

IN THE DISTRICT COURT OF OKLAHOMA COUNTY

STATE OF OKLAHOMA

FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.

Oklahoma Department of Securities)
ex rel. Irving L. Faught,)
Administrator,)

Plaintiff,)

v.)

Barry Pollard and Roxanne Pollard,)

Defendants,)

v.)

AXA Equitable Life Insurance Company,)
f/k/a Equitable Life Assurance Company)
of the United States,)

Third Party Defendants.)

JAN - 3 2008

PATRICIA PRESLEY, COURT CLERK
by _____
Deputy

Case No. CJ-2005-3799

PLAINTIFF'S RESPONSE TO DEFENDANTS BARRY AND ROXANNE POLLARD'S MOTION TO RECONSIDER AND/OR VACATE ORDER GRANTING PARTIAL SUMMARY JUDGMENT DATED NOVEMBER 18, 2007; MOTION FOR NEW [TRIAL] AND/OR MOTION TO CLARIFY AND BRIEF IN SUPPORT

Plaintiff, Oklahoma Department of Securities *ex rel.* Irving L. Faught, Administrator (Department), respectfully submits this response to *Defendants Barry and Roxanne Pollard's Motion to Reconsider and/or Vacate Order Granting Partial Summary Judgment Dated November 18, 2007; Motion for New [Trial] and/or Motion to Clarify and Brief in Support*, filed on December 13, 2007 (Pending Motion). The Department hereby adopts and incorporates by reference the arguments and authorities cited in the *Plaintiff's Motion for Summary Judgment against Defendants Barry and Roxanne Pollard and Brief in Support* and

Plaintiff's Reply to Defendants' Response to Motion for Summary Judgment, and all exhibits attached thereto.

BACKGROUND

During the year 2000 and until mid-October 2004, Marsha Schubert, individually and doing business as Schubert and Associates (Marsha Schubert), accepted money from investors, and represented that their money would be invested in option contracts or used for "day trading" purposes. Instead of investing the monies as promised, Marsha Schubert made payments to other investors – a classic "Ponzi" scheme.

The Logan County District Court appointed Douglas L. Jackson as Receiver (Receiver) for the investors and creditors of Schubert and Associates. The court granted the Receiver the authority to institute actions to recover assets and to protect the interests of and promote equity among the investors in the Schubert and Associates program.

To fulfill its charge to enforce this state's securities laws, the Department filed this action against Defendants Barry and Roxanne Pollard ("Defendants" or "Defendants Pollard") based on the theory of unjust enrichment. On October 26, 2007, the Court granted partial summary judgment in favor of the Department. In its ruling, the Court affirmed the operation of a "Ponzi" scheme by Marsha Schubert and determined that Defendants Pollard were unjustly enriched through that scheme. The Court did find there to be a question as to the amount by which the Defendants were unjustly enriched and reserved determination of that issue to a later time. The Court also denied the request of Defendants for a setoff and/or an offset. The Pending Motion was filed by Defendants Pollard in response to the rendering of the November 18th order by this Court.

ARGUMENTS AND AUTHORITIES

I. The partial summary judgment is supported by sufficient evidence, is in accordance with applicable law, and should remain in effect.

Effect of the Pending Motion

A “motion to reconsider” does not exist under Oklahoma’s Pleading Code. *Halliburton Oil Producing Co. v. Grothaus*, 1998 OK 110, n. 6, 981 P.2d 1244, 1248, (so-called “motion to reconsider” is a stranger to the statutory nomenclature in Oklahoma’s nisi prius practice and procedure); *McMillian v. Holcomb*, 1995 OK 117, n. 3, 907 P.2d 1034, 1036. The Court in *Halliburton* and *McMillian* determined that a “motion to reconsider” may be considered a motion for new trial, *if* timely made. *Id.* Generally, the Oklahoma Code of Civil Procedure provides that a motion for new trial must be filed within ten (10) days of the filing of the judgment, decree or appealable order. 12 O.S. § 653(A). Since the Pending Motion was filed by Defendants on December 13th, more than ten (10) days after the Court’s order rendering partial summary judgment, a motion for new trial was not timely made by Defendants.

Based on the Oklahoma Supreme Court’s treatment of a “motion to reconsider” in *Schepp v. Hess*, 1989 OK 28, 770 P.2d 34, the Pending Motion *may* be accepted by the Court as a motion to vacate its decision, thereby invoking the Court’s power under 12 O.S. § 1031.1. While it is within the Court’s discretion to correct, open, modify or vacate the partial summary judgment, this Court should not vacate or modify the order. The Court correctly based its order on uncontroverted material facts and on principles of law that entitle the Department to partial summary judgment.

Standard of Review for Summary Judgment

When a moving party demonstrates to a court that no controversy exists as to any material fact and the party is entitled to judgment as a matter of law, the court has a duty to enter summary judgment in favor of that party. Rule 13, Rules for the District Courts of Oklahoma, OKLA. STAT. ANN. TIT. 12, Ch.2, App. (Rule 13); *Valley Vista Development Corp., Inc. v. City of Broken Arrow*, 1988 OK 140, 766 P.2d 344; *Flanders v. Crane Co.*, 1984 OK 88, 693 P.2d 602. Rule 13 also provides for partial summary judgments. The rule “contemplates that when no material dispute is found to exist as to some fact or issue in the case, a trial could be confined to matters that remain in controversy.” *Reams v. Tulsa Cable Television, Inc.*, 1979 OK 171, 604 P.2d 373, 374.

In opposing the Department’s motion for summary judgment, Defendants Pollard were required to present actual evidentiary materials to justify a trial on the merits. *Adams v. Moriarty*, 2005 OK CIV APP 105, 127 P.3d 621, 624. Defendants failed to dispute the existence of a “Ponzi” scheme and their involvement in such scheme with acceptable evidence.

As to the existence of the “Ponzi” scheme, the Court need not have looked any further than Marsha Schubert’s Logan County plea agreement. In the plea agreement, Marsha Schubert stated as the factual basis for her guilty plea that she obtained money in a “Ponzi” scheme in which she promised investment funds would be invested, but instead, used the money to pay prior investors in the scheme. In connection with the Department’s summary judgment motion, Marsha Schubert’s guilty plea is sufficient to establish the existence of a “Ponzi” scheme. *Scholes v. Lehmann*, 56 F.3d 750, 762 (7th Cir. 1995); *In re McCarn’s*

Allstate Finance, Inc., 326 B.R. 843, 851 (Bankr. M.D. Fla. 2005); *Stenger v. World Harvest Church, Inc.*, 2006 WL 870310 *14 (N.D. Ga.).

In its summary judgment motion, the Department presented the following facts evidencing the *involvement* of Defendants Pollard in the “Ponzi” scheme:

- Marsha Schubert, promising large financial returns, accepted funds in excess of Two Hundred Million Dollars (\$200,000,000) for purported investment (Schubert Investment Program). Marsha Schubert did not make the investments that she represented she would make, but instead, used most of the money to make distributions to other persons (“Ponzi” scheme).
- At all times material, Marsha Schubert owned and/or controlled several bank accounts including account number 34-7477 at Farmers and Merchants Bank (F&M Bank) in Crescent, Oklahoma (Schubert F&M Account), account number 35-9424 at F&M Bank (Kattails Account), the Richard Schubert Farm account at BancFirst in Kingfisher, Oklahoma (Farm Account), and a Schubert and Associates account at BancFirst in Kingfisher, Oklahoma (Schubert BancFirst Account).
- The majority of the proceeds obtained by Marsha Schubert through the Schubert Investment Program were deposited into the Schubert F&M Account where the proceeds were commingled with proceeds of bank loans, and Marsha Schubert’s personal funds, such as commission and royalty checks. A portion of the proceeds was deposited into the Kattails Account, the Farm Account or the Schubert BancFirst Account and commingled with other funds in those accounts. All of the funds deposited into the Schubert F&M Account, the Kattails Account, the Farm Account and the Schubert BancFirst Account are referred to as “Commingled Funds.”
- From April 2000 through October 2004, Defendants Pollard gave monies directly to Marsha Schubert and/or Schubert and Associates on multiple occasions. The monies were deposited into the Commingled Funds.
- From April 2000 through October 2004, Defendants Pollard received multiple payments out of the Commingled Funds.

The facts cited above show that monies from Defendants Pollard were made a part of the Commingled Funds through which Marsha Schubert orchestrated her “Ponzi” scheme. These facts further evidence that the source of monies paid to Defendants Pollard was the Commingled Funds and not income from any underlying investments.

The involvement of Defendants Pollard in Marsha Schubert's "Ponzi" scheme is clearly evident. Since the Defendants did not present any acceptable evidence to the contrary, the Court correctly found that Marsha Schubert orchestrated a "Ponzi" scheme in which the Defendants were financially involved.

Unjust enrichment to Defendants Pollard

Oklahoma courts recognize unjust enrichment as an equitable ground of recovery. *Lapkin v. Garland Bloodworth*, 23 P.3d 958, OKLA CIV APP. Div. 2 (2000), citing *N. C. Corff Partnership, Ltd. v. Oxy USA, Inc.*, 1996 OKLA CIV APP 92, 929 P.2d 288, 295 (*cert. denied*). The *Lapkin* court held "it is contrary to equity and good conscience for one to retain a benefit which has come to him at the expense of someone else." *Id.* at 961.

Recovery under the theory of unjust enrichment depends upon a showing the defendants received money that, in equity and good conscience, they ought not be allowed to retain. *French Energy, Inc. v. Alexander*, 1991 OK 106, 818 P.2d 1234. Regardless of fault, retention of money that does not belong to the defendant is particularly offensive to principles of equity. *Id.* at 1237.

In its summary judgment motion, the Department presented the following facts evidencing the unjust enrichment to Defendants Pollard through Marsha Schubert's "Ponzi" scheme:

- From April 2000 through October 2004, Defendants Pollard paid monies directly to Marsha Schubert and/or Schubert and Associates. The monies were deposited into the Commingled Funds. From April 2000 through October 2004, Defendants Pollard received money out of the Commingled Funds. As a result, the amount of money received by Defendants Pollard from the Commingled Funds exceeded their contributions to the Commingled Funds for a net gain to Defendants.
- Defendant Barry Pollard deposited money into a legitimate brokerage account with AXA Advisors, LLC (AXA Advisors), through its clearing agent,

Pershing, LLC (Pershing). All monies received into the AXA Account of Defendant Barry Pollard, to include his principal investment amount of \$20,000, market gains, dividends, and incoming wires, are accounted for through purchases of securities, market losses, a margin debit balance, and a cash withdrawal by Defendant Barry Pollard.

- Defendants Pollard purchased life insurance policies from AXA Equitable Life Insurance Company (AXA Equitable). Beginning in 2001, Marsha Schubert used funds obtained from other persons to make the premium payments on behalf of Defendants Pollards for two of the AXA Equitable policies.
- Marsha Schubert represented to Defendant Barry Pollard that the premium payments were made from the profits of a purported investment account that Marsha Schubert opened on behalf of Defendants Pollard. Such account was fictional.
- Defendants Pollard did not provide Marsha Schubert and/or Schubert and Associates any goods, services, labor, or other consideration during the time period of January 1, 2000 through October 14, 2004.
- Approximately 87 persons lost in excess of Nine Million Dollars (\$9,000,000) in the "Ponzi" scheme. Over 150 persons made approximately Six Million Dollars (\$6,000,000) in the scheme.

Defendants Pollard received the benefit of fictitious profits from Marsha Schubert for which they did not provide anything of reasonably equivalent value and which were not generated from any real or legitimate investment. The windfall to Defendants Pollard was at the expense of creditors and claimants of Marsha Schubert, including 87 "Ponzi" scheme victims. These undisputed facts present a textbook example of unjust enrichment on which this Court correctly rendered summary judgment.

II. The Court correctly applied the law to deny a setoff to Defendants.

Based on the facts of this case and the applicable law, this Court rightly decided the issue of setoff. Historically, a setoff has been recognized as "the right which one party has against another to use his claim in full or partial satisfaction of what he owes to the other." *Studley v. Boylston Nat. Bank*, 229 U.S. 523, 528 (1913). The purpose of a setoff is "to

extinguish the mutual indebtedness of parties who each owe a debt to one another.” *Aviation Ventures, Inc. v. Joan Morris, Inc.*, 110 P.3d 59, 63 (Nev. 2005).

A setoff may be considered if there is a mutuality of obligations. This requirement is preserved in the language of Section 2013 of the Oklahoma Pleading Code which provides that a setoff or counterclaim relates only to claims between opposing parties. 12 O.S. § 2013.¹ In this matter, the Defendants are asking this Court to apply a Logan County judgment obtained by default against Marsha Schubert as a setoff to the Department’s disgorgement claim against them. The Department was not a party to the Defendants’ Logan County action and owes no obligation to Defendants Pollard. There is no mutuality of obligations between Defendants Pollard and the Department, making a setoff of the Logan County judgment improper.

Finally, “setoff is an equitable remedy that should be granted when justice so requires to prevent inequity.” *Aviation Ventures*, at 63. Due to the circumstances of this case, any setoff on behalf of Defendants Pollard, whether the Logan County judgment and/or the assigned claim of L&S Pollard Farms LLC, would only serve to create serious inequities. A setoff would diminish the assets in the Schubert receivership estate by the amount to be disgorged by Defendants. A setoff would be a detriment to those who made claims with the Receiver² and would create a disproportionate financial benefit to the Defendants. Setoff is not proper in this case.

¹ Prior to the adoption of Oklahoma’s current pleading code, a distinction between a counterclaim and a demand for setoff was recognized. Under the current statutory scheme, there is no distinction between setoff and a counterclaim. *F.D.I.C. v. Moss*, 1991 OK 116, nn. 17 – 18, 831 P.2d 613, 622.

² It should be noted that Defendants Pollard did not file a claim with the Receiver.

CONCLUSION

The Court correctly found that Marsha Schubert orchestrated a "Ponzi" scheme in which the Defendants were financially involved and through which Defendants Pollard were unjustly enriched. The Court based its order on uncontroverted material facts and on principles of law that entitle the Department to partial summary judgment. The Department hereby requests that the Court deny Defendants' Pending Motion so that the November 18th order remains in effect.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of January, 2008, I mailed a true and correct copy of the above and foregoing instrument, postage pre-paid to:

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