

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

JAN 13 2010

PATRICIA PRESLEY, COURT CLERK
by _____
DEPUTY

Oklahoma Department of Securities)
ex rel. Irving L. Faught, Administrator,)
)
Plaintiff,)
)
v.)
)
The Estate of Bryan David Roark,)
Defendant.)

Case No. CJ 2009-10905

Set for Hearing FEBRUARY 17, 2010
at 10:00 a.m. before Judge GRAY

**INTERIM APPLICATION FOR ATTORNEY'S FEES AND COSTS BY
INTERVENOR, CHRISTIANA ROARK**

COMES NOW Clell I. Cunningham III of the law firm of Dunn, Swan & Cunningham, P.C. (the "Law Firm"), counsel of record for Intervenor, Christiana Roark, and moves the Court for an order awarding counsel its reasonable attorney's fees incurred in connection with its assistance to Plaintiff, the Receiver, Intervenor and the Court in identifying, locating, preserving and turning over to the Receiver the assets subject to this proceeding.

Counsel seeks a net interim award of \$4,737.50 in attorney's fees, and \$57.98 in costs, for the period commencing with the filing of this action and continuing through December 31, 2009.

BRIEF IN SUPPORT

Facts

1. This proceeding arose out of the actions of Bryan Roark, a stock broker in Ada, Oklahoma. Mr. Roark was accused of selling sham securities in an alleged ponzi scheme over a period of about seven years beginning in 2002. Mr. Roark died on October 24, 2009, only days after being confronted by his employer, Morgan Stanley Dean Witter, with allegations of wrongdoing.

2. On November 4, 2009 Plaintiff, Oklahoma Department of Securities, brought this action against The Estate of Bryan Roark. On the same date, the Court entered an Order Freezing Assets and Appointing Receiver (the "Freeze Order"). The Freeze Order names Doug Jackson, Esq. as the Receiver for all substantially all of the assets of Mr. Roark and his family, and enjoins Intervenor and her family members from dispersing any funds or assets subject to the Freeze Order.

3. On December 10, 2009 this Court entered an "Order Relating to Interim Disbursements From Receivership Assets to Intervenor", authorizing a payment to Intervenor of \$500.00 for December 2009 and January 2010, and a payment to counsel for the Intervenor of \$1,500.00 per month. The Order further provided, "The attorney for Intervenor C. Roark shall have the opportunity to file monthly interim applications for additional costs incurred." This Interim Application is made pursuant to such Order of the Court.

4. Intervenor and her counsel have fully cooperated with the Oklahoma Department of Securities and the Receiver appointed in this case. In that regard, Intervenor, through her counsel, has turned over to such persons all of the cash (\$98,400.00), precious metals and other personal property located by Intervenor after the death of Mr. Roark. Intervenor, through her counsel, has assisted in the identification and disposition of various real properties affected by the Freeze Order. The Law Firm has coordinated with the Receiver for the transfer of all of such assets to the Receiver for safekeeping pending the outcome of this action.

5. Attached hereto as Exhibit A is a complete record of all of the time of the Law Firm incurred in connection with this proceeding that was incurred in connection with the

efforts of Plaintiff and the Receiver to identify, preserve, collect, and dispose of the assets subject to the Freeze Order. The total value of such time is \$7,737.50. The fee request is for \$4,737.50, after allocation of the two interim payments of \$1,500.00 authorized by the Court. Also included in Exhibit A is an itemization of actual out-of-pocket expenses incurred by the Law Firm in connection with the same efforts of Plaintiff and the Receiver.

6. Attached hereto as Exhibit B is a complete record of all of the time and expenses of the Law Firm incurred in connection with this proceeding that was incurred for the benefit and protection of Intervenor. The total value of such time and expenses is \$8,987.50. Intervenor paid to the Law Firm a retainer of \$9,000.00 on October 27, 2009, approximately one week before this action was instituted. After application of the retainer, the net sum of attorney fees and expenses due from Intervenor to the Law Firm is \$4,199.94, which sum is *not* sought by the Law Firm from the Receiver at this time.

7. As evidenced by the time records of Clell I. Cunningham III of the Law Firm in Exhibit A, counsel is in regular contact with the Receiver and Plaintiff to address the various assets of the Receivership and their maintenance and disposition, including cattle, farm equipment, vehicles, and various other real and personal properties.

Legal Discussion

"A district court may exercise its discretion to release frozen funds to pay living expenses or attorney fees, even in instances where the profit from the alleged wrongdoing exceeds the amount of the frozen funds. Whether a defendant has other sources of income from which to pay living expenses or attorney fees is a factor in determining whether frozen assets should be released to pay these costs." *S.E.C. v. Petters, et al.*, 2009 U.S. dist. LEXIS 98015 (U.S.D.C. Minnesota), citing *S.E.C. v. Dowdell*, 175 F.Supp.2d 850, 854 (W.D.

854 (W.D. Va. 2001); *Commodities Future Trading Comm'n. v. Noble Metals*, 67 F.3d 766, 775 (9th Cir. 1995). In *Petters*, the court allowed paid attorney fees equal to "the number of hours reasonably expended [times] the reasonable hourly rate." *Id.* Attorney's fees were also granted in *SEC v. Duclaud Gonzalez de Castilla*, 170 F.Supp.2d 427 (S.D.N.Y.2001). See also, *SEC v. International Loan Network, Inc.*, 770 F.Supp. 678, 680 (D.D.C.1991) (mentioning that it had granted a modification of the asset freeze to permit defendants to retain counsel on their behalf).

In the case of *SEC v. Quinn*, 997 F.2d 287, 289 (7th Cir.1993), while the court froze all of Quinn's assets, the district court "indicated willingness to release small amounts so that he could defend this suit, and on occasion the court did so." *Quinn*, 997 F.2d at 289. See also, *Commodities Future Trading Comm'n. v. Noble Metals*, supra: "...[D]istrict courts should establish procedures that will *permit* the payment of reasonable attorneys fees." (Circuit Judge Stephen Reinhardt, in dissent) (emphasis in original).

In the case of *F.S.L.I.C. v Dixon, et al.*, (835 F.2d 554 (5th Cir. 1987), the court considered and rejected the argument of the F.S.L.I.C. that frozen assets should not be used by the defendant to defend an action brought against that defendant:

As compelling as that argument is, and despite considerable evidence that its factual premise is correct, this suit was brought to establish the defendants' wrongdoing; the court cannot assume the wrongdoing before judgment in order to remove the defendants' ability to defend themselves. The basis of our adversary system is threatened when one party gains control of the other party's defense as appears to have happened here. See, e.g., *United States v. Thier*, 801 F.2d 1463 (1986), *mod. on den of reh'g* 809 F.2d 249 (1987). ***Thus we conclude that some kind of an allowance must be made to permit each defendant to pay reasonable attorneys' fees if he is able to show that he cannot pay them from new or exempt assets***; the burden, however, will be on the defendant to satisfy the court that he can secure the services of an attorney only if assets subject to the freeze order are released. (Emphasis added.) *Id.*, at 565.

In the case at bar, Intervenor has not been accused of wrongdoing. She is not responsible for the losses alleged to have been sustained, and should not be prevented from payment of her reasonable legal expenses due solely to actions of persons other than herself.

As set forth in the affidavit of Intervenor (Exhibit C, attached), Intervenor is a schoolteacher with no outside source of income other than her compensation as a schoolteacher. Intervenor has two (2) dependent children, Chad Ryan Roark and Craig Bryan Roark. Both dependents attend East Central University in Ada, Oklahoma on a full-time basis. Chad Roark is currently residing with Intervenor. Intervenor's sons currently have no outside source of income (other than football scholarship credits) and are dependent upon Intervenor for support. The Freeze Order entered herein has prevented Intervenor from accessing any of her families' savings or other disposable assets. As a result, she is unable to compensate the Law Firm to represent her in this matter.

The Affidavit of Clell I. Cunningham III, the attorney at Dunn, Swan & Cunningham, P.C. responsible for this matter, is attached hereto as Exhibit D.

WHEREFORE, the Law Firm of Dunn, Swan & Cunningham, P.C., prays that the Court enter an Order requiring the Defendants to pay to Plaintiff interim net legal fees of \$4,737.50 and costs of \$57.98.

Respectfully Submitted,

DUNN SWAN & CUNNINGHAM

By:


Clell I. Cunningham III, OBA #2093
2800 Oklahoma Tower
210 Park Avenue

Oklahoma City, Oklahoma 73102
(405) 235-8318

Attorneys for Intervenor

CERTIFICATE OF SERVICE

The undersigned certifies that on the 13 day of January, 2009, a true and correct copy of the above and foregoing Interim Application for Attorney's Fees and Costs was mailed, postage prepaid, to:

Oklahoma Department of Securities
Jennifer Shaw
120 North Robinson, Suite 860
Oklahoma City, OK 73102

Douglas L. Jackson
Gongoll Jackson Law Firm
Post Office Box 1549
Enid, OK 73702

