief that this Court deems just and proper.

334

45

Respectfully submitted,

TILLY & ASSOCIATES



John D. Clayman, OBA #11790
Two West Second Street, Suite 2220
P.O. Box 3645
Tulsa, OK 74101-3645
(918) 583-8868

**ATTORNEYS FOR DEFENDANT,
ROBERT H. WESTFIELD**



William R. Turnbow
**HERSHNER, HUNTER, MOULTON,
ANDREWS & NEILL**
180 E. Eleventh Avenue
P.O. Box 1475
Eugene, Oregon 97440

**Attorneys for Federal Deposit Insurance
Corporation**

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing was that a true and copy of the above and foregoing was sent by U.S. Mail, postage prepaid, this 9th day of January, 1998, to:

James G. Wilcoxon
WILCOXEN & WILCOXEN
112 North 5th Street
P.O. Box 357
Muskogee, OK 74402-0357

Local Attorneys for the Federal Deposit Insurance Corporation

James W. Tilly
Craig A. Fitzgerald
TILLY & ASSOCIATES
P.O. Box 3645
Tulsa, OK 74101-3645

Frederic Dorwart
J. Michael Medina
Paul DeMuro
FREDERIC DORWART, LAWYERS
Old City Hall
124 East Fourth Street
Tulsa, OK 74103-5010

Attorneys for Joseph A. Frates

Jeff Sacra
Kara M. Dorssom
BARKLEY & RODOLF
2700 Mid-Continent Tower
401 S. Boston Avenue
Tulsa, OK 74103

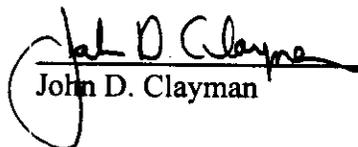
Attorneys for C. Michael Barkley

John E. Deas
2707 East 67th Place
Tulsa, Oklahoma 74136

Pro Se

Mr. Thorn C. Huffman
8415 Timber Bridge
San Antonio, Texas 78250-4217

Pro Se


John D. Clayman

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

FILED
JAN 09 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOHN C. STEWART,
Plaintiff,

v.

MIKE'S AIRCRAFT FUEL METERING
SERVICE, INC.,
Defendant.

Case No. 97-CV-50-H

ENTERED ON DOCKET

DATE 1-13-98

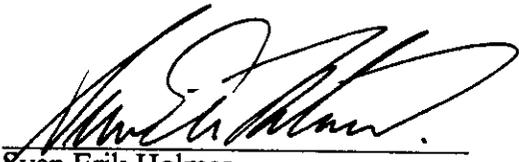
JUDGMENT

This matter was tried before the Court on December 11-12, 1997. On January 9, 1998, the Court entered its Findings of Fact and Conclusions of Law finding Defendant liable on Plaintiff's claim for unpaid vacation time. The Court awarded Plaintiff \$528.00 in damages.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Plaintiff and against Defendant in the amount of \$528.00.

IT IS SO ORDERED.

This 9TH day of January, 1998.


Sven Erik Holmes
United States District Judge

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

ENTERED ON DOCKET
DATE 1-13-98

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

THE FEDERAL DEPOSIT INSURANCE)
CORPORATION, as manager of the)
FSLIC Resolution Fund;)

Case No. 93cv123H ✓

Plaintiff;)

v.)

JOSEPH A. FRATES, THORN)
HUFFMAN, JOHN E. DEAS,)
DAVID L. FIST, C. MICHAEL)
BARKLEY and ROBERT WESTFIELD;)

Defendants.)

FILED
JAN 12 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

STIPULATED JUDGMENT OF DISMISSAL

Plaintiff and Defendant John Deas having settled the disputes between them, and those parties having moved for entry of this judgment, it is hereby

/////
/////
/////

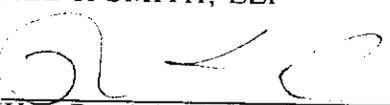
1 ORDERED AND ADJUDGED that all claims and counterclaims between Plaintiff and
2 Defendant John Deas are dismissed with prejudice, and without an award of costs, disbursements
3 or attorney's fees to any party.
4

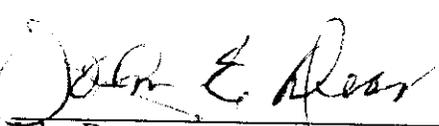
5 DATED this 12TH day of January, 1998.
6

7
8 
9 _____
Sven Holmes
United States District Judge

10
11 THE PARTIES HEREBY
12 STIPULATE TO, AND MOVE FOR,
ENTRY OF THIS JUDGMENT:

13
14 HERSHNER, HUNTER, ANDREWS,
NEILL & SMITH, LLP

15
16 By 
Wm. Randolph Turnbow
Of Attorneys for Plaintiff

17
18 
19 _____
John Deas, pro se
20
21
22
23
24
25
26

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

Civil Action No. 97CV859 H (M)

RE/MAX INTERNATIONAL, INC.

Plaintiff,

v.

RICKEY D. MAXSON, an individual,

Defendant.

ENTERED ON DOCKET

DATE 1-13-98

97-C-859-H /

FILED

JAN 12 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CONSENT JUDGMENT

This action having been commenced by Plaintiff, RE/MAX International, Inc. ("RE/MAX") against Defendant Rickey D. Maxson ("Defendant"), and the parties having agreed to settle this matter and to terminate this action by a Consent Judgment, and this matter having come on to be heard by stipulation, as evidenced by the signatures of counsel representing RE/MAX and Defendant, and the Court being duly advised, the Court orders as follows:

1. Defendant, and any of his principals, agents, servants, employees, successors and assigns and all those in privity, concert or participation with Defendant are hereby immediately and permanently enjoined and restrained from using, imitating, copying, duplicating or otherwise making any use of a red-over-white-over-blue horizontal bar design or any other design that is confusingly similar to the RE/MAX trademarks as shown in U.S. Registration Nos. 1,702,048 1,691,854 and 1,720,592. in connection with providing, advertising or promoting real estate or related services, including without limitation:

a. using, imitating, copying, duplicating or otherwise making unauthorized use of

RE/MAX's trademarks or any other trade dress configuration that is confusingly similar to RE/MAX's trademarks;

- b. manufacturing, producing, distributing, circulating, selling, offering for sale, advertising, promoting or displaying any product, advertisement, card or sign, bearing any simulation, reproduction, counterfeit, copy or colorable imitation of RE/MAX's trademarks;
- c. using any simulation, reproduction, counterfeit, copy or colorable imitation of RE/MAX's trademarks in connection with the promotion, advertisement, display, sale, offering for sale, manufacture, production, circulation or distribution of any real estate product or service in such fashion as to relate or connect, or tend to relate or connect, such products or services in any way to RE/MAX or to any product or services sponsored or approved by, or connected with RE/MAX; and
- d. assisting, aiding or abetting any other person or business entity in engaging in or performing any of the activities referred to in subparagraphs (a) through (c) above.

2. The jurisdiction of this Court is retained for purposes of making any other orders necessary and proper to construe, enforce or implement the terms of this Consent Judgment and to punish violations thereof.

IT IS SO ORDERED this 12TH day of January, 1997.⁸

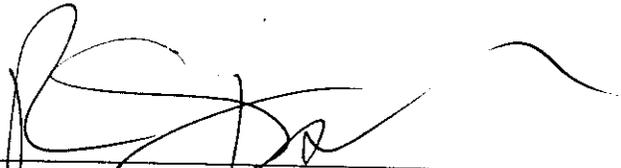

United States District Judge

Stipulated to by Plaintiff and Defendant:

Dated: 12/29/97


Attorneys for Plaintiff
John R. Posthumus
Holme Roberts & Owen LLP
1700 Lincoln Street, Suite 4100
Denver, Colorado 80203 (303) 861-7000

Dated: December 8, 1997



Attorneys for Defendant

Ronald B. Stockwell
The Law Offices of Ronald B. Stockwell
2 North Main Street, Suite 600
Miami, Oklahoma 74354

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

F I L E D

JAN 12 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BILL ROBERSON,)
)
 Plaintiff,)
)
 vs.)
)
 AUSTIN MUSEUM OF ART, INC.)
)
 Defendant.)

Case No. 97-C-255-E ✓

ENTERED ON DOCKET
DATE JAN 13 1998

ORDER

Now before the Court is the Motion To Dismiss (docket #3) of the Defendant Austin Museum of Art.

Statement of the Case

This is a personal injury case in which Roberson, an artist from Claremore, alleges that he injured his shoulder when he fell into a hole on Defendant's premises in Austin Texas on May 16, 1996. Defendant has not answered, but has filed a motion to dismiss based on lack of personal jurisdiction and improper venue. Defendant asserts that the event Roberson was attending at the museum was organized by a corporation other than defendant and that it does not maintain general, pervasive, continuous, systematic or pervasive contacts with the State of Oklahoma.

In order for a court to have personal jurisdiction over a defendant, the defendant must "have certain minimum contacts with [the forum] such that the maintenance of suit does not offend 'traditional notions of fair play and substantial justice.'" International Shoe Co. V. Washington, 326 U.S. 310 (1945). There are two types of personal jurisdiction. "Specific jurisdiction" exists where "the defendant has 'purposefully directed' [its] activities at residents of the forum and the litigation

2

results from alleged injuries that 'arise out of or relate to' those activities." Burger King Corp. V. Rudzewicz, 471 U.S. 462, 472 (1985). In this case, by the undisputed affidavit of Sidney Mallory, the chief executive of Austin Museum of Art, specific jurisdiction does not exist. The event during which plaintiff was allegedly injured in Fiesta which was conducted by the Women's Art Guild of Laguna Gloria Art Museum, Inc., and the Austin Museum of Art did not solicit, contact, or communicate with artists regarding their participation in that event.

"General jurisdiction" exists when the state exercises personal jurisdiction in a suit not related to the defendant's contacts with the forum, but rather based on sufficient or "continuous and systematic" contacts between, the state and the foreign corporation. Helicopteros Nacionales De Colombia, S.A. v. Hall, 466 U.S. 408, 414-15, n.9 (1984). Austin Museum of Art, through the affidavit of Sidney Mallory, denies that any such "continuous and systematic" contacts exist between the museum and Oklahoma. Plaintiff has failed to controvert that affidavit, or to point out any contacts between the museum and Oklahoma. Accordingly, the Court finds that there is no basis for this Court's exercise of personal jurisdiction over the Austin Museum of Art.

Defendant's Motion to Dismiss (Docket #3) is granted.

IT IS SO ORDERED THIS 12th DAY OF JANUARY, 1998.


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

JAN 9 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RICKY LEE HENDRICKS,)
)
Petitioner,)
)
vs.)
)
RON WARD and)
ATTORNEY GENERAL OF THE)
STATE OF OKLAHOMA,)
)
Respondents.)

No. 97-CV-21-C (M)

ENTERED ON DOCKET

DATE JAN 13 1998

ORDER

Currently pending before the Court is petitioner Ricky Lee Hendricks' objection to the Magistrate's Report and Recommendation ("Report").

On October 17, 1996, Hendricks filed a petition, in the Eastern District of Oklahoma, seeking habeas corpus relief, pursuant 28 U.S.C. § 2254. On January 8, 1997, this case was transferred to the Northern District of Oklahoma. On September 24, 1997, the Report was issued denying Hendricks' petition. On October 9, 1997, Hendricks filed the present objections, pursuant to Rule 72 of the Federal Rules of Civil Procedure.

Rule 72(b) governs prisoner petitions that are referred to a magistrate judge and subsequently reviewed by the district court. The Rule provides that a party may serve and file objections to the order within ten days after being served with the order. The Rule further provides that the district judge "make a de novo determination . . . of any portion of the magistrate judge's disposition to which specific written objection has been made . . ." F.R.Civ.P. 72(b).

17

On October 9, 1997, petitioner filed the present objections seeking review of the Report and urging the Court to reject it. In the Report, the magistrate made the following recommendations: 1) the Attorney General of the State of Oklahoma should be dismissed as a respondent; 2) petitioner's claims asserting due process violations, in regard to his removal from the Preparole Conditional Supervision ("PPCS") program, should be dismissed for failure to exhaust a state remedy; and, 3) petitioner's claims asserting that he was subjected to double jeopardy, in connection to his DUI charge, should be dismissed as the state court's dismissal rests upon an independent and adequate state ground. Hendricks objects and seeks a default judgment asserting that respondents' answer was not filed in a timely manner. In the alternative, petitioner argues that no state remedy remains; thus, the Court should proceed to the merits of the case. Hendricks next contends that no independent and adequate grounds exist to deny his double jeopardy claim. Hendricks further asserts that cause has been shown thereby warranting review of this case on its merits, notwithstanding the independent state grounds.

The Court, having conducted a de novo review, concludes that the Magistrate's Report and Recommendation is based on substantial evidence and that the correct law was applied. The Court notes that petitioner did not object to the magistrate's recommendation that Drew Edmondson, Attorney General of the State of Oklahoma, be dismissed as a respondent. Therefore, Mr. Edmondson is dismissed as a party to the instant action.

Hendricks first objects to the magistrate's recommendation that his due process claims be dismissed. Hendricks asserts that a default judgment is proper because respondents failed to file a timely answer. On April 4, 1997, the Magistrate issued an Order Requiring Respondent to Show Cause; respondents were to reply within 30 days. The Order cited Rule 81(a)(2) of the Federal Rules

of Civil Procedure and stated that extensions would be granted for good cause; but, in no event, would an extension in excess of 20 days be granted.¹ The magistrate subsequently granted respondents an additional 30 days to reply. However, respondents are not in default as the additional time granted by the Magistrate did not exceed the 40 day maximum proscribed under Rule 81(a)(2). Accordingly, petitioner's present objection and all other objections related to the timeliness of respondents' answer are overruled.

In the alternative, Hendricks seeks review of this case on the merits asserting that no state remedies remain. However, the magistrate found that petitioner had failed to exhaust a state remedy because petitioner had not sought a writ of mandamus. Indeed, a writ of mandamus is the proper vehicle for a petitioner to challenge removal from the PPCS program. Waldon v. Evans, 861 P.2d 311, 313 (Okla. Crim. App. 1993); Johnson v. Department of Corrections, 916 P.2d 264, 265 (Okla. Crim. App. 1996). The Court therefore concludes that petitioner has failed to exhaust a state remedy as a writ of mandamus is available under Oklahoma law.

By contrast, petitioner has exhausted all state remedies in regard to his double jeopardy claim. Even so, petitioner's present claim is dismissed. Petitioner did file a habeas corpus petition which was denied by the Rogers County District Court. Subsequently, the Oklahoma Criminal Court of Appeals denied Hendricks' petition for failure to provide evidence that relief had been sought in district court as required by Rule 10.6(C) of the Rules of the Court of Criminal Appeals. The Criminal Court of Appeals further denied petitioner's request for rehearing because Rule 10.6(D) prohibits a rehearing on denials of extraordinary writs. Petitioner now seeks review of this denial.

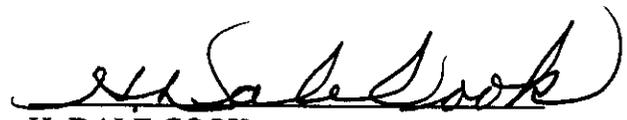
¹ The Court notes that, while the magistrate's Order limited extensions to no more than 20 days, Rule 81(a)(2) specifically allows for extensions up to a total of 40 days in cases brought under 28 U.S.C. § 2254. F.R.Civ.P. 81(a)(2).

In cases where a state court refuses to address the merits of a claim on grounds of procedural default because of a failure to meet state procedural requirements, the claim is procedurally barred in federal habeas proceedings. Coleman v. Thompson, 501 U.S. 722, 729-30 (1991). "In these cases, the state judgment rests on independent and adequate state procedural grounds." Id. at 730. However, review will be granted in cases where cause and prejudice or a fundamental miscarriage of justice can be shown. Hendricks' habeas corpus petition was dismissed for a failure to comply with state procedural rules, and he has failed to show either cause or a miscarriage of justice. Therefore, the Court overrules petitioner's present objection as the state court's dismissal rests upon an independent and adequate state ground.

In sum, the Attorney General of the State of Oklahoma is improperly named as a party to this case and is therefore dismissed as a party. Further, petitioner's due process claim is dismissed for failure to exhaust a state remedy. Likewise, petitioner's double jeopardy claim is dismissed as he fails to show cause or a miscarriage of justice.

Accordingly, Hendricks' objection to the Magistrate's Report and Recommendation is hereby OVERRULED.

IT IS SO ORDERED this 9th day of January, 1998.


H. DALE COOK
Senior United States District Judge

12-19-98

ENTERED ON DOCKET

DATE 1-13-98

F I L E D

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JAN 13 1998

UNITED STATES OF AMERICA,

Plaintiff

v.

Pam J. Millikin,

Defendant.

)
)
)
)
)
)
)
)
)
)
)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Civil Action No. 97CV 798 K ✓

DEFAULT JUDGMENT

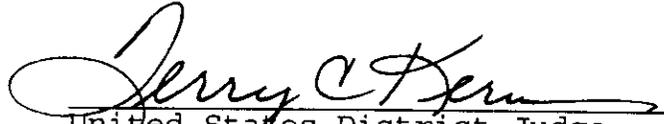
This matter comes on for consideration this 9 day of January, 1998, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, Pam J. Millikin, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Pam J. Millikin, was served with Summons and Complaint on October 9, 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.

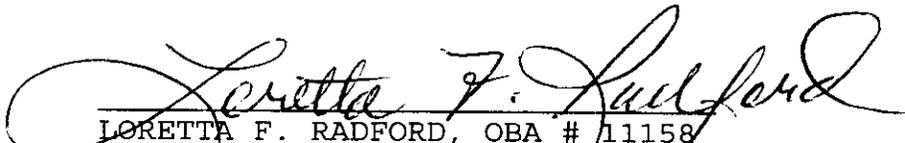
IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Pam J. Millikin, for the principal amount of \$3,320.32, plus accrued interest of \$1,538.68, plus administrative charges in the amount of \$58.71, plus interest thereafter at the rate of 5.34 percent per

6

annum until judgment, 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 5.34 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

LFR/sba

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

FILED
JAN 12 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

IN RE:)
)
STANLEY HOWARD RICH,)
)
Debtor.)
)
STANLEY HOWARD RICH,)
)
Plaintiff/Appellant,)
)
v.)
)
UNITED STATES OF AMERICA,)
ex rel INTERNAL REVENUE)
SERVICE,)
)
Defendant/Appellee.)

Bky. No. 93-02514-C
Chapter 7

Adversary No. 95-0219-C

Case No. 96-C-775-K

ENTERED ON DOCKET
DATE 1-13-98

ORDER

This order pertains to the appeal of the United States of America *ex rel* Internal Revenue Service ("IRS") of the Order of the United States Bankruptcy Court for the Northern District of Oklahoma filed July 11, 1996, which found that the interest of the debtor, Stanley Howard Rich ("Debtor"), in a pension fund was not subject to the unfiled tax lien of the IRS.

Factual Background

The undisputed facts are as follows. Debtor founded S.H. Rich Financial, Inc. ("Rich Financial"), a California corporation engaged in the business of financial planning, in 1978. Debtor was the chief executive officer and the sole stockholder of the corporation, which had several employees. The corporation created a pension plan (the "first plan") and contributed substantial amounts of money to it. Debtor and

other employees participated in the plan. In 1986, due to a downturn in business, all of the employees of the corporation except debtor were discharged, and their interests in the first plan were distributed. Debtor was the only remaining employee and sole stockholder, and his interest in the first plan was rolled into a new pension plan (the "current plan"), in which he was the only participant. No contributions to the current plan were made after 1986.

In 1992, debtor and his friend, Joseph Kessler ("Kessler"), decided to merge debtor's corporation with a partnership which sold airplane parts overseas owned by Kessler called KMI. Debtor sold 55 percent of his stock in Rich Financial to Kessler for \$200.00, and the stock transfer stated that Kessler acquired control of Rich Financial and that debtor became an employee. Rich Financial was to perform certain bookkeeping and financial services for KMI. However, KMI failed, so the planned merger never occurred.

Debtor's testimony at a hearing on May 2, 1996 revealed that he retained complete control over the management of the corporation, and Kessler did not control his activities in any meaningful way. Debtor remained the sole participant in the current plan. Kessler became the nominal trustee of the current plan, but debtor performed all the bookkeeping required.

Debtor filed for protection under Chapter 7 of the Bankruptcy Code on June 30, 1993. In his bankruptcy petition, he listed his interest in the current plan as an asset and claimed it as exempt property. The IRS did not file an objection to debtor's claim of exemption, and the current plan was allowed as exempt property.

The IRS filed a claim against debtor's estate in the amount of \$424,267.07 on November 28, 1994, but never filed notice of a tax lien. Debtor was granted a discharge of all of his dischargeable debts on November 17, 1993, and on December 12, 1994, debtor and the IRS stipulated that debtor's tax liabilities were dischargeable debts. On June 28, 1995, the IRS filed suit in the United States District Court for the Central District of California in Los Angeles, Case No. CV 95-4197, seeking to recover the taxes from debtor's interest in the current plan.

Standard of Review

The district court has jurisdiction to hear appeals from final decisions of the bankruptcy court under 28 U.S.C. § 158(a). Bankruptcy Rule 8013 sets forth a "clearly erroneous" standard for appellate review of bankruptcy rulings with respect to findings of fact. In re: Burkart Farm & Livestock, 938 F.2d 1114, 1115 (10th Cir. 1991). However, this "clearly erroneous" standard does not apply to review of findings of law or mixed questions of law and fact, which are subject to the de novo standard of review. Id.; In re: Osborn, 24 F.3d 1199, 1203 (10th Cir. 1994). This appeal challenges the legal conclusion drawn from the facts presented at trial, so de novo review is proper.

The Issue

When a debtor files a bankruptcy petition, all of his equitable and legal interest in property becomes property of the bankruptcy estate under 11 U.S.C. § 541.¹

¹ § 541 states in part:

However, his beneficial interest in property that is subject to a transfer restriction enforceable under "applicable nonbankruptcy law" is excluded from the bankruptcy estate under 11 U.S.C. § 541(c)(2).² The United States Supreme Court has held that the provisions of the Employee Retirement Income Security Act of 1974 ("ERISA") are included within the definition of "applicable nonbankruptcy law" and that a debtor's interest in an ERISA-qualified pension plan is not included within the bankruptcy estate. Patterson v. Shumate, 504 U.S. 753, 757-58 (1992).

The issue before the bankruptcy court was whether debtor's interest in the current plan was included in the bankruptcy estate. To determine whether it was part of the bankruptcy estate, the court had to decide if the plan was ERISA-qualified. If it was, the debtor's interest in it was excluded from the bankruptcy estate, could not be claimed as exempt property, and would be subject to the lien of the IRS. If it was not, the debtor's interest in it was part of the bankruptcy estate and could be claimed as exempt from the tax lien.

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

- (1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

² § 541(c)(2) states:

- (2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

The Bankruptcy Court's Decision

The bankruptcy court noted that many courts have addressed the issue of whether a specific pension plan is an ERISA plan. The court stated that "[t]he existence of an ERISA plan is a question of fact, to be answered in light of all the surrounding facts and circumstances from the point of view of a reasonable person" in Harper v. American Chambers Life Ins. Co., 898 F.2d 1432, 1433 (9th Cir. 1990) (*quoting* Kanne v. Connecticut Gen. Life Ins., 867 F.2d 489, 492 (9th Cir. 1988), *cert. denied*, 492 U.S. 906 (1989)).

The bankruptcy court pointed out that a key element in determining whether a pension fund is an ERISA plan is the employment status of the plan participant. The Supreme Court in Nationwide Mutual Ins. Co. v. Darden, 503 U.S. 318, 322 (1992), articulated a common-law test to determine whether a person qualifies as an "employee" under ERISA. Some factors to consider in determining whether a person is an employee are "the hiring party's right to control the manner and means by which the [work] is accomplished . . . the skill required; the source of the instrumentalities and tools; the location of the work; [and] the duration of the relationship between the parties." *Id.* This test contains "no shorthand formula or magic phrase that can be applied to find the answer . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." N.L.R.B. v. United Ins. Co. of America, 390 U.S. 254, 258 (1968).

The bankruptcy court then determined that debtor was not an employee, in the traditional sense, but rather a substantial co-owner of Rich Financial. The document

memorializing the stock transfer stated that Kessler, the majority stockholder of Rich Financial, acquired complete control of Rich Financial. However, debtor testified that he had control of the operation of the business, as well as complete autonomy in the performance of his daily tasks.

The court noted that, in deciding a similar issue, the Ninth Circuit held that "a plan whose sole beneficiaries are the company's owners cannot qualify as a plan under ERISA." Kennedy v. Allied Mut. Ins. Co., 952 F.2d 262, 264 (9th Cir. 1991). See also Schwartz v. Gordon, 761 F.2d 864, 867-869 (2d Cir. 1985); Fugarino v. Hartford Life & Accident Ins. Co., 969 F.2d 178, 185 (6th Cir. 1992), cert. denied, 507 U.S. 966 (1993).

The bankruptcy court found that Congress enacted Title I of ERISA to remedy the abuses that existed in the handling and management of welfare and pension plan assets and to protect retirement funds held in trust for workers in a traditional employer-employee relationship. Schwartz, 761 F.2d at 868. It was not enacted to protect substantial co-owners of corporations. Thus, the bankruptcy court found that the current plan was not ERISA-qualified, became part of the bankruptcy estate, was properly claimed and allowed as exempt, and was not subject to the tax lien.

IRS Contentions on Appeal

The chief argument of the IRS is that debtor's pension plan is ERISA-qualified and was therefore excluded from the bankruptcy estate pursuant to Section 541(c)(2) of the Bankruptcy Code. As required to be ERISA-qualified, the plan was set up to provide benefits exclusively to employees or former employees. The IRS contends

that debtor meets the definition of "employee" for purposes of ERISA, as determined by using the common-law test set out in Darden. Debtor was an employee because he drew a salary from Rich Financial from 1978 to 1990 and acknowledged that he was providing services for remuneration during that period. He discussed decisions concerning Rich Financial with Kessler, who was the director and majority shareholder and had the ability to overrule his decisions, and the corporation treated him as an employee for tax purposes.

The IRS argues that the bankruptcy court erred in concluding that debtor's status as a co-owner of the corporation precluded his simultaneous status as a common-law "employee." It cites Darrell Harris, Inc. v. United States, 770 F.Supp. 1492 (W.D. Okla. 1991), where the court found that the taxpayer was an employee, not an independent contractor, for federal taxation purposes, to show that a substantial co-owner of a corporation can also be an "employee" of the corporation under the common law. Thus, debtor should have been found to be an employee, as well as a co-owner, of the corporation.

The IRS contends that the bankruptcy court should have considered the labor regulation found at 29 C.F.R. § 2510.3-3³ to find that the debtor's plan is ERISA-

³ § 2510.3-3 states in part:

(a) General. This section clarifies the definition in section 3(3) of the term "employee benefit plan" for purposes of Title I of the Act and this chapter. It states a general principle which can be applied to a large class of plans to determine whether they constitute employee benefit plans within the meaning of section 3(3) of the Act. Under section 4(a) of the Act, only employee benefit plans within the meaning of section 3(3) are subject to Title I.

qualified. This regulation provides that the term "employee benefit plan" for purposes of ERISA does not include any plan under which no employees are covered participants, and an individual and his spouse are not employees with respect to a business which is wholly owned by the individual or by the two of them. The IRS argues that § 2510.3-3 exempts persons who are both sole plan participants and sole shareholders of a plan sponsor only from the disclosure and reporting provisions contained in Title I of ERISA and not from the other provisions of ERISA.⁴

The IRS contends that, if Congress had meant to exclude closely-held

(b) Plans without employees. For purposes of Title I of the Act and this chapter, the term "employee benefit plan" shall not include any plan, fund or program, other than an apprenticeship or other training program, under which no employees are participants covered under the plan, as defined in paragraph (d) of this section. For example, a so-called "Keogh" or "H.R. 10" plan under which only partners or only a sole proprietor are participants covered under the plan will not be covered under Title I. However, a Keogh plan under which one or more common law employees, in addition to the self-employed individuals, are participants covered under the plan, will be covered under Title I

(c) Employees. For purposes of this section:

- (1) An individual and his or her spouse shall not be deemed to be employees with respect to a trade or business, whether incorporated or unincorporated, which is wholly owned by the individual or by the individual and his or her spouse, and
- (2) A partner in a partnership and his or her spouse shall not be deemed to be employees with respect to the partnership.

⁴ The IRS relies on Fasco Indus. Inc. v. Mack, 843 F.Supp. 1252, 1255 (N.D. Ill. 1994) for this argument. Fasco involved a "top-hat" plan, which was an unfunded pension plan maintained by the employer for the purpose of providing deferred compensation for a select group of management or highly compensated employees. Top-hat plans are exempted from the substantive provisions of parts 2, 3, and 4 of Title I regarding participation, vesting, funding, and fiduciary responsibility. 29 U.S.C. §§ 1051(2), 1081(a)(3), and 1101(a)(1). The case at bar does not involve such a plan.

corporations like Rich Financial from the other provisions of ERISA, it could have done so specifically, but it did not, and thus the bankruptcy court erred in failing to use § 2510.3-3 to find that the plan in this case was an ERISA plan. The IRS notes that § 2510.3-3 excludes from the definition of "employee" only an individual who wholly owns a business and, if applicable, his or her spouse, but the bankruptcy court found that Debtor was a "substantial co-owner of the corporation." Thus, debtor does not fall within the regulation's exception to the common-law definition of "employee" for purposes of ERISA.

An additional IRS argument is that the debtor's pension plan was a valid spendthrift trust containing a transfer restriction or anti-alienation provision and was therefore excluded from the bankruptcy estate pursuant to § 541(c)(2) of the Bankruptcy Code. The settlor of the trust was not a beneficiary of the trust on the date the bankruptcy was filed, as required by Cal. Prob. Code. § 15304(a). On that date, the debtor was only a 45% shareholder of the plan sponsor and no longer trustee or administrator of the plan. The settlor of the plan on that date was S.H. Rich Financial, Inc., and Kessler had removed debtor as trustee and administrator and taken on those roles.

The final argument of the IRS is that, because the debtor's pension plan was qualified for special tax treatment under 26 U.S.C. § 401(a)⁵ and contained an anti-

⁵§ 401(a) states in part:

(a) Requirements for qualification. A trust created or organized in the United States and forming part of a stock bonus, pension, or profit-sharing plan of an

alienation provision, it was excluded from the bankruptcy estate pursuant to 11 U.S.C. § 541(c)(2), which excludes from the estate any interest in a plan which is subject to a transfer restriction enforceable under "applicable nonbankruptcy law." Since the IRS is able to enforce the provisions of Title 26 by denying tax-qualification under 26 U.S.C. § 401(a), and refusing tax-exemption under 26 U.S.C. § 501(a),⁶ the

employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust under this section --

(1) if contributions are made to the trust by such employer, or employees, or both, or by another employer who is entitled to deduct his contributions under section 404(a)(3)(B) (relating to deduction for contributions to profit-sharing and stock bonus plans), for the purpose of distributing to such employees or their beneficiaries the corpus and income of the fund accumulated by the trust in accordance with such plan;

(2) if under the trust instrument it is impossible, at any time prior to the satisfaction of all liabilities with respect to employees and their beneficiaries under the trust, for any part of the corpus or income to be (within the taxable year or thereafter) used for, or diverted to, purposes other than for the exclusive benefit of his employees or their beneficiaries . . . ;

(3) if the plan of which such trust is a part satisfies the requirements of section 410 (relating to minimum participation standards); and

(4) if the contributions or benefits provided under a plan do not discriminate in favor of highly compensated employees (within the meaning of section 414(q)).

⁶§ 501(a) states in part: "Exemption from taxation. An organization described in subsection (c) or (d) or section 401(a) shall be exempt from taxation under this subtitle unless such exemption is denied under section 502 or 503." Sections (c) and (d) include such organizations as corporations organized for the exclusive purpose of holding title to property and collecting income therefrom, corporations and any community chest, fund, or foundation organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national, or international amateur sports competition, civil leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, labor, agricultural, or horticultural organizations, business leagues, chambers of commerce, real-estate boards, boards of trade, and professional football leagues.

IRS contends that a tax-qualified plan should in and of itself be excludable from the bankruptcy estate.

Analysis

There is substantial authority to support the bankruptcy court's decision that the plan at issue was not an ERISA plan because no employees were participants. While the first plan established in 1979 was ERISA qualified, that plan was terminated and the proceeds distributed to debtor, who rolled them over into the current plan. This plan has never been subject to ERISA, because debtor was the sole participant and ERISA does not apply to a plan in which no employees are participants under 29 C.F.R. § 2510.3-3(b). This regulation defining the term "employee" determines the existence of an "employee benefit plan for purposes of Title I of ERISA." 29 C.F.R. § 2510.3-3(a). The regulation has consistently been interpreted to exclude from ERISA plans that cover only owners of a business who do not need the protection of ERISA, as do employees who, because of their status, may lack information and adequate safeguards concerning the operation of the business and to whom disclosure should be made and "safeguards be provided with respect to the establishment, operation, and administration of such plans." 29 U.S.C. § 1001(a).

In Peterson v. American Life & Health Ins. Co., 48 F.3d 404, 407 (9th Cir.), cert. denied, ____ U.S. ____, 116 S.Ct. 377, 133 L.Ed.2d 301 (1995), the court cited 29 C.F.R. § 2510.3-3 to support its finding that "[n]either an owner of a business nor a partner in a partnership can constitute an 'employee' for purposes of determining the existence of an ERISA plan." (emphasis added). In Madonia v. Blue

Cross & Blue Shield of Virginia, 11 F.3d 444, 449-450 (4th Cir. 1993), cert. denied, 511 U.S. 1019 (1994), the court held that the same regulation governed the definition of employee for purpose of determining the existence of an ERISA plan. Similarly, the Eighth Circuit in Robinson v. Linomaz, 58 F.3d 365, 369 (8th Cir. 1995), cited 29 C.F.R. § 2510.3-3 for the definition of "employee" for purposes of determining the existence of an ERISA plan. In each of these cases, there was at least one non-owner "employee" covered under the plan, as defined by 29 C.F.R. § 2510.3-3, so the plans were determined to be ERISA plans. The courts all cited Darden, not for the purpose of determining the existence of a plan, but for other purposes. For example, in Madonia, after the court held that the plan was subject to ERISA, it examined whether the owner/employee was an "employee" for purposes of determining whether that individual was a "participant," which is defined by reference to the term "employee." The Madonia court held that, for purposes other than determining the existence of an ERISA plan, the Darden test would be used. 11 F.3d at 447-449.

The law is clear that an ERISA plan does not exist if there is no "employee" as defined by § 2510.3-3. An owner of a business, which the bankruptcy court correctly concluded debtor was, is not such an employee. Therefore there was no ERISA plan in the case at bar. The Darden test is only applicable when an ERISA plan exists, to determine who may bring a civil action under ERISA concerning the particular plan. While the bankruptcy court did not cite § 2510.3-3 and referred to the Darden factors exclusively in its opinion, its conclusion that debtor was not an

employee, but rather a co-owner of Rich Financial, and the sole participant in the plan, resulted in a correct conclusion that the plan was not ERISA-qualified.

There is no merit to the assertion of the IRS that the example in § 2510.3-3 dealing with a sole shareholder and sole participant does not apply to the case at bar because, although debtor is the sole participant, he is not the sole shareholder. The court found that the exclusion from ERISA for sole shareholders applies to other than a sole owner in Kennedy v. Allied Mut. Ins. Co., 952 F.2d 262, 264-265 (9th Cir. 1991). The Kennedy court applied the regulation to two brothers who were the owners of a corporation that sponsored a plan involving the brothers as the sole participants. The court set forth the regulation that provided that ERISA does not apply to a plan "under which no employees are participants" and quoted the "sole owner" example ("[a]n individual and his or her spouse shall not be deemed to be employees with respect to a trade or business, whether incorporated or unincorporated, which is wholly owned by the individual or by the individual and his or her spouse"). Id. Then the court concluded: "[a]s a result, a plan whose sole beneficiaries are the company's owners cannot qualify as a plan under ERISA." Id.

Under 29 C.F.R. § 2510.3-3(c)(2), a singular "partner" is excluded from the definition of the term "employee." However, "partners" are not "employees" for purposes of determining the existence of a plan under 29 C.F.R. § 2510.3-3(b). Likewise, 29 C.F.R. § 2510.3-3(c)(1) refers to the singular "individual" who is the sole owner of a corporation, but clearly applies to the plural of "individuals." Courts have concluded that plans whose only participants are joint-owners are not ERISA plans

in cases involving more than one owner who are not husband and wife. In Re Kaplan, 162 B.R. 684, 694 (Bankr. E.D. Pa. 1993), aff'd, Kaplan v. First Options of Chicago, Inc., 189 B.R. 882 (E.D. Pa. 1995), recons. denied, 198 B.R. 91 (E.D. Pa. 1996); Kennedy, 952 F.2d at 264-265.

There is no merit to the claim of the IRS that debtor's pension plan included an anti-alienation provision and thus was a valid spendthrift trust and excluded from the bankruptcy estate under § 541(c)(2) of the bankruptcy code. Section 541(c)(2) operates to exclude from the bankruptcy estate "a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law;" but the "trust" must be a spendthrift trust, and the "applicable nonbankruptcy law" must be state law governing spendthrift trusts. In re Goldberg, 59 B.R. 201, 204 (Bankr. N.D. Okla. 1986). Thus, only spendthrift trusts whose restrictions on transfer are enforceable under applicable state law can be excluded from a bankruptcy estate under 11 U.S.C. § 541(c)(2).

In debtor's case, the settlor and beneficiary of the trust are the same, so it is a self-settled trust and loses the protection ordinarily afforded spendthrift trusts. Under California law, which is applicable to this case, "if the settlor is a beneficiary of a trust created by the settlor and the settlor's interest is subject to a provision restraining the voluntary or involuntary transfer of the settlor's interest, the restraint is invalid against transferees or creditors of the settlor." Cal. Prob. Code § 15304(a).

There is likewise no merit to the claim of the IRS that the fact that debtor's pension plan was tax-qualified under 26 U.S.C. § 401(a) excluded it from the

bankruptcy estate pursuant to 11 U.S. § 542(c)(2). The provisions of § 401(a) relate solely to the criteria for tax qualification under the Internal Revenue Code, and § 401(a) does not create any substantive rights that a beneficiary or participant of a qualified retirement trust can enforce. Reklau v. Merchants Nat'l Corp., 808 F.2d 628, 631 (7th Cir. 1986), cert. denied, 481 U.S. 1049 (1987); Cowan v. Keystone Employee Profit Sharing Fund, 586 F.2d 888, 890 (1st Cir. 1978); Wiesner v. Romo Paper Prod. Corp. Emp. Retirement Plan, 514 F.Supp. 289, 291 n.2 (E.D.N.Y. 1981). Section 401 therefore is not "enforceable applicable nonbankruptcy law," and debtor's pension plan is not excluded from the bankruptcy estate based on its application.

The bankruptcy court's finding that debtor was not an "employee" of Rich Financial is supported by his day-to-day control over the company, as well as his autonomy in performing his tasks. In addition, courts such as those in Peterson, Madonia and Robinson have found that the principles of 29 C.F.R. § 2510.3-3 determine the existence of an ERISA plan, and under that regulation debtor is clearly not an "employee," so the plan is not subject to ERISA.

Since the plan is not ERISA qualified, the anti-alienation provision is not enforceable and debtor's interest in the plan became property of the bankruptcy estate upon the filing of the petition and was properly claimed as exempt. The unfiled IRS tax lien was avoided if the plan was exempt property of debtor.

The judgment of the bankruptcy court determining the IRS has no right, title, interest or lien in the plan is affirmed.

Dated this 9th day of January, 1998.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

s:\orders\rich.bk

ENTERED ON DOCKET

DATE 1-13-98

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

FILED

JAN 12 1998

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

MARKIE K. GARNER, in person and for
all persons similarly situated,

Plaintiff,

vs.

MAYES COUNTY JAIL, et al.,

Defendants.

Case No. 96-CV-91-K ✓
(Base File)

DEBRA LYNN CLAYTON

Plaintiff,

vs.

HAROLD BERRY,

Defendant.

Case No. 96-CV-622-B

REPORT AND RECOMMENDATION

Defendants' motion for summary judgment filed December 26, 1996, Docket Number 60 in consolidated case number 96-CV-91-K is before the undersigned United States Magistrate Judge for report and recommendation.

Although this case is subject to a stay entered August 5, 1997, by order dated August 21, 1997, the Court lifted the stay to give Plaintiff 20 additional days in which to respond to Defendants' motion for summary judgment. On September 11, 1997, the Court reviewed the case file, because the Court was unable to conclusively determine whether a copy of the August 21 order was mailed to Ms. Clayton the Court granted her until October 2, 1997 to respond to defendants' motion for summary judgment. That deadline

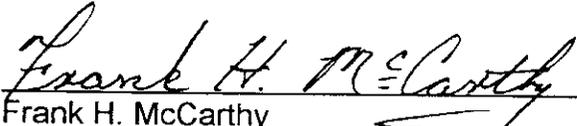
has passed and Plaintiff has not filed a response in either 96-CV-91-K or 96-CV-622-B.

According to N.D. LR 7.1 C., the court, in its discretion may deem a matter confessed, and may enter the relief requested for the failure to timely respond to a motion.

The Court declines to recommend that judgment be entered for Defendants. See *Miller v. Department of Treasury*, 934 F.2d 1161 (10th Cir. 1991) (judge abused discretion granting summary judgment based on failure to respond without evidence that failure was prejudicial to defendant, that the litigant was culpable, or that interference with judicial process occurred). Instead, the undersigned United States Magistrate Judge RECOMMENDS that Plaintiff's Case, Case No. 96-CV-622-B, be DISMISSED WITHOUT PREJUDICE for failure to prosecute.

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 10th day of January, 1998.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

ENTERED ON DOCKET

DATE 1-13-98

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

FILED

JAN 12 1998

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

MARKIE K. GARNER, in person and for
all persons similarly situated,

Plaintiff,

vs.

MAYES COUNTY JAIL, et al.,

Defendants.

Case No. 96-CV-91-K ✓
(Base File)

DEBRA LYNN CLAYTON

Plaintiff,

vs.

HAROLD BERRY,

Defendant.

Case No. 96-CV-622-B

REPORT AND RECOMMENDATION

Defendants' motion for summary judgment filed December 26, 1996, Docket Number 60 in consolidated case number 96-CV-91-K is before the undersigned United States Magistrate Judge for report and recommendation.

Although this case is subject to a stay entered August 5, 1997, by order dated August 21, 1997, the Court lifted the stay to give Plaintiff 20 additional days in which to respond to Defendants' motion for summary judgment. On September 11, 1997, the Court reviewed the case file, because the Court was unable to conclusively determine whether a copy of the August 21 order was mailed to Ms. Clayton the Court granted her until October 2, 1997 to respond to defendants' motion for summary judgment. That deadline

AB

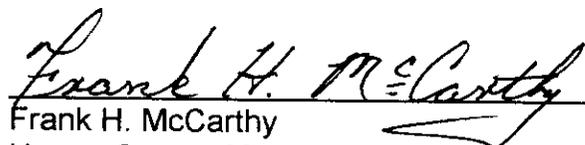
has passed and Plaintiff has not filed a response in either 96-CV-91-K or 96-CV-622-B.

According to N.D. LR 7.1 C., the court, in its discretion may deem a matter confessed, and may enter the relief requested for the failure to timely respond to a motion.

The Court declines to recommend that judgment be entered for Defendants. See *Miller v. Department of Treasury*, 934 F.2d 1161 (10th Cir. 1991) (judge abused discretion granting summary judgment based on failure to respond without evidence that failure was prejudicial to defendant, that the litigant was culpable, or that interference with judicial process occurred). Instead, the undersigned United States Magistrate Judge RECOMMENDS that Plaintiff's Case, Case No. 96-CV-622-B, be DISMISSED WITHOUT PREJUDICE for failure to prosecute.

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 10th day of January, 1998.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

ENTERED ON DOCKET

DATE 1-13-98

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

IN RE:

SUNRISE ISLAND, LTD., LIMITED
GAMING OF AMERICA, INC,

Debtor,

SUNRISE ISLAND, LTD.,

Appellant,

vs.

GOLDMAN SACHS & COMPANY, FOR
THE BENEFIT OF CLAUDE M. BALLARD
IRA ACCOUNT NO. 005990189,

Appellee.

Case No. 97-CV-279-K(M) ✓

FILED

JAN 12 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

REPORT AND RECOMMENDATION

The instant appeal from the United States Bankruptcy Court for the Northern District of Oklahoma is before the undersigned United States Magistrate Judge for report and recommendation. *Greigo v. Padilla*, 64 F.3d 580 (10th Cir. 1995).

The record on appeal in the above referenced matter was filed in the United States District Court for the Northern District of Oklahoma on March 26, 1997. On March 28, 1997, the Court Clerk advised the parties by letter that the filing of the record on appeal commenced the briefing schedule in this matter. The letter from the Court Clerk further advised the parties that, pursuant to the Court's rules, the Appellants' brief was due within fifteen (15) days of the filing of the record on appeal.

By order dated September 17, 1997, the Appellants were directed to show cause on or before October 2, 1997, why their appeal from the Bankruptcy Court

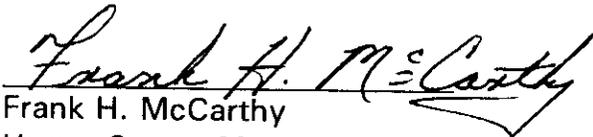
13

should not be dismissed for their failure to timely file an opening brief. Appellants were advised that failure to respond within the time specified would result in a recommendation that their appeal be dismissed for failure to prosecute.

To date, the Appellants have neither responded to the order to show cause nor filed an opening brief. The undersigned United States Magistrate Judge therefore RECOMMENDS that the case be DISMISSED for failure to prosecute.

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 10th day of January, 1998.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

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

FILED

JAN 9 1998 *mu*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

GEORGE L. GRAYSON,)
an individual,)

Plaintiff,)

vs.)

PHILLIP E. SNOW, an individual and in his)
official capacity as a City of Tulsa police officer;)
ROBERT S. JACKSON, an individual and in his)
official capacity as a City of Tulsa police officer;)
JOHN D. CAROLLA, an individual and in his)
official capacity as a City of Tulsa police officer;)
and CITY OF TULSA, a municipality,)

Defendants.)

No. 97-CV-769-C ✓

ENTERED ON DOCKET
DATE JAN 12 1998

JUDGMENT

This matter came before the Court for consideration on the motion of summary judgment filed by defendant, City of Tulsa, on plaintiff George L. Grayson's cause of action for false imprisonment and intentional infliction of emotional distress. The issues having been duly considered by the Court, and a decision having been rendered in favor of defendant City of Tulsa,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that judgment is entered for the defendant City of Tulsa and against plaintiff George L. Grayson.

IT IS SO ORDERED this 9th day of January, 1998.

H. Dale Cook
H. DALE COOK
Senior U.S. District Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 9 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff

v.

Garrell G. Young, Jr.,

Defendant.

Civil Action No. 97CV914 C

ENTERED ON DOCKET
DATE JAN 12 1998

DEFAULT JUDGMENT

This matter comes on for consideration this 9th day of January, 1998, 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, Garrell G. Young, Jr., appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Garrell G. Young, Jr., was served with Summons and Complaint on November 19, 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, Garrell G. Young, Jr., for the principal amount of \$2,696.87, plus accrued interest of \$1,438.09, plus interest thereafter at the rate of 8 percent per annum until judgment, and the principal amount of

\$2,259.13 plus accrued interest in the amount of \$999.90, plus interest thereafter at the rate of 7.51 percent per annum until judgment, 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 5.341 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

LFR/sba

DATE
1/7/98

FILED

JAN 9 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff)
)
 v.)
)
 AUSTIN W. FOWLER, JR.,)
)
 Defendant.)

Civil Action No. 97 CV 880 C/

ENTERED ON DOCKET
DATE JAN 12 1998

DEFAULT JUDGMENT

This matter comes on for consideration this ^W 9 day of January, 1998, 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, Austin W. Fowler, Jr., appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Austin W. Fowler, Jr., was served with Summons and Complaint on November 20, 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.

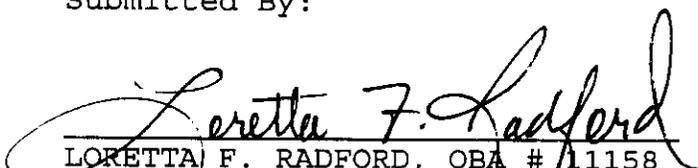
IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Austin W. Fowler, Jr., for the principal amount of \$8,599.86, plus accrued interest of \$5,537.23, plus interest thereafter at the rate of 8 percent per annum until judgment, plus filing fees in the amount of

7

\$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.341 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

LFR/jmo

ENTERED ON DOCKET

DATE 1-12-98

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

MOBIL EXPLORATION & PRODUCING)
U.S. INC.,)

Plaintiffs,)

vs.)

BRUCE BABBITT, SECRETARY,)
DEPT. OF THE INTERIOR, et al.,)

Defendants.)

FILED

JAN 12 1998

No. 96-C-790-K

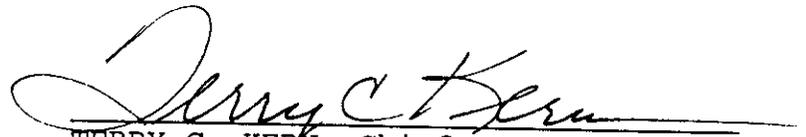
Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

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

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

ORDERED THIS DAY OF 9 JANUARY, 1998


TERRY C. KEEN, Chief
UNITED STATES DISTRICT JUDGE

63

ENTERED ON DOCKET

DATE 1-12-98

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

FILED

JAN 12 1998 *AD*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

| | |
|---------------------------------|---|
| MOBIL EXPLORATION & PRODUCING) |) |
| U.S. INC; et al.,) |) |
|) Plaintiffs,) |) |
|)) |) |
| vs.) |) |
|)) |) |
| BRUCE BABBITT, SECRETARY,) |) |
| DEPARTMENT OF THE INTERIOR,) |) |
| et al,) |) |
|) Defendants.) |) |

No. 96-C-790-K ✓

O R D E R

Before the Court are the cross-motions of the parties for summary judgment. Plaintiffs bring this action seeking a declaratory judgment that document requests and subpoenas relating to an audit conducted by the Minerals Management Service (MMS) are invalid, and seeking injunctive relief against enforcement of those requests and subpoenas. Defendants have filed the present motion, asserting that the Court lacks subject matter jurisdiction over the action. Mobil Exploration & Producing U.S. Inc. (MEPUS) and OXY USA, Inc. (OXY) are federal oil and gas lessees in California on leases issued primarily under the Mineral Leasing Act, 30 U.S.C. §§ 181-287. Also, MEPUS and OXY are federal lessees on leases issued under the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356. MEPUS is a subsidiary of Mobil Corporation (Mobil) and OXY is a subsidiary of Occidental Oil and Gas Company (OOGC). These four entities are the named plaintiffs in this lawsuit.

The Secretary of the Interior administers these leases and has authority to determine royalty value under these acts and the

62

Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), 30 U.S.C. §§ 1701-1757. The MMS is the agency of the Department of the Interior (DOI) responsible for determining royalty value and collecting royalties due on federal and Indian oil and gas leases.

Virtually identical letters were sent by MMS to MEPUS and OXY. Plaintiffs characterize the letters as "Audit Engagement Orders" and defendants characterize them as document requests. The letters state that DOI is "conducting a review" of the valuation of crude oil for royalty purposes. The letters continue: "The MMS requests [recipient] to keep all records related to its California operations for the audit period. We also request access to all documents and information in [recipient]'s possession related to the production and disposition of crude oil for the audit period." The letters state the audit will cover the time period January 1, 1980 through July, 1996. MEPUS and OXY did not provide MMS access to the documents, and MMS issued Mobil and OOGC (the parent companies) subpoenas pursuant to 30 U.S.C. § 1717(a). Plaintiffs have not complied with the subpoenas to the extent the subpoenas request documents over six years old.¹ The defendants filed a motion to dismiss on jurisdictional grounds, which the Court denied. In that the order of denial, the Court stated it would revisit the issues on summary judgment, provided the parties addressed certain concerns or ambiguities which the Court delineated.

¹30 U.S.C. §1713(b) requires records be maintained for six years, absent notice from the Secretary that an audit has been initiated.

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).

First, defendants argue that plaintiffs' challenge to the subpoenas is not properly before this Court. In Belle Fourche Pipeline Co. v. United States, 751 F.2d 332 (10th Cir.1984), cert. denied, 474 U.S. 818 (1985), the Tenth Circuit Court of Appeals noted the Supreme Court has announced a rule "strongly disfavoring any pre-enforcement review of investigative subpoenas." Id. at 334, citing Reisman v. Caplin, 375 U.S. 440 (1964). Just as in Reisman and Belle Fourche, the subpoenas before the Court are not self-executing. 30 U.S.C. § 1717(b) provides that, upon refusal of a person served to obey a subpoena, the agency may seek to commence a proceeding for judicial enforcement. Reisman and Belle Fourche hold that such an enforcement proceeding is the proper arena for the person served to raise defenses and objections.

Plaintiffs argue that there is no per se rule against a pre-

enforcement challenge, and that in fact this is no longer a case of "pre-enforcement" judicial review, because the government initiated proceedings in a California federal court to enforce the two subpoenas.² However, the Court agrees with the defendants that "FOGRMA explicitly allows MMS to choose when and where to enforce its administrative subpoenas. 30 U.S.C. §1717(b)." (Defendant's response brief at 8). The Belle Fourche court rejected the view that, by seeking dismissal of a declaratory action, the government effectively "counterclaimed" for enforcement of the subpoenas. 751 F.2d at 335. The Court is not persuaded that an anticipatory action challenging the validity of an administrative subpoena confers jurisdiction on this Court. See In re Ramirez, 905 F.2d 97, 98-99 (5th Cir.1990).

Next, defendants contend the plaintiffs' objection to the document requests should be dismissed on ripeness grounds. In Ash Creek Mining Co. v. Lujan, 934 F.2d 240 (10th Cir.1991), the court said four factors to consider regarding the ripeness of an agency action are (1) whether the issues in the case are purely legal, (2) whether the agency action involved is "final agency action" within the meaning of the Administrative Procedure Act, 5 U.S.C. §704, (3) whether the action has or will have a direct and immediate impact upon the plaintiff and (4) whether the resolution of the issues will promote effective enforcement and administration by the agency. Id. at 243. With respect to the second factor, the Supreme

²The California court dismissed the enforcement action pending this Court's ruling.

Court has recently stated that two conditions must be satisfied for agency action to be "final": First, the action must mark the "consummation" of the agency's decisionmaking process--it must not be of a merely tentative or interlocutory nature. Second, the action must be one by which "rights or obligations have been determined" or from which "legal consequences will flow". Bennett v. Spear, 117 S.Ct. 1154, 1168 (1997).

The parties dispute the effect of the July 18, 1996 letters. The defendants contend that the letters merely request retention of documents (which is in fact the word the letters use) and did not establish any legal obligations. Plaintiffs contend that the commencement of an audit imposes immediate record-keeping obligations, citing 30 U.S.C. §1713(b) and 30 C.F.R. §212.51. The statute provides as follows:

Records required by the Secretary [of the Interior] with respect to oil and gas leases from Federal or Indian lands or the Outer Continental Shelf shall be maintained for 6 years after the records are generated unless the Secretary notifies the record holder that he has initiated an audit or investigation involving such records and that such records must be maintained for a longer period. In any case in which an audit or investigation is underway [sic], records shall be maintained until the Secretary releases the record holder of the obligation to maintain the records.

The regulation provides:

Lessees, operators, revenue payors, or other persons required to keep records under this section shall maintain and preserve them for 6 years from the day on which the relevant transaction recorded occurred unless the Secretary notifies the record holder of an audit or investigation involving the records and that they must be maintained for a longer

period. When an audit or investigation is underway [sic], records shall be maintained until the recordholder [sic] is released in writing from the obligation to maintain the records.

The government has submitted an affidavit by Erasmo Gonzales, the Chief of the Houston Compliance Office for the MMS, which asserts the letters were not orders and do not impose any legal obligations on plaintiffs. The government asserts that "[t]he letters requested a voluntary response which Plaintiffs refused to provide. MMS was then forced to turn to other administrative tools it has to acquire information from oil companies, namely, the administrative subpoena." (Defendants' summary judgment brief at 6). The "voluntary" nature of a request, the denial of which is answered by subpoena, may be questioned.

In any event, the government has disavowed seeking imposition of penalties under 30 U.S.C. §1719(c)(2). This disavowal places this case in the same posture as Sun Exploration and Production Company v. United States Department of the Interior, et al., Case No. CA3-84-1624-F, an unpublished decision of the United States District Court for the Northern District of Texas, which defendants cited in support of their motion to dismiss. The court there dismissed a similar action challenging the issuance of subpoenas. Accepting the government's characterization of the letters as an informal request also brings this case within the reasoning of Phillips Petroleum Co. v. Lujan, 963 F.2d 1380, 1387 (10th Cir.1992). In that case, the court addressed challenges, similar

to those here, to two classes of documents. First, letters had been sent from the MMS to plaintiffs which stated, in pertinent part, "[t]his is to formally notify you that the [MMS] is initiating an audit" regarding royalty payments. The letters further stated all "records related to Federal and Indian mineral leases for this period must be retained. . . ." (emphasis added). The second class of document under challenge were document requests which stated "MMS is requesting" that certain documents be provided to MMS. The court held that the MMS informal request for documents was not a final agency action, a holding the court said "is consistent with the purpose of the ripeness doctrine as applied to agency actions. . . ." Id. at 1388.

Plaintiffs make much of the fact that the court in Phillips did not appear to question its jurisdiction when it reviewed the first class of challenged documents, the letters of audit initiation. The Tenth Circuit reviewed the agency determination on the merits and concluded it was not "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law". Id. at 1385. However, that class of documents was clearly an order requiring retention of documents.

Even accepting plaintiffs' position that the letters impose a legal obligation, such a conclusion only satisfies one prong of the test articulated in Bennett v. Spear, 117 S.Ct. 1154, 1168 (1997). Do the letters mark the "consummation" of the agency's decisionmaking process? It seems clear that the mere commencement of an audit is a decision of an "tentative or interlocutory

nature". Id. Authority exists for the proposition that an agency's initiation of an investigation does not constitute final agency action. See FTC v. Standard Oil Co., 449 U.S. 232, 239-45 (1980); Veldhoen v. U.S. Coast Guard, 35 F.3d 222, 225 (5th Cir.1994). The plaintiffs have attempted to distinguish Veldhoen on its facts, but have not shown inapplicable the legal principle for which it stands. An "obligation to defend oneself before an agency is not the type of obligation that creates final agency action." Id. at 226.

Plaintiffs also protest that dismissal of this action would condemn them to maintain records beyond the six-year limitation of § 1713(b). Defendants rely upon the argument that the six-year statute of limitation for damages actions contained in 28 U.S.C. § 2415(a) does not affect production of documents over six years old. Defendants rely upon the statement in Phillips Petroleum Company v. Lujan, 951 F.2d 257 (10th Cir.1991) that: "Plaintiff cannot avoid disclosure of the records simply by asserting that any action defendants might bring to which the documents relate is barred by the statute of limitations." Id. at 260-61 (footnote omitted). Defendants' interpretation of the governing statute and regulation is that "[w]hile the record holder may lawfully dispose of records after six years, if such records have been voluntarily retained, MMS may seek and obtain them." (Defendants' response brief at 9). See also Phillips, 951 F.2d at 260 n.5.

In response, plaintiffs note the Tenth Circuit stated in Phillips Petroleum Co. v. Lujan, 4 F.3d 858, 864 (10th Cir.1993):

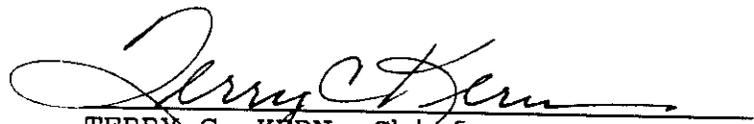
"[I]t is clear that if the government fails to initiate an audit within six years after the records were generated, the delay is per se unreasonable. This is because under § 1713(b) a record holder is exempt from the obligation to maintain its records if an audit is not started within the six-year period." Defendants distinguish this statement by pointing out the plaintiffs in that case were challenging orders to pay, rather than request letters and subpoenas as in the case at bar. As regards the facts of this case, defendants characterize the Tenth Circuit's statement as dicta, which cannot overrule the clear holding in Phillips Petroleum Co. v. Lujan, 951 F.2d 257 (10th Cir.1991). The matter is not free from doubt, but it is established that one Tenth Circuit panel may not overrule another. See In re Smith, 10 F.3d 723, 724 (10th Cir.1993). Any reconciliation of opinions would have to be undertaken by the Tenth Circuit itself. This Court concludes, based upon all existing precedent, that Phillips Petroleum Co. v. Lujan, 951 F.2d 257 (10th Cir.1991) remains good law, and there is no per se rule against document requests by the MMS beyond the six-year statute of limitation. Indeed, this is not inconsistent with the government's own interpretation, which is that there is no obligation on the record holder's part to maintain documents beyond six years.

As a secondary position, the plaintiffs attack the audits themselves, arguing that they exceed the statutory authority of the MMS and that the issue should be addressed, even at the "pre-enforcement" stage. The Court disagrees. "An attack on the

authority of an agency to conduct an investigation does not obviate the final agency action requirement." Veldhoen, 35 F.3d at 225. See also Aluminum Co. v. United States, 790 F.2d 938, 942 (D.C.Cir.1986) (holding claim that agency action is beyond statutory authority does not "make any difference" for finality analysis). As the court noted in Veldhoen, "[a] claim that an agency action is in plain contravention of a statutory mandate. . . may present one of the extraordinary exceptions to the finality requirement." 35 f.3d at 225. Upon review, the Court finds this is not such a case. Rather, "[a]t best, this dispute is over the agency's interpretation of its statute and the regulations, an activity to which courts generally grant deference to agencies." Id. at 226. In any event, plaintiffs are in no way precluded from raising these arguments in any proceeding to enforce the administrative subpoenas. This Court lacks jurisdiction over the present challenge.

It is the Order of the Court that the motion of the defendants for summary judgment (#38) is hereby GRANTED. The motion of the plaintiffs for summary judgment (#40) is hereby DENIED.

ORDERED this 9 day of January, 1998.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE 1-12-98

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

JOHN HASH,)
)
 Plaintiff,)
)
 vs.)
)
 B S & B SAFETY SYSTEMS, INC.,)
)
 Defendant.)

Case No. 97 CV 818 K (M)

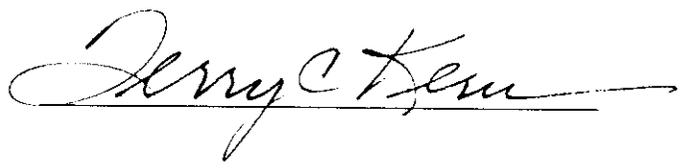
FILED

Phil Leathers, Clerk
U.S. District Court

ORDER

The Court has before it Defendant BS&B's Motion to Dismiss with prejudice Plaintiff's Complaint of age discrimination. More than sixty (60) days have elapsed since the extended deadline for the Plaintiff to file a response to Defendant's Motion to Dismiss, and Plaintiff still has not filed any response nor shown this Court any reason for his failure to respond. Pursuant to Local Rule 7.1, Defendant BS&B's Motion to Dismiss Plaintiff's Complaint with Prejudice is hereby GRANTED.

IT IS HEREBY ORDERED.



7

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

ENTERED ON DOCKET
DATE 1/9/98

WILLIAM WELLS,
Plaintiff,
vs.
UNITED WISCONSIN LIFE INSURANCE
COMPANY, d/b/a AMERICAN MEDICAL
SECURITY, a foreign insurance
company,
Defendants.

No. 97-CV-324-K (W)

FILED

JAN - 9 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

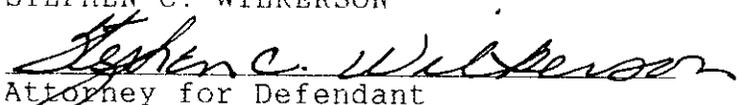
STIPULATION OF DISMISSAL

COME NOW the Plaintiff and the Defendants, by and through their respective attorneys, and in accordance with Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedures, hereby stipulate to the dismissal with prejudice of all claims and causes of action involved herein with prejudice for the reason that all matters, causes of action and issues in the case have been settled, compromised and released herein, including post and pre-judgment interest.

JOHN A. BOURLAND


Attorney for Plaintiff

STEPHEN C. WILKERSON


Attorney for Defendant

clj

a