

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

IN RE:

ROBERT WILLIAM MATTHEWS,

Debtor.

)
)
)
)

Bankr. Case No. 07-10108-BH
Chapter 7

OKLAHOMA DEPARTMENT OF
SECURITIES *ex rel.* IRVING L.
FAUGHT, Administrator, et al.,

)
)
)
)

Plaintiff/Appellee,

)

v.

)

Adversary No. 07-01140-BH

ROBERT WILLIAM MATTHEWS,

)

Defendant/Appellant .

)

and

)

IN RE:

)

MARVIN LEE WILCOX and
PAMELA JEAN WILCOX,

)
)

Debtors.

)

Bankr. Case No. 07-10610-BH
Chapter 7

OKLAHOMA DEPARTMENT OF
SECURITIES *ex rel.* IRVING L.
FAUGHT, Administrator, et al.,

)
)
)

Plaintiff/Appellee,

)

vs.

)

Adversary No. 07-01226-BH

MARVIN LEE WILCOX and
PAMELA JEAN WILCOX,

)
)

Defendants/Appellants.

)

MOTION FOR STAY OF ORDER

Defendants/Appellants, Robert William Matthews (“Matthews”), Marvin Lee Wilcox (“M Wilcox”) and Pamela Jean Wilcox (“P. Wilcox”) (collectively, “Defendants”), move that this Court enter an order staying the Order Granting Summary Judgment entered by this Court on December 12, 2008 (Doc. No. 25), stating as follows:

Procedural History

1. Judgment was entered in the matter Oklahoma Department of Securities ex rel. Irvin L. Faught, Administrator, et al., Case No. CJ-2005-3796 in the District Court of Oklahoma County, State of Oklahoma against Defendant Matthews on December 12, 2006 (Exhibit 2, Journal Entry of Judgment) and against Defendants M. Wilcox and P. Wilcox on January 31, 2007 (Exhibit 1, Order of Judgment) on the claim of unjust enrichment. This matter remains on appeal at the Oklahoma Supreme Court in consolidated case, SD-104262.

2. On January 18, 2007, Matthews filed a petition of bankruptcy under Chapter 7 of the United States Bankruptcy Code (the “Code”) in Bankr. Case No. 10108

3. On July 16, 2007, Plaintiff/Appellee, Oklahoma Department of Securities ex rel. Irvin L. Faught, Administrator, et al. (“Plaintiff”) brought an adversary action against Matthews in Adversary Case No.01140 seeking denial of Matthew’s discharge of Plaintiff’s judgment under the authority of § 523(a)(2) and (19) and revocation of his discharge under § 727(c),(d), and (e) of the Code.

4. On March 2, 2007, M. Wilcox and C. Wilcox filed a petition of bankruptcy under Chapter 7 of the United States Bankruptcy Code in Bankr. Case No. 10610.

5. On October 25, 2007, Plaintiff brought an adversary action against M. Wilcox and C. Wilcox in Adversary Case No. 01226 seeking denial of the Wilcoxs’ discharge of Plaintiff’s

judgment under the authority of § 523(a)(2) and (19) and revocation of his discharge under § 727(c),(d), and (e) of the Code.

6. On January 30, 2008, this Court ordered the consolidation of the two adversary actions for trial purposes only (Doc. No. 11).

7. On December 12, 2008, this Court sustained Plaintiff's motion for summary judgment in the consolidated case, finding that the Defendants had been unjustly enriched by a third party's security fraud and that their discharge of their obligations to Plaintiff is denied pursuant to § 523(a)(19) (Doc. No. 25). The Court has noted that this finding is made without a finding of intent to commit a securities violation by Defendants.

8. On December 22, 2008, Defendants brought their appeals of this Court's orders to District Court in their respective cases (Adv. Case 07-01140, Doc. No. 28 and Adv. Case 07-01126, Doc. No. 30).

Argument and Authority

The appeal here has been brought to address issues related to whether a third-party's securities fraud imposes liability sufficient under § 523(a)(19) of the Code, when lacking any indicia of intent or deceit by the debtors to allow the denial of the discharge to which they would otherwise be entitled. The plain language of § 523(a)(19) states that a denial of a debtor's discharge of debt

. . . that . . . is for . . . the violation of any of the Federal securities laws (as that term is defined in section 3(a)(47) of the Securities Exchange Act of 1934), any of the State securities laws, or any regulation or order issued under such Federal or State securities laws; or . . . common law fraud, deceit, or manipulation in connection with the purchase or sale of any security; and results, before, on, or after the date on which the petition was filed, from . . . (i) any judgment, order, consent order, or decree entered in any Federal or State judicial or administrative proceeding; (ii) any settlement agreement entered into by the debtor; or (iii) any court or administrative order for any damages, fine, penalty, citation,

restitutionary payment, disgorgement payment, attorney fee, cost, or other payment owed by the debtor.

Here, there has never been a finding by any state court of a securities law violation by the Defendants as this Court has recognized. Defendants have been found only to have been unjustly enriched by the unlawful activities of another. This appeal has been brought in good-faith and for no improper or frivolous purpose.

The standard for granting a stay of a bankruptcy court's order pending appeal is well-established with the court considering: (1) whether the movant will suffer irreparable injury absent a stay; (2) whether the opposing party will suffer substantial injury if the stay is granted; (3) whether the movant has demonstrated substantial possibility, although less than likelihood, of a successful outcome on appeal; and (4) the public interests that may be affected. Fed. R. Bankr. P. 8005; In re Lang, 414 F.3d 1191, 1201 (10th Cir. 2005); See also, In re First South Sav. Ass'n., 820 F.2d 700 (5th Cir. 1987); ACC Bondholder Group v. Adelphia communications Corporation, et al, (In re Adelphia Communications Corporation), 361 B.R. 337 (S.D.N.Y. 2007).

Irreparable harm to movants. As evidenced by the Defendants' schedules filed in their respective bankruptcy matter, these Defendants have no meaningful assets upon which to execute. Matthews works for a rural services company earning approximately \$2,000 per month, C. Wilcox is a physical therapist earning approximately \$2,000 per month and M. Wilcox is a farmer with only negligible income, if any. The only non-exempt assets of the parties involve farm livestock that is essential to any hope that Matthews can ever move forward in any meaningful and productive way with his professional life. In other words, but for some limited livestock, there is nothing the Plaintiffs can hope to gain from an aggressive collection effort against the Defendants.

A collections effort by the State of Oklahoma and its Department of Securities, involving their seemingly limitless resources, can cause great, if not irreparable harm to the Defendants. The Defendants are already being charged to appear at hearings on assets and run the risk of their few available assets being seized and sold by the State of Oklahoma. The cost and burden to the Defendants by the State's collection efforts would likely result in the permanent and irreparable denial of the Defendants an opportunity to restart their farming efforts.

No substantial injury to the State. At this point, the Defendants have virtually nothing left from any windfall allegedly enjoyed by the Defendants. As demonstrated by the Defendants' schedules in their respective bankruptcy filings, their remaining assets can only be described as modest. A slight delay in the execution by the State pending the outcome of either the state court appeal or the appeal brought here in the District Court will do little more than cause inconvenience, much less injury to the State

Substantial possibility of a successful appeal. This standard does not request the substantial likelihood, but merely a colorable possibility of a successful appeal. Ruiz v. Estelle, 650 F.2d 555, 565 (5th Cir. 1981). Recognizing that the factors to be used by the court in determining whether to grant a stay are the same as those used in determining whether to grant a preliminary injunction, one court used the test "better than negligible" to describe the level of possibility of success. Matter of Forty-Eight Insulations, Inc., 115 F.3d 1294, 1301 (7th Cir., 1997), quoting Roland Machinery Co. v. Dresser Industries, Inc., 749 F.2d 380, 387 (7th Cir. 1984). Defendants assert that their alleged unjust enrichment, even if affirmed by the Oklahoma Supreme Court, does not satisfy the exception to discharge found in § 523(a)(19). It is indisputable that the Defendants have never had judgment taken against them for violations of an Oklahoma securities law. The State of Oklahoma's own state court action against Defendants

resulted not in judgment against them for violation of the Oklahoma Securities Act (Okla. Stat. tit. 71 §§ 1-413, 501, 701-703, but simply in judgment against them based on Defendants' unjust enrichment from the wrongful activities of another and unrelated party (See Exhibits 1 and 2, State Court Judgments). Unjust enrichment is not a violation of any Oklahoma securities law and certainly does not rise to fraud, deceit or manipulation. Defendants suggest to this Court that there remained sufficient controverted issues of material fact that make the granting of summary judgment against Defendants appropriate.

No effect upon public interest. Here, this Court's staying its order denying discharge of Defendants' debt/judgment to Plaintiff, pending the results of their appeal to the District Court, will only serve to preserve the status quo until such time as this matter is completely and entire resolved. Should the District Court reverse this Court's decision, then it would not serve any public interest to have Defendants so harmed at the hand of the Plaintiff, State of Oklahoma. Conversely, there is no identifiable harm in delaying any collection action that the Plaintiff may take against Defendants.

Waiver of bond. Because of the virtual absence of resources by Defendants, any requirement of a supersedeas bond would result in an absolute and unjust barrier to Defendants' ability to gain any benefit from this stay, should this Court be inclined to grant it. Defendants simply do not have any money. They do not have an ability to fund the purchase of a surety bond. Accordingly, Defendants requests that this Court exercise its discretionary authority and waive the requirement of providing a bond in order to secure this requested stay.

WHEREFORE, PREMISES CONSIDERED, Defendants Robert William Matthews, Marvin Lee Wilcox, and Pamela Jean Wilcox urge this Court to stay its order granting summary judgment against Defendants in favor of the Plaintiff, until such a time as Defendants' appellate

rights have become exhausted or upon further order of this Court. Further Defendants urge this Court to waive any bonding requirement by Defendants.

Respectfully submitted,

PHILLIPS MURRAH P.C.

/s/ Robert J. Haupt

Robert N. Sheets, OBA No. 8152
Robert J. Haupt, OBA No. 18940
Corporate Tower, Thirteenth Floor
101 North Robinson Avenue
Oklahoma City, Oklahoma 73102
405.235.4100 – telephone
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ATTORNEYS FOR DEFENDANTS/
APPELLANTS, ROBERT WILLIAM
MATTHEWS, MARVIN LEE WILCOX,
AND PAMELA JEAN WILCOX

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of January 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing. Based on the records currently on the file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants:

Amanda M. Cornmesser
amc@securities.ok.gov

Gerri L. Stuckey
gstuckey@securities.ok.gov

Jeffrey C. Trent
tlcjtaal@netscape.net

/s/ Robert J. Haupt

FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.

IN THE DISTRICT COURT OF OKLAHOMA COUNTY FEB - 5 2007
STATE OF OKLAHOMA

PATRICIA PRESLEY, COURT CLERK
by Deputy

OKLAHOMA DEPARTMENT OF SECURITIES)
ex rel. IRVING L. FAUGHT, Administrator, et al.,)

Plaintiffs,)

v.)

Case No. CJ-2005-3796

ROBERT W. MATHEWS, et al.,)

Defendants.)

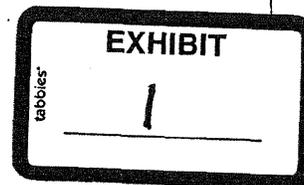
JOURNAL ENTRY OF JUDGMENT

NOW on the 31st day of January 2007, the *Motion for Summary Judgment* relative to Marvin and Pamela Wilcox filed by the Plaintiffs, Douglas L. Jackson, in his capacity as court appointed receiver for the benefit of claimants and creditors of Marsha Schubert and Schubert and Associates, and the Oklahoma Department of Securities was decided by the Court without hearing pursuant to Rule 4(h) of the Rules of the District Courts of Oklahoma.

Based on the briefs filed, the arguments of counsel, and being fully advised in the premises, this Court finds as follows:

1. There is no genuine issue of material fact pertaining to Plaintiffs' unjust enrichment cause of action against Defendants Marvin and Pamela Wilcox; and,
2. Plaintiffs' *Motion for Summary Judgment* against Defendants Marvin and Pamela Wilcox, should be and hereby is granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that summary judgment is entered, jointly and severally, against Defendants Marvin and Pamela Wilcox on Plaintiffs' unjust enrichment cause of action, and Marvin and Pamela Wilcox are ordered to disgorge and/or repay to Plaintiffs the amount of \$509,505.00, plus interest accruing thereon at

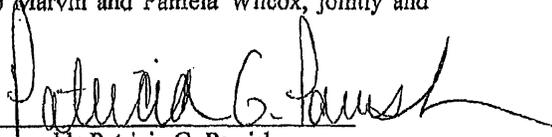


the statutory rate from the date this summary judgment is entered until paid in full, and costs of the action in the amount of \$110,00.

IT IS FURTHER ORDERED that Defendants Marvin and Pamela Wilcox shall disgorge and/or repay the sums of money set forth above, including interest, to Plaintiff/Receiver, Douglas L. Jackson.

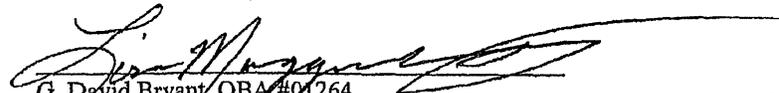
IT IS FURTHER ORDERED that there is no just reason for delay and the Court expressly directs the filing of a final judgment as to Marvin and Pamela Wilcox, jointly and severally.

Date: 1/31/07


Honorable Patricia G. Parrish
Judge of the District Court

Approved as to Form:


Amanda Cornmesser, OBA #20044
Gerri Stuckey, OBA #16732
Melanie Hall, OBA #1209
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Attorneys for Defendants, Marvin and Pamela Wilcox

Approved as to Form:


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Attorneys for Plaintiff/Receiver, Douglas L. Jackson

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 5th day of February, 2007, a true and correct copy of the above and foregoing was mailed by U.S. Mail, with postage prepaid thereon, addressed to:

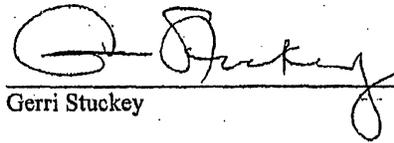
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Gerri Stuckey

FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.
IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

DEC 12 2006

PATRICIA PRESLEY, COURT CLERK
by _____
DEPUTY

OKLAHOMA DEPARTMENT OF SECURITIES)
ex rel. IRVING L. FAUGHT, Administrator, et al.,)

Plaintiffs,)

v.)

Case No. CJ-2005-3796

ROBERT W. MATHEWS, et al.,)

Defendants.)

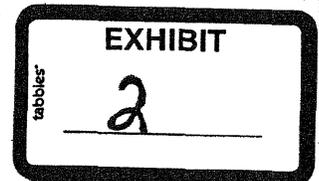
ORDER OF JUDGMENT

NOW on the 12th day of ~~November~~ ^{December} 2006, the Motion for Summary Judgment relative to Robert W. Mathews, filed by the Plaintiff, Oklahoma Department of Securities ("Department"), was decided by the Court without hearing pursuant to Rule 4(h) of the Rules of the District Courts of Oklahoma.

Based on the motions and the briefs filed, this Court finds as follows:

1. The Plaintiff/Receiver joined in the Department's Motion for Summary Judgment relative to Defendant Robert W. Mathews;
2. There is no genuine issue of material fact pertaining to Plaintiffs' unjust enrichment cause of action against Defendant Robert W. Mathews; and,
3. Plaintiffs' Motion for Summary Judgment against Defendant Robert W. Mathews, should be and hereby is granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that summary judgment is entered against Defendant Robert W. Mathews on Plaintiffs' unjust enrichment cause of action, and Robert W. Mathews is ordered to disgorge and/or repay to Plaintiffs the amount of \$524,826.19, plus interest accruing thereon at the statutory rate from the date this



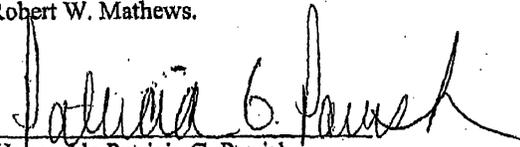
summary judgment is entered until paid in full, and costs of the action in the amount of \$55.00.

IT IS FURTHER ORDERED that Defendant Robert W. Mathews shall disgorge and/or repay the sums of money set forth above, including interest, to Plaintiff/Receiver, Douglas L. Jackson.

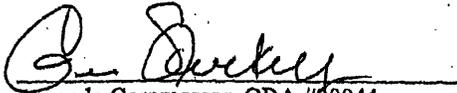
IT IS FURTHER ORDERED that there is no just reason for delay and the Court expressly directs the filing of a final judgment as to Robert W. Mathews.

Date:

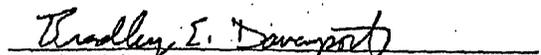
12/12/06


Honorable Patricia G. Parrish
Judge of the District Court

Approved as to Form:



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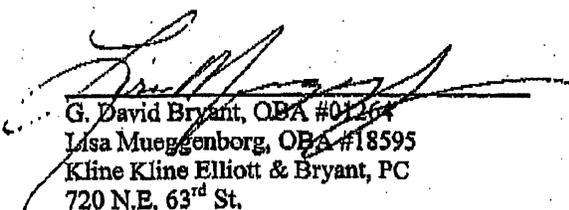

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DEC-07-2006 15:15

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Attorneys for Defendant Robert W. Mathews

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of December 2006, I mailed a true and correct copy of the above and foregoing instrument, postage pre-paid to:

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Attorneys for Defendants Schubert



Amanda Commesser/Bradley E. Davenport