

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

FILED IN DISTRICT COURT
OKLAHOMA COUNTY

APR - 7 2017

RICK WARREN
COURT CLERK

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

Plaintiff,)

v.)

Secure Operations Group, LLC, an)
Oklahoma limited liability company;)
Johnnie Louis McAlpine, an individual;)
Cindy Kay McAlpine, an individual;)
George Franklin Conner, an individual;)
and Cody Belitz, an individual,)

Defendants.)

Case No. CJ-2017-1138

Judge Roger H. Stuart

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 Johnnie Louis McAlpine, Cindy Kay McAlpine and Cody Belitz (collectively, the “Defendants”).

I. Introduction

The Department filed its petition on February 27, 2017 (the “Petition”). On March 20, 2017, the Defendants filed a *Special Entry of Appearance and Reservation of Time*. On April 5, 2017, the Defendants filed their answer to the Petition asserting certain 12 O.S. §§ 2008(C) and 2012(B) defenses (the “Answer”).

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

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

a. Waiver

Defendants pled the Department's claims are barred by the doctrine of waiver. Answer at Item No. 58(a)(1).

Waiver is "an intent on the part of the party alleged to have waived a right[.]" *Bay Petroleum Corp. v. May*, 1953 OK 370, ¶ 6, 264 P.2d 734, 736. Ordinarily, this defense is invoked in actions in contract. *Vernon's Okla. Forms 2d*, OUJI-CIV 18.11, 23.24 and 23.39 (2d ed.).

This defense is improper because the Department has never, explicitly or implicitly, shown any intent to waive any rights granted to it nor is the Department in privity of contract with the Defendants. The Department's action is regulatory in nature, brought to enforce the Act and to further the public interest. At no time has the Department shown any intention to abandon or relinquish any of its regulatory or enforcement rights or duties or entered into any contract with the Defendants. Therefore, this defense is insufficient.

b. Estoppel

The Defendants pled the Department's claims are barred by the doctrine of estoppel. Answer at Item No. 58(a)(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). The Defendants

have not pled a public policy or interest that would be furthered by its assertion of estoppel against the Department and, because of the facts of this case, a plausible one does not appear to exist.

Further, 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, this defense is insufficient.

c. Release

The Defendants pled the Department’s claims are barred by the doctrine of release. Answer at Item No. 58(a)(4).

A release is a valid and enforceable contract when “(1) an attempt to excuse one party from liability is expressed in clear, definite and unambiguous language, (2) the contract is made at arm's length with no vast disparity of bargaining power between the parties, and (3) when it is not contrary to public policy.” *Thompson v. Peters*, 1994 OK CIV APP 97, ¶ 4, 885 P.2d 686, 688 (citations omitted). Ordinarily, this defense is invoked in actions in contract. *Vernon's Okla. Forms 2d*, OUJI-CIV 23.40 (2d ed.).

At no time has the Department attempted, in any way, shape or form, to excuse the Defendants from liability under the Act. Such a release would be contrary to the

public policy charging the Department with regulation of securities and enforcement of the Act. As stated above, the Department is not in privity of contract with any of the Defendants. Therefore, this defense is insufficient.

d. Statute of Limitations

The Defendants pled the Department's claims are barred by the doctrine of statute of limitations. Answer at Item No. 58(a)(7).

As stated by the Oklahoma Supreme Court, unless "statutes provide to the contrary...statutes of limitation do not apply to states when suing in their sovereign capacity." *State ex rel. Land Office Comm'rs v. Hall*, 1942 OK 41, ¶ 12, 128 P.2d 838, 840. Statutes of limitation in private suits are provided for in Section 1-509 of the Act while criminal prosecution actions are governed under Title 22. The Department, in civil actions, enforces the Act pursuant to Section 1-603 of the same. Section 1-603 does not include a statute of limitation provision.

This defense is improper because Section 1-603 of the Act, under which this action was filed, does not provide for a statute of limitation. Further, pursuant to *State ex rel. Land Office Comm'rs v. Hall*, no statute of limitation applies to the Department's action before the Court. Therefore, this defense is insufficient.

e. Laches

The Defendants pled the Department's claims are barred by the doctrine of laches. Answer at Item No. 58(a)(8).

The Defendants claim that the Department's alleged laches are prejudicial to them. In Oklahoma, "the doctrine of laches does not apply to cases not of equitable cognizance" and is therefore not "a defense to an action at law." *Short v. Am.*

Biomedical Grp., Inc., 2002 OK CIV APP 114, ¶ 9, 60 P.3d 518, 520. Even in equitable proceedings, laches “are generally not available against the state and its agencies acting in a sovereign capacity, unless application of equitable defenses would further a principle of public policy or interest.” *Oklahoma Dep’t of Sec. ex rel. Faught v. Blair*, 2010 OK 16, ¶ 28, 231 P.3d 645, 662, as corrected (Apr. 6, 2010) (citations omitted); also see 30A C.J.S., Equity § 114 (1965) (governments and their agencies are generally not barred by laches when enforcing a public or governmental right). An action at law is a “civil suit stating a legal cause of action and seeking only a legal remedy.” ACTION, Black’s Law Dictionary (10th ed. 2014).

As stated by the Oklahoma Supreme Court, laches are not generally available against the Department. The Defendants have not pled a public policy or interest that would be furthered by its assertion of laches against the Department. The case at bar stated legal causes of action, and prays for legal remedies pursuant to Section 1-603 of the Act thereby making the equitable defense of laches not available to the Defendants. Therefore, this defense is insufficient.

f. Assumption of Risk

The Defendants pled the Department’s claims are barred by the doctrine of assumption of risk. Answer at Item No. 58(a)(9).

The Oklahoma Supreme Court has outlined three situations in which an assumption of risk defense may arise: (1) “where a plaintiff expressly agrees that the defendant will not be held accountable for plaintiff’s well being or lack thereof”; (2) “where the two parties stand in some sort of voluntary relationship by which the plaintiff assumes such a risk so as to destroy any duty which defendant might owe the plaintiff”;

and (3) “voluntarily exposing oneself to a known danger, even though not negligent in so doing.” *Byford v. Town of Asher*, 1994 OK 46, ¶13, 874 P.2d 45, 48.

This case involves violations of the Act and is an action relating to the offer and sale of securities and regulation of the same by a government agency. Assumption of risk, and the situations in which this defense is applicable, have no applicability to the case at bar. Therefore, this defense is insufficient.

III. 12 O.S. § 2012(B)(6) – Failure to State a Claim

The Defendants claim the Department has “fail[ed] to state a claim upon which relief can be granted” against the Defendants. Answer at Item No. 58(a)(2). Although Defendants list this defense as affirmative, the Department believes it is appropriately classified as a 12 O.S. § 2012(B) defense and, therefore, its sufficiency is to be properly determined pursuant to 12 O.S. § 2012(C).

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.

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 are insufficient and/or inapplicable. 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 the defenses discussed herein.

Respectfully submitted,

OKLAHOMA DEPARTMENT OF SECURITIES
Irving L. Faught, Administrator

By:



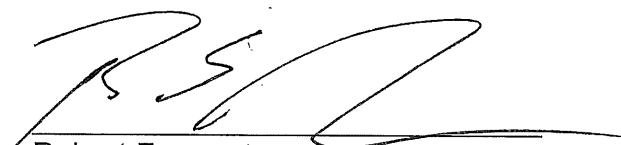
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CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 7th day of April, 2017, a true and correct copy of the above and foregoing *Motion to Determine and Strike Defenses* was mailed via first-class US mail, with postage prepaid thereon, and addressed to:

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