

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

SEP - 9 2016

RICK WARREN
COURT CLERK

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Oklahoma Department of Securities)
ex rel. Irving L. Faught,)
Administrator,)

Plaintiff,)

v.)

Case No. CJ-2016-2884
Judge Aletia H. Timmons

Nick's Oil & Gas Corporation, an)
unincorporated association;)
Semper Fidelis Exploration & Production,)
LLC, a Texas limited liability company;)
Harbor Resources, LLC, a)
dissolved Texas limited liability company;)
BTJ Consulting, Inc., a Texas corporation;)
and Nicholas P. Yukich, III, an individual,)

Defendants.)

MOTION TO DETERMINE AND STRIKE DEFENSES

Plaintiff, Oklahoma Department of Securities ("Department"), ex rel. Irving L. Faught, Administrator, moves this Court for a preliminary hearing to determine the sufficiency of certain defenses pled by Defendants Nick's Oil & Gas Corporation, Semper Fidelis Exploration & Production, LLC, and Nicholas P. Yukich, III (collectively, the "Defendants").

I. Introduction

The Department filed its petition on June 8, 2016 (the "Petition"). The Court granted the Defendants an extension to file an answer on August 25, 2016, pursuant to their *Motion for Leave to File Answer Out of Time* ("Motion for Leave"). In its Motion for Leave, the Defendants relied upon an *Entry of Appearance and Reservation of Time*

sent to the Department, but not filed with the Court, attached hereto as *Exhibit A* (the “Entry”). Defendants argued that their failure to answer the Petition was due to a “lack of understanding of the legal system” and was the result of “excusable neglect” addressed in 12 O.S. § 2006(B)(2). *Exhibit B* at ¶¶ 4 – 9.¹

The Court granted the Defendants an extension of time pursuant to their Motion for Leave and, therefore, appears to have endorsed the legal validity of the Entry. On August 25, 2016, the Defendants filed their answer asserting certain 12 O.S. §§ 2012(B) and 2008(C) defenses (the “Answer”). Inasmuch as the Court finds the Entry to be legally valid, and pursuant to 12 O.S. § 2012(A)(b), the Defendants have waived certain 12 O.S. §2012(B) defenses, to wit: lack of *in personam* jurisdiction, improper venue and failure to state a claim.

II. 12 O.S. § 2012(B) Defenses

The Defendants have pled certain § 2012(B) defenses that are unavailable to them and/or are insufficient on their face.

a. Subject Matter and *In Personam* Jurisdiction

Defendants deny they are subject to the provisions of the Oklahoma Uniform Securities Act of 2004 (“Act”), Okla. Stat. tit. 71, §§ 1-101 through 1-701 (2011), and the jurisdiction of this Court. Petition and Answer at ¶3.

A court’s subject matter jurisdiction exists when it has the power to proceed in the case before it or to grant the relief sought. “The power to proceed is acquired by an application of a party showing the general nature of the case and requesting relief of the kind the court has power to grant.” *Oklahoma Dep’t of Sec. ex rel. Faught v. Blair*, 2010 OK 16, ¶ 19, 231 P.3d 645, 658, as corrected (Apr. 6, 2010)(citations omitted). *In*

¹ *Exhibit B*’s attachments have not been included.

personam jurisdiction is acquired, in part, by the voluntary appearance by a party before a court. *Conoco, Inc. v. Agrico Chem. Co.*, 2004 OK 83, ¶ 16, 115 P.3d 829, 834, as corrected (Nov. 17, 2004).

As to the nature of this case, Section 1-102(32) of the Act defines “securities”. Civil actions relating to the offer, sale or purchase of a security are authorized by the Act. Section 1-610 of the Act requires offers, sales and purchases of securities to have occurred “in this state” in order for the transactions to fall within the jurisdiction of the Act. Section 1-603 of the Act authorizes the Administrator to file an action for injunctive relief in a district court if the Administrator “believes that a person has engaged, is engaging, or is about to engage in an act, practice, or course of business constituting a violation of [the Act] or constituting a dishonest or unethical practice[.]”

In the case at bar, the Defendants admit the Okmulgee and Muskogee Interests are securities. Petition and Answer at ¶ 21. The Department has pled the Defendants’ offer and sale of the Okmulgee and Muskogee Interests, and related business transactions, occurred in and/or from Oklahoma. Petition at ¶¶ 22, 34 and 35. The filing of the Petition evidences the belief that violations of the Act have occurred. Finally, the Defendants appeared before the Court, and answered, on August 25, 2016.

Subject matter and *in personam* jurisdiction have been firmly established. Therefore, these defenses are insufficient and, inasmuch as the Court finds the Entry legally valid, the *in personam* defense is waived in accordance with 12 O.S. § 2012(A)(b).

b. Venue

Defendants deny that sufficient facts were pled by the Department to establish venue; therefore, the Defendants deny Oklahoma County as the proper venue. Answer at ¶ 4; 12 O.S. § 2008(D).

Section 1-603(A) of the Act defines the venue for an action brought by the Administrator under the Act. Specifically, this section states, in part, that the Administrator may maintain an action in “the district court of Oklahoma County[.]” Therefore, this defense is insufficient and, inasmuch as the Court finds the Entry legally valid, waived in accordance with 12 O.S. § 2012(A)(b).

c. Failure to State a Claim

The Defendants claim the Department has “failed to state claims for relief against Defendants.” Answer at pg. 4, Item No. 7. Although listed as an “Affirmative Defense”, the Department believes this to be a 12 O.S. § 2012(B) defense.

Oklahoma is a notice pleading state. As stated by the Oklahoma Supreme Court, notice pleading “merely requires that the pleading shall contain ‘[a] short and plain statement of the claim showing that the pleader is entitled to relief.’” *Gens v. Casady Sch.*, 2008 OK 5, ¶ 9, 177 P.3d 565, 569 (citing 12 O.S. § 2008).

In its Petition, the Department clearly and unequivocally states its claims against the Defendants and its entitlement to relief. Further, the Department invokes appropriate statutes and legal theories and states facts consistent with all its allegations. Therefore, this defense is insufficient and, in so much as the Court finds the Entry legally valid, waived in accordance with 12 O.S. § 2012(A)(b).

III. 12 O.S. 2008(C) Affirmative Defenses

The Defendants have pled affirmative defenses that appear insufficient on their face and should be stricken.

a. Personal Knowledge

Affirmative Defense No. 1 states the Department “has no personal knowledge of the allegations[.]” Answer at pg. 4, Item No. 1.

Generally, “personal knowledge” is an evidentiary requirement regarding the competency of a witness. 12 O.S. § 2602. Pleadings are not required to be verified or accompanied by an affidavit unless “otherwise specifically provided by rule or statute[.]” 12 O.S. § 2011. Further, and in accordance with 12 O.S. § 2011(B)(3), the undersigned attorney’s signature to the Petition certifies that, to the best of said attorney’s knowledge, information and belief, the Petition’s allegations and factual contentions have, or are likely to have, evidentiary support. Therefore, this defense is insufficient.

b. Estoppel

Affirmative Defense No. 2 claims the Department “is estopped by virtue of unclean hands of the parties who purchased the fractional working interests.” Answer at pg. 4, Item No. 2. In addition, Affirmative Defense No. 3 claims the Department “is estopped from bringing its claims by virtue of fraud upon Defendants by the third parties who purchased the fractional working interests[.]” Answer at pg. 4, Item No. 3.

Generally, an estoppel defense is unavailable against state agencies unless “it would further a principle of public policy or interest.” *Indiana Nat. Bank v. State Dep’t of Human Servs.*, 1993 OK 101, ¶ 23, 857 P.2d 53, 64 (citation omitted). An element

necessary to establish equitable estoppel is “a false representation or concealment of facts[.]” *Id.* at ¶ 24.

The Defendants have not pled a public policy or interest that would be furthered by its assertion of estoppel against the Department. In addition, an estoppel defense is unavailable against the Department when: (1) the Department was not a party to, or a participant in, any of the transactions at issue; (2) the Department shares no degree of culpability in connection with the conduct of any third party and comes before the Court with clean hands; and (3) no claims of “false representation or concealment of facts” have been pled against the Department. See *Tulsa Torpedo Co. v. Kennedy*, 1928 OK 383, ¶¶ 4 – 10, 131 Okla. 159, 268 P. 205, 207 (citations omitted); *Camp v. Camp*, 1945 OK 234, ¶ 8 - 11, 196 Okla. 199, 200 - 201, 163 P.2d 970, 972 (citations omitted); *Indiana Nat. Bank.* at ¶24. Therefore, these defenses are insufficient.

c. Indispensable Parties

Affirmative Defense No. 6 claims the Department failed to name indispensable parties. Answer at pg. 4, Item No. 6.

The Defendants have not pled the identity of the indispensable parties. In accordance with 12 O.S. § 2019, these parties must be identified and, if these parties are determined to be indispensable, must be joined in order for the case to proceed. Therefore, this defense is insufficient.

d. Separate Action, Same Issues

Affirmative Defense No. 8 claims there is “another action pending with the same issues as alleged in the Petition[.]” Answer at pg. 4, Item No. 8.

This defense is improper because the Department is not a party to any other action, before any other court, regarding the transactions contained in the Petition. In addition, the Department's action is regulatory in nature, brought to enforce the Act and to further the public interest. The issues and interests involved in this case are not the same as in any other, even if certain facts and applicable laws may be. Therefore, this defense is insufficient.

IV. Authorities

Pursuant to 12 O.S. § 2012(C) and (D), and upon motion of a party, defenses shall be heard and determined before trial unless the court orders their deferment. In addition, if a motion to strike an insufficient defense is not raised as outlined in 12 O.S. § 2012(D), the motion is waived. 12 O.S. § 2012(F)(1)(b).

In the case at bar, the Defendants raise several defenses that have been waived, are unavailable and/or insufficient. Further, several defenses raised, if determined sufficient as a matter of law, would necessitate amendment of the Petition or the dismissal of the case.

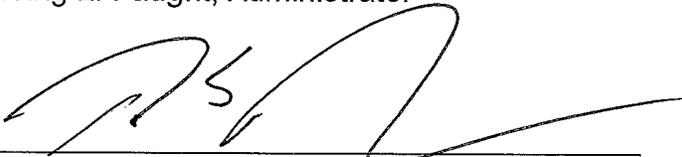
V. Conclusion

In the interest of justice, efficiency and equity, and to allow the Department to take any necessary corrective actions in a timely manner, Plaintiff requests a determination by the Court of certain defenses asserted by the Defendants.

Respectfully submitted,

OKLAHOMA DEPARTMENT OF SECURITIES
Irving L. Faught, Administrator

By:



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CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 9th day of September, 2016, a true and correct copy of the above and foregoing *Motion to Determine and Strike Defenses* was mailed via electronic and first-class US mail, with postage prepaid thereon, and addressed to:

Stephen Q. Peters, Esq.
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steve@tplawtulsa.com

Attorney for Defendants
Nicholas P. Yukich, III
Semper Fidelis Oil & Gas, LLC
Nick's Oil and Gas Corp.


Robert Fagnant

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

Oklahoma Department of Securities)
ex rel. Irvin L. Faught)
administrator)
Plaintiffs,)
vs.) Case No. CJ-2016-2834
Judge Unknown
Nick's Oil & Gas Corp. an unincorporated)
corporation; Semper Fidelis Exploration &)
Production, LLC a Texas Limited Liability)
Corporation and Nicholas P. Yukich III, individual)
Defendants.

ENTRY OF APPEARANCE AND RESERVATION OF TIME

Nick's Oil & Gas Corp., Semper Fidelis Exploration & Production, LLC and Nicholas P. Yukich III, hereby enters his appearance in the above-captioned case and reserves an additional twenty (20) days from the current answer date in which to answer or otherwise plead.



Nicholas P. Yukich III
316 N. MAIN STREET
BRISTOW, OKLAHOMA 74010
(918) 367-9012
(214) 697-7325

CERTIFICATE OF SERVICE

I certify that on the 30th day of June, 2016, a copy of the above and foregoing was mailed, via U.S. Mail to the following:

Robert Fagnant (OBA # 30548)
204 North Robinson Avenue, Suits #400
Oklahoma City, Ok 73102
Telephone: 405-280-7700



Nicholas P. Yukich III

EXHIBIT

A



FILED IN DISTRICT COURT
IN THE DISTRICT COURT OF OKLAHOMA COUNTY OKLAHOMA COUNTY
STATE OF OKLAHOMA

AUG 18 2016

RICK WARREN
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89_____

Oklahoma Department of Securities *ex rel.*)
Irving L. Faught, Administrator,)
)
Plaintiff,)

vs.)

Case No. CJ-2016-2884

Nick's Oil & Gas Corporation, an)
Unincorporated association;)
Semper Fidelis Exploration & Production,)
LLC, a Texas limited liability company;)
Harbor Resources, LLC, a dissolved)
Texas limited liability company;)
BTJ Consulting, Inc., a Texas corporation;)
and Nicholas P. Yukich, III, an individual,)
)
Defendant.)

Judge Aletia H. Timmons

**DEFENDANTS' OPPOSED MOTION FOR LEAVE
TO FILE ANSWER OUT OF TIME**

COME NOW Defendants, Nick's Oil & Gas Corporation, Semper Fidelis Exploration & Production, LLC, and Nicholas P. Yukich, III, ("Moving Defendants") by and through their attorney of record, Stephen Q. Peters of Tomlins & Peters, PLLC, and, pursuant to 12 O.S. §2006(B)(2), respectfully moves the Court for leave to file their Answer to the Petition filed herein out of time. In support of this Motion, Moving Defendants would show the Court the following:

1. The undersigned counsel has conferred with Robert Fagnant, counsel for Plaintiff, by telephone and requested leave to file an answer out of time. Mr. Fagnant has advised he is opposed to Moving Defendants' Motion for Leave to File Answer Out of Time.

2. Plaintiff filed its Petition on June 8, 2016.

EXHIBIT
B

3. Moving Defendants acknowledge that they received service of a copy of the Petition filed herein on June 18, 2016.

4. On June 30, 2016, Nicholas P. Yukich, III on behalf of Nick's Oil & Gas Corporation, Semper Fidelis Exploration & Production, LLC and himself mailed an Entry of Appearance and Reservation of Time to Plaintiff's counsel, but failed to file it with the Court because of a lack of understanding of the legal system.

5. Moving Defendants had previously retained the undersigned counsel to represent them in a lawsuit with almost identical claims styled *Brian Allen, et al. v. Semper Fidelis Oil & Gas, LLC, et al.*, U.S. District Court, Northern District of Oklahoma Case No. 16-CV-00200-GKF-TLW. (See Exhibit "A") The Moving Defendants have now requested the undersigned to represent them in the instant action.

6. Pursuant to the provisions of §2006(B)(2), the Court is at liberty to enlarge the time for answering a petition where the failure to answer a petition was the result of excusable neglect.

7. The Oklahoma Supreme Court has held that the excusable neglect standard permits a court "to accept late filings caused by inadvertence, mistake, or carelessness, as well as by circumstances beyond the party's control." *Humphries vs. Lewis*, 2003 OK 12, ¶14, 67 P.3d 333, quoting with approval *Pioneer Iv. Servs. Co. v. Brunswick Assocs. Ltd. Partnerships*, 507 U.S. 380, 388 (1993). The *Pioneer* court further stated that the question of whether neglect is excusable:

. . . is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include . . . the danger of prejudice to the [non-moving party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

Pioneer at 395.

8. The Moving Defendants' original time to file an answer or otherwise plead was July 8, 2016. With Defendants' Entry of Appearance and Reservation of Time, the answer would have been extended automatically to July 28, 2016. Moving Defendants are now requesting to file an answer 20 days late. There is no prejudice to Plaintiff and the danger of allowing Plaintiff to prevail other than on the merits is discouraged strongly by the Oklahoma Supreme Court. *Nelson v. Nelson*, 1998 OK 10, ¶23, 954 P.2d 1219, 1228. Default judgments are not favored. *Singleton v. LePak*, 1967 OK 37, ¶10, 425 P.2d 974, 977.

9. Moving Defendants believed they had entered an appearance and were attempting to retain counsel. Moving Defendants respectfully request leave to file an answer out of time pursuant to Okla. Stat. tit. 12 §2006(B)(2).

10. A copy of Moving Defendants' proposed Answer to the Petition requested to be filed herein is attached hereto as Exhibit "B" and the original thereof is prepared for filing upon entry of the Court's Order granting leave to file the Answer out of time.

WHEREFORE, Moving Defendants respectfully pray that this Court grant them leave to file their Answer out of time and for such other and further relief as the Court may deem just and proper.

Respectfully submitted,



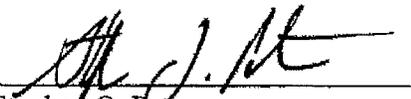
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Semper Fidelis Exploration & Production, LLC
and Nicholas P. Yukich, III

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of August, 2016, the above and foregoing instrument, was placed in the U.S. mail with postage prepare thereon, to:

Robert Fagnant
Oklahoma Department of Securities
204 North Robinson Avenue, Suite 400
Oklahoma City, OK 73102



Stephen Q. Peters