

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.

AUG 23 2007

PATRICIA PRESLEY, COURT CLERK
by _____ DEPUTY

Oklahoma Department of Securities)
ex rel. Irving L. Faught,)
Administrator;)
)
Plaintiff,)
)
v.)
)
Barry Pollard and Roxanne Pollard,)
)
Defendants and Third Party)
Plaintiffs,)
)
v.)
)
Equitable Life Assurance Society of the)
United States,)
)
Third Party Defendants.)

Case No. CJ-2005-3799

**PLAINTIFF'S REPLY TO DEFENDANTS' RESPONSE TO THE MOTION TO STRIKE
AFFIDAVIT OF DAVID MORLEY**

Plaintiff, Oklahoma Department of Securities, *ex rel.* Irving L. Faught, Administrator, respectfully replies to the Defendants Barry and Roxanne Pollards' response to the *Motion to Strike David Morley's Affidavit* (Motion) and asks this Court to strike the affidavit.

INTRODUCTION

Plaintiff has shown through admissible evidence that Defendants Barry and Roxanne Pollard (Defendants) were unjustly enriched in a "Ponzi" scheme operated by Marsha Schubert. In their response to Plaintiff's *Motion for Summary Judgment*, Defendants attempt to raise questions of fact to defeat the motion by relying on an affidavit containing the purported

“expert” testimony of their previously unidentified witness, David Morley (Morley). *See Morley’s affidavit*, attached as Exhibit A.

Since 2001, Morley has been registered in the state of Oklahoma as a registered agent of a broker-dealer. In 2002, Morley became registered in Oklahoma as an investment adviser representative. Morley testifies he has been the Defendants’ accountant for the last seven (7) years. While acting as Defendants’ accountant, Morley ignored violations of securities industry rules committed by Marsha Schubert and now attempts to raise factual questions to defeat the summary judgment motion by blaming AXA/Equitable for the Defendants’ circumstances.

Based on the arguments included in the Motion and those that follow, Plaintiff renews its request that the Court strike Morley’s affidavit.

ARGUMENT AND AUTHORITIES

I. Defendants failed to attach proof of the statements made in Morley’s affidavit.

One basis for Plaintiff’s motion to strike is the lack of evidence to support the statements made in Morley’s affidavit. Defendants erroneously respond that such supporting evidence is not required since Morley is providing expert testimony. However, Defendants have not designated or qualified Morley as an expert witness.

The Tenth Circuit Court of Appeals in *Bryant v. Farmers Insurance Exchange*, 432 F.3d 1114 (10th Cir. 2005), analyzed an affidavit submitted to defeat a motion for summary judgment. The *Bryant* court stated that “[a summary judgment] affidavit may not contain expert testimony unless the affiant has first been designated an expert witness.” *Id.* at 1124.

Defendants did not identify Morley as a lay or expert witness in its discovery responses and Defendants did not properly designate Morley as an expert witness before attaching his affidavit to their response. In connection with the pending motion for summary judgment,

Defendant may not use Morley, a lay witness, to simply contend that issues of fact exist. “A mere contention that a material fact exists without providing the evidentiary proof of the alleged fact is not sufficient to withstand summary judgment.” *Butler v. Oklahoma City Public School System*, 871 P.2d 444, 445 (Okla. Ct. App. 1994).

Evidentiary proof of the alleged facts in Morley’s affidavit is necessary to show this Court that evidence exists to justify a trial. *See Weeks v. Wedgewood Village, Inc.*, 554 P.2d 780, 785 (Okla. 1976). Neither the specific transactions and amounts included in his calculations nor documents otherwise substantiating paragraphs 7, 8, and 12-15 of Morley’s affidavit and Exhibit A thereto are provided. The conclusory nature of Exhibit A and the undocumented statements contained in paragraphs 7-8 and 12-15 are not sufficient to defeat a summary judgment motion.

II. Morley’s affidavit does not satisfy the requirements of Rule 13(c) and is insufficient to defeat Plaintiff’s Motion for Summary Judgment.

Pursuant to Rule 13(c) of the Oklahoma District Court Rules (Rule 13(c)), an affidavit filed in response to a summary judgment motion “shall be made on personal knowledge, shall show that the affiant is competent to testify as to the matters stated therein, and shall set forth matters that would be admissible in evidence at trial.” Morley’s affidavit does not satisfy the requirements of Rule 13(c).

A. Lack of personal knowledge

The statements contained in paragraphs 9-11 of Morley’s affidavit are inadmissible hearsay and as such, are not based on Morley’s personal knowledge. *See Elledge v. Staring*, 939 P.2d 1163, 1165-1166 (Okla. Civ. App. 1997). Interestingly, Defendants argue that such statements are not hearsay as they were not offered for the truth of the matter asserted. If the statements are not being offered for the truth of the matter asserted, questions of fact have not been raised by paragraphs 9-11 of the affidavit.

B. Competence to testify as to statements made in affidavit

Since 2001, Morley has been a registered agent of FSC Securities Corporation. As Morley knows, under securities industry rules, a customer should not write a check to or receive funds directly from his registered agent. *See* NASD Rules 2110 and 2330, attached as Exhibit B. During the seven years that Morley has been Defendants' accountant, Morley knew Defendants were directly giving funds to and receiving funds from Marsha Schubert. *See* ¶ 5 of Morley's affidavit, attached as Exhibit A. Morley ignored this critical red flag.

Morley also attempts to emphasize the existence of factual disputes based on a purported lack of distinction between Marsha Schubert and AXA/Equitable. *See* ¶¶ 4-5 and 8 of Morley's affidavit, attached as Exhibit A. Such testimony is totally without merit for the following reasons. First, after Marsha Schubert's departure from AXA/Equitable, Defendants continued their relationship with AXA/Equitable through their new AXA/Equitable agent, James Freudenberger. *See* excerpt of *Barry Pollard's AXA Statement for April 1, 2004 through April 30, 2004*, attached as Exhibit C. Morley testifies that Defendants wrote checks either directly to Marsha Schubert or directly to AXA/Equitable. *See* ¶ 5 of Morley's affidavit, attached as Exhibit A. Finally, as Defendants' accountant, Morley knows that Defendants received \$63,240 directly from Marsha Schubert's personal bank account after she left AXA/Equitable, transactions that were definitely distinguishable from the activities of AXA/Equitable. *See* checks, attached as Exhibit D.

Morley also testifies that Defendants' financial records show that in "2001 Robert Schubert¹, Marsha Schubert's husband, purchased a bull from the Pollards in the amount of \$1,037.25." However, in Plaintiff's accounting backup documentation provided to Defendants, there is a check dated April 11, 2000, from Richard Schubert to Barry Pollard for \$1,037.25.

¹ Plaintiff assumes Morley is referring to Marsha Schubert's ex-husband, Richard Schubert.

There is no evidence on the face of the check or anywhere else in the financial records that these funds were used to purchase a bull. *See* Check No. 7005, attached as Exhibit E. Morley's testimony in paragraph 15 is pure speculation and should be stricken.

Contrary to Rule 13(c), the affidavit does not show that Morley is competent to testify as to the matters stated therein.

C. Admissibility of Morley's statements as evidence

Like paragraphs 6-8 discussed above, paragraphs 13 and 14 of Morley's affidavit and Exhibit B of Morley's affidavit thereto contain inadmissible testimony. Paragraphs 13 and 14 and Exhibit B of Morley's affidavit refer to a "reasonable rate of return" and the financial outcome to Defendants *if* actual investments had been made by Marsha Schubert. Such statements are purely speculative and are not sufficient to defeat a motion for summary judgment. *See Butler*, 871 P.2d 444 (mere speculation or conjecture as to cause of injuries in negligence suit, unsupported by evidence, did not show existence of material factual disputes in connection with summary judgment motion).

III. Morley's affidavit includes beliefs that fail to raise issues of material fact to dispute Plaintiff's Motion for Summary Judgment.

For purposes of summary judgment, "an issue of fact is 'material' if under the substantive law it is essential to the proper disposition of the claim." *Maul v. Logan County Bd. Of Com'rs*, 2006 WL 2863227 at *1 (W.D. Okla.), citing, *Adler v. Wal-Mart Store, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998). Defendants attempt to raise questions of material fact through testimony by Morley of what he, and/or Defendants, believed circumstances to be. *See* paragraphs 6 and 9-11 of Morley's affidavit.

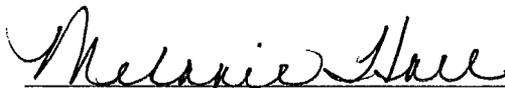
Oklahoma courts recognize unjust enrichment as an equitable ground of recovery. *Lapkin v. Garland Bloodworth*, 23 P.3d 958 (Okla. Civ. App. 2000). The *Lapkin* court held "it

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. In connection with this unjust enrichment claim, it is irrelevant and immaterial what Morley and/or the Defendants believed about Marsha Schubert’s representations and activities. In addition, who and what Defendants believed about Marsha Schubert’s operations is “irrelevant and insufficient to create any fact issue regarding the underlying scheme”. *Ramirez Rodriguez v. Dunson*, 209 B.R. 424 (Bkrtcy S.D. Tex. 1997). Paragraphs 6 and 9-11 of Morley’s affidavit do not raise issues of material fact.

CONCLUSION

“When on the basis of established facts, the plaintiff is entitled to summary judgment as a matter of law, the defendant contending and arguing that there is a genuine issue of fact cannot and will not make it so.” *Weeks v. Wedgewood Village, Inc.*, 554 P.2d 780, 785 (Okla. 1976). David Morley’s affidavit offers no substantiated or admissible evidence. Plaintiff requests that the Court strike the affidavit of David Morley in its entirety, or in the alternative, to strike paragraphs 7-15 of the affidavit, as no evidentiary material was attached to support the conclusory and speculative statements made therein.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of August 2007, I mailed a true and correct copy of the above and foregoing instrument, postage pre-paid to:

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