

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.

MAR - 9 2010

PATRICIA PRESLEY, COURT CLERK

by _____
DEPUTY

Oklahoma Department of Securities)
ex rel. Irving L. Faught,)
Administrator,)
)
Plaintiff,)
)
v.)
)
Bothwell Consulting, LLC, an Oklahoma)
LLC; Lawrence G. Bothwell, an individual;)
Christopher S. VonWerder, an individual;)
and Tommy L. Richardson, an individual,)
)
Defendants,)
)
and)
)
Amy J. Richardson, an individual,)
)
Defendant Solely For)
Purposes of Equitable Relief.)

Case No. CJ-2009-6989

PLAINTIFF'S RESPONSE TO MOTION FOR NEW TRIAL OF DEFENDANTS
BOTHWELL CONSULTING, AN OKLAHOMA LLC AND LAWRENCE G.
BOTHWELL, AN INDIVIDUAL, AND REPLY TO OBJECTION TO
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff, Oklahoma Department of Securities *ex rel.* Irving L. Faught, Administrator, requests that this Court deny the *Motion for New Trial of Defendants Bothwell Consulting, an Oklahoma LLC[,] and Lawrence G. Bothwell, an Individual* (Motion). Further, Plaintiff requests that this Court uphold its *Order Granting Motion for Summary Judgment and Permanent Injunction and Order of Restitution Against Defendants Bothwell Consulting, LLC and Lawrence G. Bothwell* (Final Order) issued on February 11, 2010.

Background

1. On July 24, 2009, a *Petition for Permanent Injunction and Other Equitable Relief* (Petition) was filed by Plaintiff against various defendants including Defendants Bothwell Consulting, LLC and Lawrence G. Bothwell (“Defendants Bothwell” or “Defendants”).

2. On July 24, 2009, a *Temporary Restraining Order, Order Freezing Assets and Order for Accounting* (Order) was issued by this Court against all of the defendants and Relief Defendant Amy J. Richardson.

3. On August 17, 2009, Defendants Bothwell were served with the Petition, Summons and Order by personal service on their attorney, David Ogle.

4. On August 20, 2009, Defendants Bothwell consented to the entry of a temporary injunction with David Ogle appearing before the Court on their behalf.

5. On August 21, 2009, David Ogle filed an entry of appearance on behalf of Defendants Bothwell reserving until September 28, 2009, to answer or otherwise plead. *See* Exhibit 1. Despite the extension of time to answer by September 28, 2009, Defendants Bothwell did not answer or otherwise plead to the matters in the Petition until February 11, 2010.

6. On November 18, 2009, Plaintiff filed a Motion to Enter.

7. On January 21, 2010, *Plaintiff's Motion for Summary Judgment Against Defendants Bothwell Consulting, LLC and Lawrence G. Bothwell* (Motion for Summary Judgment) was filed. The Motion for Summary Judgment provides admissible evidence to prove all material facts alleged in the Petition, that is, (a) Defendants offered and/or sold securities in violation of the Oklahoma Uniform Securities Act of 2004 (Act), Okla. Stat. tit. 71, §§ 1-101 through 1-701 (Supp. 2009); (b) the securities were not registered under the Act; (c) the Defendants were not properly registered under the Act to offer and/or sell securities; and (d) the

Defendants made material misrepresentations and omissions in connection with the offer and/or sale of the unregistered securities.

8. On January 21, 2010, at this Court's scheduling conference, Plaintiff delivered a copy of the Motion for Summary Judgment to David Ogle.

9. On February 4, 2010, David Ogle verbally requested a continuance of the hearing on the Motion for Summary Judgment because of a scheduling conflict. Plaintiff verbally agreed to a continuation to no later than February 24, 2010. Mr. Ogle made no mention of an extension of time to respond to the Motion for Summary Judgment.

10. Six days later, on February 10, 2010,¹ David Ogle sent the Department a proposed order continuing the hearing beyond March 5, 2010, and included within the proposed order the granting of an enlargement of time to respond to the Plaintiff's Motion for Summary Judgment. *See* Exhibit 2. The proposed order was the first time an enlargement of time to respond to the Motion for Summary Judgment was raised by Defendants Bothwell. David Ogle's email, with the proposed order attached, only addressed his need to move the hearing date because of a school trip with his son. The email mentioned nothing about an extension of time to respond in writing to the Motion for Summary Judgment and did not include an inquiry as to whether Plaintiff had an objection to such an extension. *See* Exhibit 3.

11. The Plaintiff did not agree to the Defendants' order as proposed because the hearing would be moved beyond February 24, 2010, and Plaintiff had *not* agreed to an extension of time to respond to the Motion for Summary Judgment.

¹ This was also two days after Defendants were required to respond to the Motion for Summary Judgment pursuant to Rule 13 of the Rules for District Courts of Oklahoma (District Court Rules).

12. On February 11, 2010, *Plaintiff's Application for Summary Judgment Without a Hearing* (Application) was filed with this Court based on the uncontroverted material facts as to the activities of Defendants Bothwell and admissible evidence proving such facts.

13. Following the filing of Plaintiff's Application, Defendants filed an answer to the Petition and an objection to the Motion for Summary Judgment. Both were filed outside of the statutory response time and without leave of Court.

14. On February 11, 2010, this Court issued its Final Order relating to Defendants Bothwell. *See* Exhibit 4.

I. Defendants Bothwell are not entitled to a new trial.

Defendants incorrectly rely on 12 O.S. § 651 in asking this Court to grant a new trial and to vacate the Final Order. A new trial may be granted if any one of the causes set forth in § 651 are met. Defendants claim that several of the provisions of § 651 apply and that they should be granted a new trial. Plaintiff respectfully disagrees.

A. There was no irregularity in the proceedings, no abuse of discretion, and no misconduct.

Plaintiff has properly served and provided sufficient notice to Defendants throughout this case. As demonstrated above, the Defendants' counsel twice failed to follow the statutory requirements to respond within the specified time periods. As provided by 12 O.S. § 2012, Defendants Bothwell were required to serve their answers on the Plaintiff within twenty (20) days after their attorney accepted service of the Petition on their behalf. Being aware of the statutory deadline, Defendants Bothwell reserved time to answer until September 28, 2009. However, no answer was filed until February 11, 2010. Contrary to 12 O.S. § 2006, Defendants did not request the Court's permission to extend their time to answer beyond their September 28, 2009 deadline. Instead, Defendants answered only after Plaintiff's Motion for Summary

Judgment and Application highlighted their failure to comply with the rules of civil procedure.² The answer filed outside of the time allowed by the Oklahoma Pleading Code and without leave of court should have no procedural effect. *Durant Civic Foundation v. The Grand Lodge of Oklahoma*, 2008 OK CIV APP 541 ¶ 8, 91 P.3d 612, 615. The averments by Plaintiff in its petition, a pleading to which a responsive pleading was required, are therefore admitted. 12 O.S. § 2008(D).

In addition to failing to respond timely to the Petition, Defendants Bothwell failed to respond within the Rule 13 requirement to the Motion for Summary Judgment. Rule 13 of the Rules of the District Court provides that a nonmoving party in opposition to such a motion “shall file with the court clerk within fifteen days (15) after service of the motion a concise written statement of the material facts as to which a genuine issue exists and the reasons for denying the motion.”

The request to continue the hearing by David Ogle did not cure the Defendants’ failure to respond to the Motion for Summary Judgment within the required fifteen (15) days. If Defendants Bothwell required additional time to respond, they should have properly requested an extension from the Court before expiration of the prescribed time. 12 O.S. § 2006(B). Defendants’ failure to respond results in the admission by Defendants Bothwell of the facts alleged in the Plaintiff’s Motion for Summary Judgment. *Spirgis v. Circle K Stores, Inc.*, 1987 OK CIV APP 45 ¶ 9, 743 P.2d 682, 684.

There was no agreement to an extension of time for Defendants to respond to Plaintiff’s motion. Accordingly, the need for a hearing on the Motion for Summary Judgment became

² It is not the responsibility of the Plaintiff to inform counsel that he is required to file an answer. While discussions were had regarding settlement of this case, Plaintiff never instructed Defendants Bothwell that there was no need to answer the petition.

moot. Plaintiff acted properly in moving forward with the Application. Since there is no substantial controversy as to the material facts and Plaintiff is entitled to summary judgment as a matter of law, the Court's rendering of summary judgment was proper. Finally, this Court had the authority to rule without a hearing on the Motion for Summary Judgment pursuant to Rules 4(h) and 13(f) of the Rules for District Courts. The Court "had the authority to rule without a hearing and without giving notice of [its] intent to rule." *Day v. Snider*, 2005 OK CIV APP 102 ¶ 17, 125 P.3d 1229, 1233.

There was no irregularity in this proceeding other than Defendants' inaction in responding. This Court did not abuse its discretion in granting the Final Order and Defendants should not be granted a new trial. *Bride v. Bride*, 131 Okla. 176, 268 P. 212 (1928).

B. No error in the assessment of the amount of recovery occurred.

The restitution ordered by this Court is based on the amount set forth in the Motion for Summary Judgment. The Final Order was based on solid evidence before the Court; therefore, the restitution amount is not a reason for a new trial to be granted. *Tulsa City Lines v. Geiger*, 1954 OK 263 ¶ 19, 275 P.2d 325, 328. As described in affidavits attached to Plaintiff's Motion for Summary Judgment, the Plaintiff relied on its financial analysis of Defendants' bank records and materials provided by Defendants Bothwell to arrive at the amount of restitution. *See* Exhibit 5. This same amount is also reflected in the Defendants' accounting that was provided to Plaintiff. *See* Exhibit 6.

The Motion for Summary Judgment was properly supported by sufficient evidentiary materials. The restitution amount was not excessive. Therefore, this Court acted properly in ordering the amount of restitution that it did in its Final Order. *See* Exhibit 4.

C. The decision is sustained by sufficient evidence and no error of law occurred in the issuance of the Final Order.

“A trial court is vested with broad legal discretion in granting or denying a new trial,” and “[u]nless it clearly appears that the trial court erred in some pure simple question of law or acted arbitrarily, its judgment will not be disturbed on appeal.” *Poteete v. MFA Mut.Ins. Co.*, 1974 OK 110 ¶ 24, 527 P.2d 18, 22. As previously stated, the failure to respond by Defendants Bothwell deems the allegations contained in the Plaintiff’s Petition and Motion for Summary Judgment admitted. However, this Court should not only look at the Defendants’ failure to respond timely but must further look at the facts offered to substantiate summary judgment. *Union Oil v. Board of Equalization*, 1996 OK 40, 913 P.2d 1330, 1334. The material facts set forth in the motion show (a) Defendants offered and/or sold securities; (b) the securities were not registered under the Act; (c) the Defendants were not properly registered to offer and/or sell securities; and (d) the Defendants made material misrepresentations and omissions in connection with the offer and/or sale of the unregistered securities.

As further explained below, the substantial rights of Defendants Bothwell were not materially affected by the Court’s decision. As evidenced by the Defendants’ objection to the Motion for Summary Judgment and the following reply thereto, summary judgment is still appropriate in this matter.

II. Summary judgment is appropriate.

Should this Court grant the Defendants’ request for a new trial and vacate the Final Order, Plaintiff wishes to supplement the evidence presented in its Motion for Summary Judgment in reply to the Defendants’ objection to the motion. The exhibits attached hereto definitively show that there are no issues of material fact and that there is sufficient evidence to support summary judgment.

Defendants Bothwell complain that Plaintiff's evidence to support its summary judgment motion includes no documentary evidence but is comprised only of testimony provided through the affidavits of Department employees. Ironically, the only source of evidence presented by Defendants Bothwell in opposition to Plaintiff's motion is the affidavit of Stephen Bowe. Plaintiff contends that Defendants Bothwell cannot present any documentary evidence because the Defendant's own records directly contradict the affirmations made by Mr. Bowe. Samples of these records, which are attached as exhibits hereto, speak for themselves. In spite of the Defendants' desperate efforts, the exhibits clearly demonstrate there is no dispute as to the material facts.

The denials made by Defendants Bothwell in their objection fall into four general categories: the non-involvement of Defendant Lawrence G. Bothwell in the transactions; no offer or sale of a security; no issuer/investor relationship; and no promise of an investment return. Plaintiff responds to the Defendants' denials as follows:

A. Lawrence G. Bothwell played a significant role.

Paragraph 3 of Mr. Lowe's affidavit states in pertinent part as follows: "*Bothwell did not conduct business as Bothwell Consulting.*" See Exhibit 7, ¶ 3. Yet, a bank form signed by Lawrence Bothwell as Managing Member of the limited liability company on October 30, 2008, provides in pertinent part as follows:

I, Lawrence Bothwell, certify that I am a Manager of the above named Limited Liability Company ("LLC") [Bothwell Consulting LLC] organized under the laws of Oklahoma Federal Employers I.D. Number XX-XXXXXXX engaged in business under the trade name of BOTHWELL CONSULTING LLC

See Exhibit 8. Defendant Lawrence G. Bothwell executed other documents with the same or similar language. See Exhibits 9 and 10.

In addition, Defendant Lawrence G. Bothwell executes the “Bothwell Consulting, LLC Debenture, Guarantee Agreement”, attached hereto as Exhibit 11 (Debenture Agreement). Defendant Lawrence G. Bothwell signs the Debenture Agreement as the “principal” authorizing the agreement on behalf of Bothwell Consulting, LLC. See Exhibit 11, page 5.

B. Defendants Bothwell offered and sold securities.

To reject the notion that the Defendants offered and sold securities, Mr. Bowe repeatedly states that “*Bothwell Consulting entered into various note transactions with individual lenders.*” See Exhibit 7, ¶¶ 4, 5, 6, and 7. Mr. Bowe also states that “*Bothwell Consulting never had ‘investors’ which is a securities term of art.*” (Emphasis added.) See Exhibit 7, ¶ 6. Further, Mr. Bowe makes the following statements: “*Neither Bothwell Consulting nor Bothwell accepted money from investors for ‘so-called debentures’ and “[n]either Bothwell Consulting nor Bothwell offered or sold any debentures.*” See Exhibit 7, ¶¶ 4 and 8.

As set forth specifically below, the introductory paragraph of the “Bothwell Consulting, LLC Subscription Agreement Questionnaire”, attached hereto as Exhibit 12, (Subscription Agreement) directly contradicts the assertions by Mr. Bowe:

*The following purchaser questionnaire is essential to ensure that the offering is conducted in full compliance with **Regulation D promulgated under the Securities Act of 1933, as amended (the “Act”).** This purchaser questionnaire will remain on file . . . and will not be presented to any party except as deemed appropriate or necessary by the company to establish that the sale of the **Bothwell Consulting, LLC debenture** to you, did not or will not result in violation of applicable exemptions from registration under the Act being relied upon in connection with the sale of the **debenture(s)**. (Emphasis added.)*

In addition, a reference to the “BC [Bothwell Consulting, LLC] Debentures” appears numerous times in the Subscription Agreement. See Exhibit 12. By definition, a debenture is a security.

71 O.S. § 1-102(32).

Evidence of the offer and sale of debentures by Defendants Bothwell is explicitly demonstrated by the title of the “Bothwell Consulting, LLC **Debenture**, Guarantee Agreement”, attached hereto as Exhibit 11. (Emphasis added.) In addition, the Debenture Agreement repeatedly references the “Principle [sic] Investment.”

C. An issuer/investor relationship was created.

Mr. Bowe affirms that “*Bothwell Consulting never had ‘investors’; that Bothwell ‘did not accept ‘investor funds’; and that “[n]either Bothwell Consulting nor Bothwell received any money from any investors.”* See, Exhibit 7, ¶¶ 6 and 7. The Subscription and Debenture Agreements also contradict these statements made by Mr. Bowe. The Subscription Agreement clearly identifies Bothwell Consulting, LLC as the “Issuer” and the contra party to the agreement is continually referred to as the “Investor.” The term “Investor” appears numerous times in the Debenture Agreement as well. See Exhibits 11 and 12.

D. Defendants promised an investment return.

Mr. Bowe clearly states in his affidavit that “*Bothwell Consulting did not promise any return on investments.*” See Exhibit 7, ¶ 5. However, the following language appears on page 1 of the Debenture Agreement under the section titled “The Debenture”:

*“The **Investor** shall receive 12.5% (Twelve and One-Half Percent) on the PRINCIPLE [sic] INVESTMENT for a term of twelve (12) months or one (1) year”* (Emphasis in original.) See Exhibit 11.

Conclusion

Defendants established a pattern of failing to respond in this matter. The inaction of David Ogle in representing the Defendants, “is imputed to the client and constitutes negligence of the client.” *American Bank of Commerce v. Chavis*, 1982 OK 66 ¶ 9, 51 P.2d 1321, 1324. Such inaction does not constitute a basis for vacating a judgment. Plaintiff provided sufficient

admissible evidence and legal authority as part of its Motion for Summary Judgment to support all material issues in this case, including the amount of restitution ordered by this Court. The Defendants have failed to properly show that a new trial is warranted.

Summary judgment is appropriate when a party demonstrates to the court that no controversy exists as to any material fact, and that the moving party is entitled to judgment as a matter of law. Plaintiff has provided sufficient evidentiary materials to demonstrate that no genuine issue of material fact exists regarding the causes of action for violations of Sections 1-301, 1-402, and 1-501 of the Act. Summary judgment was, and continues to be, appropriate.

Respectfully submitted,



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CERTIFICATE OF MAILING

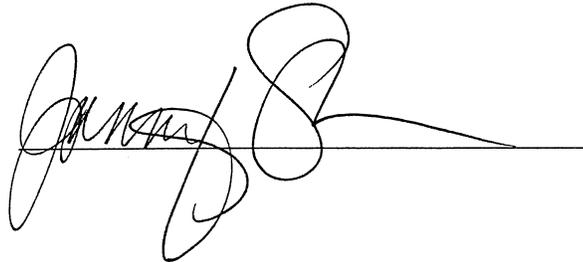
I hereby certify that a true and correct copy of the *Plaintiff's Response to Motion for New Trial of Defendants Bothwell Consulting, an Oklahoma LLC and Lawrence G. Bothwell, an Individual*, was mailed this 9th day of March, 2010, by depositing it in the U.S. Mails, postage prepaid, to the following:

J. David Ogle
100 Park Ave., Suite 500
Oklahoma City, OK 73102

Stephen Parker
416 SW 79th St., # 100
Oklahoma City, OK 73139-8121

Tommy L. Richardson
1511 Tahoe Lane
Yukon, OK 73099

Amy J. Richardson
1511 Tahoe Lane
Yukon, OK 73099

A handwritten signature in black ink, appearing to read 'Amy J. Richardson', is written over a horizontal line. The signature is stylized with large loops and a long horizontal tail.