

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

SEP 20 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.)

Case No. CJ-2005-3799

**PLAINTIFF'S REPLY TO DEFENDANTS' RESPONSE
TO MOTION FOR SUMMARY JUDGMENT**

Plaintiff, Oklahoma Department of Securities *ex rel.* Irving L. Faught, Administrator (Plaintiff), hereby replies to Defendants' response to Plaintiff's Motion for Summary Judgment (Motion).

This case arises out of an extensive "Ponzi" scheme orchestrated by Marsha Schubert individually, and doing business as Schubert and Associates ("Receivership Subjects"). A "Ponzi" scheme has long been described as:

a pyramid-type investment scheme where investors are paid profits from newly attracted investors promised large returns on their principal investments. Typically it is not supported by any underlying business venture. An investor that does receive money is not receiving income on his or her investment, but merely *a return of his or her own principal, or that of another investor.*

In re Financial Federated Title & Trust, Inc., 309 F.3d 1325, 1327 n.2 (11th Cir. 2002) (emphasis added); see *In re Ponzi*, 15 F.2d 113 (D. Mass. 1926).

In connection with the Schubert “Ponzi” scheme, Defendants Barry and Roxanne Pollard (“Defendants” or “Defendants Pollard”) did not receive profits on their investment dollars because no investments were ever made. *See* Exhibit D to Motion, Dan Clarke’s affidavit, ¶ 7. Rather, Defendants received the return of their own principal and/or that of other investors. *See* Exhibit A hereto, Supplemental Affidavit of Dan Clarke, ¶¶ 2 and 3.

Tracing not required

A prevailing theme throughout Defendants’ objection to the Motion involves the commingling and tracing of funds utilized by the Receivership Subjects in the “Ponzi” scheme. Plaintiff does not dispute that most of the investment monies collected by the Receivership Subjects, including monies from Defendants Pollard, were commingled and deposited in accounts to which the proceeds of bank loans and personal funds were also deposited (Commingled Funds). *See* Exhibit D to Motion, Dan Clarke’s affidavit, ¶ 6. Defendants seemingly place added significance on the *possibility* that they may have received their own monies back as purported profits on their investment. However, that is the nature of a “Ponzi” scheme. *Financial Federated*, 309 F.3d 1325.

In orchestrating her investment scheme, Marsha Schubert collected in excess of Two Hundred Million Dollars (\$200,000,000) from numerous individuals over a period of at least 58 months. *See* Exhibit D to Motion, Dan Clarke’s affidavit, ¶¶ 4, 8 and 9. Due to the magnitude of the scheme, a complete tracing of each and every dollar is not possible. While the Plaintiff has been able to determine the likely source of certain of the

payments received by Defendants Pollard,¹ a distinct and complete tracing analysis is not required for Plaintiff to succeed on the merits of this case.

The United States Supreme Court in *Cunningham v. Brown*, 265 U.S. 1 (1924), considered various methods of distribution to duped investors of Charles Ponzi in the original “Ponzi” scheme case. *Cunningham* involved an action by the trustee of Charles Ponzi’s estate to recover as unlawful preferences certain payments made to investors. 265 U.S. 1. After evaluating the various distribution methods, the Supreme Court rejected the application of tracing in circumstances involving multiple victims and commingled funds as a result of a fraud. *Id.* at 12-13.

The Supreme Court’s decision in *Cunningham* was followed by the Oklahoma Court of Civil Appeals in *Adams v. Moriarty*, 127 P.3d 621, 2005 OK CIV APP 105. That case relates to the deposit of an investor’s money in the general operating account used in a “Ponzi” scheme – an account in which the funds of numerous other investors were deposited and commingled. The *Adams* court, citing to the analysis in the case of *In re M & L Business Mach. Co., Inc.*, 59 F.3d 1078 (10th Cir. 1995), said: “[I]n a Ponzi scheme, or other scenario where creditors are almost exclusively defrauded parties, there is no distinguishing characteristic [of the fraudulently obtained assets] which promotes the interests of one [defrauded party] over the other.” 127 P.3d at 625. The court in *Adams* incorporated the rationale of the Supreme Court in *Cunningham* by stating: “[o]nce the party fraudulently collecting funds has commingled the funds of various investors in a single account, those assets lose their character as the peculiar assets of

¹ See Exhibit A hereto, Supplemental Affidavit of Dan Clarke, ¶ 3 and Exhibit 1 thereto. Likewise, Defendants Pollard were the source of certain payments received by other participants in the Schubert investment scheme.

their investor.” *Id.* at 624. Thus, the commingled funds are not specifically traceable. *Id.* at 624-625.

Additionally, it is not realistic for Defendants to claim that they received money that was legitimately distributed from the accounts containing the Commingled Funds. The court in the case of *In re Teltronics, Ltd. v. Kemp*, 649 F.2d 1236 (7th Cir. 1981), in reviewing the Supreme Court’s decision in *Cunningham*, stated that “[s]ince all the funds were obtained by fraud, to allow some investors to stand behind the fiction that Ponzi had legitimately withdrawn money to pay them ‘would be carrying the fiction to a fantastic conclusion.’” *Id.* at 1241 quoting *Cunningham*, 265 U.S. at 13. Based on the money in and the money out of the “Ponzi” scheme, Defendants received more than the total of the amounts of their original investments, and therefore, were unjustly enriched to the detriment of other participants who were not similarly treated.

Irrelevant beliefs

Defendants believe their thoughts and understandings about Marsha Schubert’s operations are relevant to a determination of whether they have been unjustly enriched. The process of evaluating an unjust enrichment claim does not require the Court’s consideration of the Defendants’ beliefs. Unjust enrichment is an equitable ground of recovery when a court determines that “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.” *Lapkin v. Garland Bloodworth, Inc.* 23 P.3d 958, 961, 2001 OK CIV APP 29 (Nov. 2000). Furthermore, who and what Defendants believed about Marsha Schubert’s operations is “irrelevant and insufficient to create any fact issue regarding the underlying scheme.” *In re Ramirez Rodriquez*, 209 B.R. 424, 431 (Bankr. S.D. Tex. 1997).

Attempted Diversion

Defendants' arguments concerning their AXA Equitable insurance transactions and their involvement in the Schubert "Ponzi" scheme overlap and are nothing more than a subterfuge. Defendant Barry Pollard claims he never distinguished between AXA Advisors, AXA Equitable and Marsha Schubert. *See* Transcr. Depo. Pollard 46:18-20 (March 8, 2007), Exhibit B. He also acknowledges that he did not review the periodic statements that he received from AXA Equitable and AXA Advisors. *See* Transcr. Depo. Pollard 44:2-21 (March 8, 2007), Exhibit B. Defendant Barry Pollard simply relied on what Marsha Schubert told him. *See* Transcr. Depo. Pollard 52:19-24 (March 8, 2007), Exhibit B.

Defendants cannot be excused from their failures to review the statements for their AXA Accounts. AXA Equitable sent to Defendants periodic statements reflecting their insurance policy values, billing statements, reminder notices prior to the due date of premium and loan interest payments, and confirmation notices showing premium payments made and all loans taken against the policies. A reasonable investor would not have completely ignored these statements and notices. *See Ebrahimi v. E.F. Hutton & Co., Inc.*, 852 F.2d 516 (10th Cir. 1988).

A simple review of their statements for their AXA Accounts would have provided Defendants with actual notice that their account values did not match what Marsha Schubert orally represented to them. They would have clearly seen what transactions were actually being effected in his AXA Advisor and AXA Equitable accounts (collectively, AXA Accounts). In addition, they would have clearly seen that the transactions occurring as part of the Schubert "Ponzi" were not reflected on the

statements for their AXA Accounts. At the very least, a reasonable investor would have been alerted that something was wrong and been prompted to ask questions.

Receipt of the statements for their AXA Accounts, reminder notices and confirmation notices put Defendants on constructive notice of the information in those documents. *See Zobrist v. Coal-X, Inc.*, 708 F.2d 1511, 1518 (10th Cir. 1983) (“Knowledge of information contained in a prospectus or an equivalent document authorized by statute or regulation, should be imputed to investors who fail to read such documents.”). Even if there had been a fiduciary relationship between the Defendants and Marsha Schubert, and the Department would argue that there was not, Defendants, both competent adults, are not excused from reading their statements. *Carr v. Cigna Securities, Inc.*, 95 F.3d 544 (7th Cir. 1996).

Dan Clarke’s Affidavit

In their response to the Motion, Defendants attack the affidavit of Dan Clarke with broad assertions. In his affidavit, attached as Exhibit D to the Motion, Mr. Clarke testifies that he has reviewed and analyzed the deposits into and the disbursements from four accounts controlled by Marsha Schubert over an almost six year period. Mr. Clarke’s testimony is based on his personal knowledge - knowledge he gained from his review of the bank statements, deposit items, and disbursements by check or wire transfer pertinent to all four accounts. Mr. Clarke’s testimony is also based on his qualifications and experience to perform the necessary analysis of such records.

The efforts of Defendants Pollard to dispute the facts set forth by Plaintiff in its Motion depend primarily on the affidavit of David Morley, Defendants’ accountant for the past seven years. In addition to Plaintiff’s *Motion to Strike Affidavit of David Morley*

that was separately filed and is incorporated herein by reference, Plaintiff specifically replies to Defendants' response as follows:²

Undisputed Fact No. 1

A party opposing a motion for summary judgment must point to *specific* material facts showing that there is a genuine issue for trial. Rule 13, Rules for District Courts of Oklahoma (District Court Rules). Defendants Pollard must present actual evidentiary materials to justify a trial on the merits. *Adams*, 127 P.3d at 624. Defendants Pollard have presented no evidence that the Receivership Subjects were doing anything other than perpetuating a "Ponzi" scheme. Defendants merely state that they "are without specific knowledge and information to admit" that the Receivership Subjects operated the scheme. However, in opposing the Motion, Defendants Pollard cannot claim "ignorance of facts." *Muncrief v. McMullen*, 2005 WL 2897419, *2 (W.D. Okla. Nov. 1, 2005). For these reasons alone, Defendants' response is inadequate to avoid summary judgment on the issue of the existence of a "Ponzi" scheme.

Additionally, Plaintiff would direct the Court to Marsha Schubert's Logan County plea agreement to establish the existence of the "Ponzi" scheme. *See* Exhibit C to the Motion. 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. *See* Exhibit C to Motion, Plea Agreement, ¶ 24, p. 4. Not only did Marsha Schubert specifically label her fraud as a "Ponzi" scheme, but her actions, as she described to the Logan County court under oath, paint the picture of a classic "Ponzi"

² Plaintiff's reply to Defendants' response shall correspond with the undisputed facts as set forth in the motion for summary judgment.

scheme. In connection with this summary judgment motion, Marsha Schubert's guilty plea is sufficient to establish the existence of a "Ponzi" scheme.³ *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.).

Pursuant to Rule 11 of the District Court Rules, Plaintiff hereby apprises the Court that District Judge Patricia Parrish previously ruled on the existence of the Schubert "Ponzi" scheme in connection with similar summary judgment motions in a separate unjust enrichment case brought by Plaintiff against other participants in the investment scheme (CJ-2005-3796).⁴ Like the Motion before this Court, Plaintiff set forth as its first undisputed fact that Marsha Schubert operated a fraudulent "Ponzi" scheme in violation of federal and state laws, including Oklahoma's securities laws. Judge Parrish found that there was no dispute as to the existence of a "Ponzi" scheme operated by the Receivership Subjects. The Court of Civil Appeals of the State of Oklahoma affirmed the decision of Judge Parrish finding that the case arose from "a 'Ponzi' scheme operated from approximately January 2000 through October 2004[.]" See Exhibit C, *Oklahoma Dept. of Securities v. Toepfer*, 2007 OK CIV APP __, __ P.3d __.

³ A hearsay objection to the use of the guilty plea in this manner is without merit based on 12 O.S. § 2803(22), allowing hearsay evidence of a "final judgment, but not upon a plea of nolo contendere, adjudging a person guilty of a crime punishable by death or imprisonment in excess of one (1) year, to prove any fact essential to sustain the judgment"

⁴ The case before the Court is identical to the case against all other relief defendants involved in the Marsha Schubert investment scheme. This matter was transferred from Judge Parrish to this Court due to a perceived conflict.

Undisputed Fact No. 2

In addition to the tracing issue discussed above, Defendants' apparent basis for disputing Fact No. 2 is that Plaintiff has failed to show when the "Ponzi" scheme began and that Defendants are "net winners" as a result of the scheme. The Court need only refer to Exhibit D to the Motion, the affidavit of Dan Clarke, to see that Defendants' assertions are clearly wrong. Mr. Clarke testifies that Marsha Schubert accepted in excess of \$200,000,000 for purported investment purposes beginning in December of 1999 and ending in October of 2004. *See* ¶¶ 4 and 5. Mr. Clarke also testifies that Defendants Pollard invested \$59,100 with the Receivership Subjects and received, directly or indirectly, \$445,268.06 in return, for a net gain of \$386,158.06. *See* ¶¶ 11, 12 and 15.

In addition, Defendants simply assert, without documentary proof, that the monies they received were the proceeds of loans against their life insurance policies. Defendants' assertion is based solely on purported statements made by Marsha Schubert to the Defendants. Furthermore, the Defendants had no legitimate grounds for believing they were receiving more money as loans against their insurance policies than their statements represented they had received. The Defendants directly received loan proceeds from AXA Equitable by checks made payable to the Defendants. *See* Exhibit C, copies of check nos. 520351276 and 520473366. The loans against the policies, the proceeds of which were received directly by Defendants, are not relevant to the amount by which Defendants were unjustly enriched by Schubert's scheme. Those loan proceeds were distributed directly from AXA Equitable to Defendants and were properly reflected on Defendants' AXA Equitable statements.

Defendants Pollard further attempt to dispute Fact No. 2 by simply raising rhetorical questions and innuendos. However, Defendants cannot defeat the summary judgment motion based on such suspicion and speculation. *Muncrief*, 2005 WL 2897419, *2.

Undisputed Fact Nos. 3 and 4

Defendants again claim ignorance by stating that they “are without specific information” regarding the bank accounts controlled by Marsha Schubert. Defendants Pollard further contend that discovery is needed.

It has been over two years since Plaintiff filed this action and Defendants have not requested documents or submitted interrogatories. As a result of their inaction, Defendants now express “hope” that discovery will uncover evidence in their favor. Such hope is not sufficient to defeat the motion for summary judgment. *Bryant v. O'Connor*, 848 F.2d 1064, 1067-1068 (10th Cir. 1988). As emphasized by the appellate court in *Adams v. Moriarity*, 127 P.3d at 624, a trial court’s ruling on a summary judgment motion “must be decided on the record presented, not on a record which is potentially possible[.]” A need to conduct discovery, whether real or perceived, is not sufficient to defeat a summary judgment motion.

Undisputed Fact No. 5

In addition to the irrelevant tracing issue discussed above, Defendants Pollard unsuccessfully dispute the affidavit of Carol Gruis, attached as Exhibit E to the Motion, by addressing the following transactions occurring in 2001:

a. August 5, 2001 Transaction. Defendants appear to be denying their receipt of \$83,621.81 from the Receivership Subjects on or about August 5, 2001. Plaintiff refers

the Court to the accounting summary attached to Morley's affidavit, wherein Mr. Morely has included an entry for the receipt of \$83,621.81 from Marsha Schubert in 2001. *See* Exhibit 6 to Defendants' response to the Motion. Contrary to Defendants' assertion, Plaintiff did not categorize the \$83,621.81 debit entry as a sale of stock. *See* Plaintiff's accounting attached as Exhibit G to the Motion. Rather, the entry is clearly reflected as a cash withdrawal. Since this particular transaction did not involve the sale of stock, the Defendants' 2001 investment losses, as reported on their tax return, have no bearing on the issue before this Court.

b. November 21, 2001 Transaction. Defendants errantly claim that Plaintiff has not credited them with a \$30,000 disbursement from the account of Pollard Farms, LLC, in its accounting. Plaintiff refers the Court to Ms. Gruis' affidavit in which she testifies that Barry Pollard contributed \$30,000 to his brokerage account at AXA Advisors on or about December 3, 2001. *See* Exhibit E to the Motion, affidavit of Carol Gruis, ¶ 5. A copy of the check in question is also attached as Exhibit F to the Motion. The \$30,000 deposit was legitimately credited to Barry Pollard as part of his investment activities through AXA Advisors and was not ever a part of the Commingled Funds used in the Schubert "Ponzi" scheme.

Undisputed Fact Nos. 6-8

Defendants' response to the motion for summary judgment is based, in part, on purported accounting discrepancies addressed in the affidavit of David Morley. However, 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, 12 and 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, 12 and 15 are not sufficient to defeat a summary judgment motion.

Pursuant to Rule 13(c) of the Oklahoma District Court Rules, 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) as it contains hearsay, is not based on personal knowledge, and does not show that Morley is competent to testify as to the matters asserted therein.

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". *Rodriguez*, 209 B.R. 424. Paragraphs 6 and 9-11 of Morley's affidavit do not raise issues of material fact.

Morley's affidavit is not sufficient to defeat a summary judgment motion based on accounting deficiencies.

Undisputed Fact No. 9

In addition to the irrelevant tracing issue discussed above, Defendants also contend that discovery is needed. As emphasized by the appellate court in *Adams v. Moriarity*, 127 P.3d at 624, a trial court's ruling on a summary judgment motion "must be decided on the record presented, not on a record which is potentially possible[.]" Defendants point to no material facts showing there is a genuine issue for trial.

Undisputed Fact No. 10

The Defendants claim that AXA Insurance policies #42 238 937 (Policy 937) and #44 230 443 (Policy 443) were neither owned by the Pollards nor were the Pollards beneficiaries of those policies. The Department concedes that the owner and beneficiary of Policy 937 is Frontier Trust Co. However, Frontier Trust Co. is a trust formed and funded by Barry Pollard for the benefit of his children. *See* Transcr. Depo. Pollard 18:2-7 (February 15, 2007), Exhibit E; Transcr. Depo. Pollard 56:18-21 (March 8, 2007), Exhibit B.

Barry Pollard has been the owner and beneficiary of Policy 443 since shortly after the policy was initially issued and at all times material to this action. Policy 443, although originally issued in June of 1994 in the name of P&K Implement Company, was changed on July 7, 1994, to name Barry Pollard as the policy owner and the beneficiary. *See* Exhibit F, request for change of beneficiary and/or owner and policy information brief, and Exhibit G, 1998 Statement of Insurance Coverage. Furthermore, correspondence and statements thereafter were mailed to Barry Pollard's address at 102 S. Van Buren, Enid, OK. *See* Exhibit H, correspondence and statements. Finally, premiums, other than the \$48,159 paid by the Receivership Subjects from 2002 through 2004, were paid out of Barry Pollard's farming bank account rather than a P&K Implement Company bank account. *See* Exhibit I, check nos. 3298 and 17770. Finally, Pollard, in a letter dated December 22, 2004, acknowledged himself as the owner of Policy 443. *See* Exhibit J, Pollard letter to Equitable.

Undisputed Fact No. 11

Defendants point to no material facts showing there is a genuine issue for trial and provide no evidence to dispute this fact. Schubert's representations are irrelevant and immaterial to determine whether and to what extent the Defendants were unjustly enriched. Furthermore, Defendants' periodic statements, which they received directly from AXA Equitable, clearly showed the investment returns, loan balances and surrender values of their insurance policies.

Undisputed Fact No. 12

Defendants claim they do not have sufficient information concerning which lapsed insurance policies the Department is referencing. However, the Department included copies of the *Notices of Policy Lapse* as Exhibit I to the Motion. The notices clearly show the numbers of the policies at issue, the aforementioned Policy 937 and Policy 443. As to their difficulty in determining the existence and values of their insurance policies, Defendants received statements from AXA Equitable and were on notice by their AXA Equitable statements about the existence and values of their policies.

Undisputed Fact No. 13

Defendants point to no material facts showing there is a genuine issue for trial in their response to undisputed fact no. 13. The only grounds Defendants provide for disputing this fact is that Schubert made representations that led them to believe their premiums were being paid from the investment returns on their insurance policies. Even were those representations relevant and material to a determination of unjust enrichment, a simple review of the statements they received from AXA Equitable would have informed Defendants of the actual status of their insurance policies.

Undisputed Fact No. 14

Plaintiff refers the Court to its response to Fact Nos. 6-8 above. As to the purchase of a bull, Defendants have not attached any proof regarding such a purchase and also refers the Court to Defendants' response to Request for Production No. 31, attached as Exhibit K hereto.

Conclusion

Based on its *Motion for Summary Judgment*, its *Motion to Strike Affidavit of David Morley*, and this reply, summary judgment should be granted to Plaintiff. In the alternative, Plaintiff requests that partial summary judgment be granted as to the existence of the "Ponzi" scheme, the dates of such scheme, and that Defendants were unjustly enriched in an amount to be determined by this Court.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of September 2007, I mailed a true and correct copy of the above and foregoing instrument, postage pre-paid to:

Ronald D. Fulkerson
Shawn D. Fulkerson
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