

No. 98,854

FILED
COURT OF CIVIL APPEALS
STATE OF OKLAHOMA

JAN 7 2004

MICHAEL S. RICHIE
CLERK

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

OKLAHOMA DEPARTMENT OF SECURITIES
ex rel., IRVING L. FAUGHT, ADMINISTRATOR,

Plaintiff/Appellee

v.

ACCELERATED BENEFITS CORPORATION and
AMERICAN TITLE COMPANY OF ORLANDO,

Defendants/Appellants

v.

TOM MORAN,

Court-Appointed Conservator/Appellee

**MOTION OF OKLAHOMA DEPARTMENT OF SECURITIES TO STRIKE OR IN
THE ALTERNATIVE TO DISREGARD SPECIAL APPEARANCES
AND BRIEF IN SUPPORT**

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
CASE NO. CJ-99-2500
THE HONORABLE DANIEL L. OWENS
ACTION FOR VIOLATIONS OF THE OKLAHOMA SECURITIES ACT

January 7, 2004

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INTRODUCTION

This appeal was filed by Accelerated Benefits Corporation and American Title Company of Orlando (collectively, "Appellants") on February 12, 2003. The appeal challenges the order of the District Court of Oklahoma County ("District Court") approving a sale of assets by a conservator. Appellants filed their Brief in Chief on September 4, 2003. On October 4, 2003, answer briefs were filed by the Oklahoma Department of Securities ("Appellee") and the Conservator, Tom Moran ("Conservator"), as was an amicus curiae brief by the North American Securities Administrators Association, Inc. On November 13, 2003, Appellants filed a reply brief.

Beginning on December 4, 2003, three weeks after the end of the briefing cycle, seven documents entitled "Special Appearance in Support of Appeal of Order Approving Sale of Conservatorship Assets" ("Special Appearances") were filed in this appeal, by "purchasers" or "investors" of Appellants ("Investors"). On December 11, 2003, identical Special Appearances were filed by nine other purported Investors of Appellants. On December 18, 2003, six more Special Appearances were filed by purported Investors of Appellants. This matter involves approximately 5,400 Investors.

The Investors named in the Special Appearances are not parties to the District Court case from which this appeal was taken and have not sought to intervene in the District Court case. The Certificates of Mailing for most of the Special Appearances were actually signed by the attorneys for Appellants. Many of the Special Appearances were not received directly from Investors but were faxed from Appellants' business location in Houston, Texas. Appellee moves that this Court strike, or in the alternative disregard, the Special Appearances for these reasons and for those stated below.

ARGUMENT

I. INVESTORS ARE NOT PARTIES TO THE DISTRICT COURT PROCEEDING OR THIS APPEAL

The Investors who purportedly filed the Special Appearances are not parties to the District Court case from which this appeal was filed and have not sought to intervene in the case. Appellee was not required to join the Investors as parties to its securities enforcement action under the Oklahoma Securities Act (the "Act"), Okla. Stat. tit. 71, §§ 1-413, 501, 701-703 (West 2003). While the Investors have an interest in Appellee's civil enforcement case against Appellants, their interest was adequately represented in the case, and they retained private rights of action that were not affected by such action. Thus, they are not necessary parties or persons entitled to intervene. *Feigin v. Alexa Group, Ltd.*, 19 P. 3d 23 (Colo. 2001), *S.E.C. v. Everest Management Corp.*, 475 F.2d 1236 (2d Cir. 1972).

Even if the Investors were proper parties to the appeal Investors would have been required to file an Entry of Appearance in a timely manner. Supreme Court Rule 1.5 requires:

All parties to any proceeding in the appellate courts shall immediately, but no later than filing the first document in the appellate court, file an Entry of Appearance on the forms set forth in Rule 1.301, by counsel or an unrepresented party representing himself or herself. Copies shall be served on all other parties.

An Entry of Appearance has not been filed by any Investor in this appeal. Appellee respectfully requests that this Court strike, or in the alternative disregard, the Special Appearances.

II. INVESTORS HAVE NOT BEEN GRANTED THE AUTHORITY TO APPEAR AS AMICUS CURIAE

A non-party to an appeal can participate in an appeal through an amicus curiae brief.

Rule 1.12(a) of the Supreme Court Rules provides in pertinent part:

Amicus Curiae Brief May Be Filed Either by the Consent of the Parties or by Leave of the Chief Justice of the Supreme Court.

(1) Appeal. A brief of an amicus curiae which is confined to the issues raised by the parties and which does not exceed twenty-five (25) pages may be filed during the briefing cycle of an appeal if it is accompanied by written consent of all the parties. If consent is denied by any of the parties, the procedure in subparagraph 1.12(b) shall be followed.

Rule 1.12(b) of the Supreme Court Rules provides in pertinent part:

Application to File Amicus Curiae Brief Without Consent by Parties.

(1) During Briefing Cycle of Appeal. The amicus curiae shall file a statement not to exceed five (5) pages which concisely discloses the nature and extent of the applicant's interest, states any facts or questions of law which may not be presented adequately by the litigants, and the relevancy of these facts or questions of law to the disposition of the cause. The amicus curiae shall mail a copy of the statement to the parties. If an objection is not filed within ten (10) days, consent shall be deemed to have been granted. If an objection is filed, the Supreme Court shall review the statement and the objections to determine whether to allow the filing of the amicus brief.

Investors did not seek the consent of Appellee to file an amicus curiae brief and did not file the statement prescribed in Rule 1.12(b) of the Supreme Court Rules.

Further, the consideration of such a filing when the briefing cycle has concluded would be contrary to Rule 1.12(d) of the Supreme Court Rules that provides in part:

Assignment and Disposition of Cause Not to be Delayed by Filing Amicus Curiae Brief.

(1) Appeals. The assignment and disposition of a cause will not be delayed pending action on a motion for leave to file an amicus curiae brief or to await the filing of a brief amicus curiae. **If the filing of an amicus curiae brief is allowed either by the consent of the parties or by the Supreme Court, it must be filed within the briefing cycle set for the party supported,** and in conformance with the applicable provisions of Rules 1.10 and 1.11. Extraordinary cause must be shown before an amicus curiae will be permitted to file a brief at any time other than during the normal briefing cycle or as allowed by Rule 1.12(g). No reply brief of an amicus curiae may be filed. (Emphasis added.)

The briefing cycle concluded three weeks before the filing of the first of the Special Appearances. No extraordinary cause has been shown that would now permit the filing of an amicus curiae brief. Further, considerable delay would result in allowing non-parties to begin the process of scheduling amicus curiae briefs to be filed. Appellee respectfully requests that this Court strike, or in the alternative disregard, the Special Appearances.

III. NO AUTHORITY EXISTS FOR SPECIAL APPEARANCES IN A SUPREME COURT APPEAL

Finally, there exists no authority in the Supreme Court Rules for the filing of special appearances in an appeal from a judgment or final order of the District Court. Without such authority, Investors may not participate in this appeal and may not create filings that do not comply with the Supreme Court Rules. Rule 1.2 of the Supreme Court Rules provides in pertinent part:

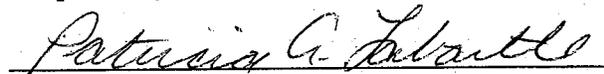
Compliance with these rules is required. In case of failure to comply with any rule or order of the Court, the Court may continue or dismiss a cause, reverse or affirm the judgment appealed, render judgment, **strike a filing**, assess costs or take any other action it deems proper. (Emphasis added.)

Appellee respectfully requests that this Court strike, or in the alternative disregard, the Special Appearances.

CONCLUSION

For the reasons stated above, Appellee respectfully requests that this Court strike, or in the alternative disregard, the Special Appearances.

Respectfully submitted,



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CERTIFICATE OF MAILING AND FILING

I hereby certify that a true and correct copy of the Motion of the Oklahoma Department of Securities to Strike or in the Alternative to Disregard Special Appearances and Brief in Support was mailed by U.S. Mail, with postage prepaid thereon, this 7~~th~~ day of January, 2004, to the following:

The Honorable Daniel L. Owens
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