

hearing set:
3-14-03 @ 9:00 AM

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.)

ACCELERATED BENEFITS)
CORPORATION, a Florida)
corporation, et al.,)

Defendants.)

FEB 21 2003
PATRICIA PRESLEY, COURT CLERK
by _____
Deputy

Case No. CJ-99-2500-66

**DEFENDANTS' MOTION FOR STAY OF
ENFORCEMENT OF SALE ORDER AND BRIEF IN SUPPORT**

Pursuant to Okla. Stat. tit. 12, § 990.4(D), Defendants, Accelerated Benefits Corporation ("ABC") and American Title Company of Orlando ("ATCO"), hereby move for a stay of enforcement of this Court's Order dated January 16, 2003, as modified on January 24, 2003 (hereafter collectively the "Sale Order"). As shown below, this Court should stay enforcement of the Sale Order pending the Supreme Court's review of the Sale Order.¹

¹Defendants have appealed the Sale Order and also intend to file an application requesting the Supreme Court to assume original jurisdiction and issue a writ of mandamus prohibiting enforcement of the Sale Order. If the application for original jurisdiction is *granted* but the writ is reviewed and refused on the merits, Defendants have no objection to lifting the stay as any pending appeal will have become moot.

I. BRIEF IN SUPPORT

Okla. Stat. tit. 12 § 990.4(A) provides that “a party may obtain a stay of enforcement of a judgment, decree or final order: (1) while a post-trial motion is pending; (2) during the time in which an appeal may be commenced; or (3) while an appeal is pending.” Section 990.4(B) provides for the types of security that must be tendered depending on the nature of the judgment rendered. None of the categories of judgments or final orders set forth in §990.4(B) apply in this case. Accordingly, § 990.4(D) is applicable. It provides:

In any action not provided for in sub-sections A, B or C, the court may stay the enforcement of any judgment, decree or final order during the pendency of the appeal or while any post-trial motion is pending upon such terms as to bond or otherwise as it considers proper for the security of the rights of the parties.

Defendants request a stay of the Sale Order without the necessity of posting a bond. As shown below, neither Defendants or any of the purchasers who will join in Defendants’ appeal of the Sale Order should have to post a bond; indeed, that would be financially impossible given the amount of money involved. Moreover, it may be that no type of security is necessary because if the Supreme Court vacates the Sale Order, the remedy would be simply to rescind the transaction between the Conservator and the successful bidder.

It is also well settled that the posting of supersedeas bond is neither a prerequisite nor a jurisdictional requirement to appeal. *Grand River Dam Authority v. Eaton*, 803 P.2d 705, 709 (Okla. 1990) (“In our view, failing to post a supersedeas bond is immaterial to the question in the normal circumstance for the reason our case law makes clear that the posting of a supersedeas bond is neither a prerequisite nor a jurisdictional requirement to an appeal.”), *citing Adams v. Unterkircher*, 714 P.2d 193, 196 (Okla. 1985).

The Sale Order calls for the assignment and sale of all life insurance policies held by the Conservator to Infinity Capital Services, Inc. In the event Infinity is unable to consummate a purchase agreement with the Conservator, the Sale Order provides that the beneficiary of the insurance policy be changed from the Conservator to Life Alliance, LLC, in accordance with its purchase offer. Defendants filed an objection to the Conservator’s Motion for Order Approving Sale of Conservatorship Assets on December 6, 2002 and a Supplementary Objection on December 23, 2002. (Said objections are incorporated herein by reference.) Defendants argued, among other things, that an order forcing the sale of the investors’ interest in the policies would be void and unenforceable for the same reasons that the Oklahoma Supreme

Court vacated this Court's previous "Six Percent Order" by Order dated October 3, 2002.

The Oklahoma Department of Securities ("Department") and the Conservator subsequently filed petitions for rehearing, urging the same and additional arguments in support of their claim that the Six Percent Order was valid and enforceable. (Copies of their respective Petitions for Rehearing and Reply briefs are attached hereto as Exhibits A-1 through A-4 without appendices.) The Supreme Court ordered Defendants to file a response to the Petitions (a copy is attached hereto as Exhibit "B"), no doubt because the Supreme Court was apprised by the Conservator and by the Department that larger issues were looming, namely the propriety of the Sale Order. On February 3, 2003, the Oklahoma Supreme Court denied the petitions for rehearing in a 7 to 2 decision.

As the Court will note, even though the Petitions for Rehearing sought reconsideration of the Supreme Court's Six Percent ruling, it is readily apparent from the briefs that the parties were also arguing the propriety of the Sale Order. As expected, the Department and the Conservator fought for reinstatement of the Six percent Order in an effort to pre-establish the validity of the Sale Order. Indeed, the

Department went so far as to ask the Supreme court for guidance as to how the Sale Order could be instituted consistent with due process. Defendants argued that the Sale Order could not pas constitutional muster, even though the conservator had served his Motion via certified mail, return receipt requested.² The Reply Briefs of the Department and the Conservator were devoted almost exclusively to the issue of whether this Court had the power to enter and enforce the Sale Order, and as noted above, the Petitions were denied without comment.

On February 12, 2003, Defendants timely appealed the Sale Order. Defendants assert that the Sale Order suffers from the same infirmities as does the Six Percent Order. Moreover, given that the Six Percent Order has been vacated by the Supreme Court and the review process is no longer available to the Department or to the Conservator, the law set down in the Supreme Court's order vacating the Six percent Order is now the law of the case. *See Lockhart v. Loosen*, 943 P.2d 1074, 1077, N.1 (Okla. 1997) ("The settled-law-of-the-case doctrine bars from re-litigation issues (a) finally settled in the review process; or (b) those that the agreed party has

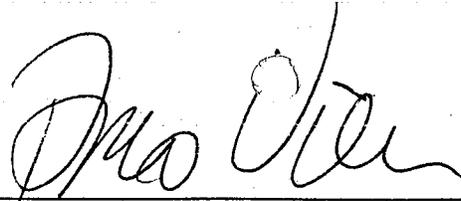
²As Defendants argued in their response Brief, sending the motion to purchasers via certified mail does nothing to cure the due process deficiencies of the Six Percent Order. *See* Defendants' Response at 4-5, attached hereto as Exhibit "B". It suffices to say that certified notice does placate the procedural safeguards that are set in motion through proper service of summons. *Id.*

failed to timely raise in the course of the appellate contest.”), *citing Nichols v. Mid-Continent Pipeline Co.*, 933 P.2d 272, 281 (Okla. 1996). Thus, the Sale Order not only is unenforceable because of lack of jurisdiction and due process, it also violates the settled law of the case.

If the order is enforced and a stay is not issued, both the purchasers and Defendants will suffer irreparable harm. Given that, in all probability, it is reasonably likely that the Sale Order will be set aside by the Oklahoma Supreme Court, either on appeal or pursuant to a writ of mandamus, this Court should stay enforcement of the Sale Order pending the disposition of either method of review. Defendants will, however, apply for a writ as that would clearly be the most expeditious means of resolving the propriety of the Sale Order.

II. CONCLUSION

For the reasons set forth above, the Sale Order should be stayed pending the earlier of (a) the disposition of Defendants’ appeal of the Sale Order or (b) the disposition of Defendants’ application to assume original jurisdiction and request for a writ of mandamus, assuming the application is granted and the writ is reviewed and decided on the merits.



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CERTIFICATE OF SERVICE

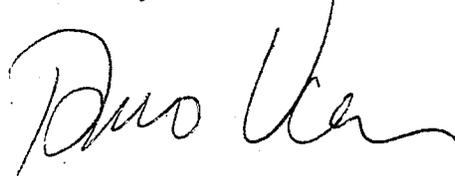
The undersigned hereby certifies that on this 21 day of February, 2003, a true and correct copy of the foregoing was mailed by first class U.S. Mail, postage prepaid thereon, to the following:

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