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No. 98,854

MICHAEL S. RICHIE
CLERK

IN THE COURT OF CIVIL APPEALS 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

RESPONSE OF THE OKLAHOMA DEPARTMENT OF SECURITIES
TO PETITION FOR REHEARING OF DEFENDANTS/APPELLANTS

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

September 2, 2004

Patricia A. Labarthe, OBA #10391
Melanie Hall, OBA #1209
Oklahoma Department of Securities
120 North Robinson, Suite 860
Oklahoma City, Oklahoma 73102
Telephone: (405) 280-7700
Facsimile: (405) 280-7742

Attorneys for the Oklahoma Department of Securities

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RESPONSE OF THE OKLAHOMA DEPARTMENT OF SECURITIES

INTRODUCTION

Plaintiff/Appellee, the Oklahoma Department of Securities ("Department"), hereby submits its response in opposition to Defendants/Appellants' Petition for Rehearing and Brief in Support ("Petition for Rehearing"). Defendants/Appellants seek this Court's reconsideration of its decision affirming an order of the Oklahoma County District Court ("District Court") approving the sale by a court-appointed receiver of a portfolio of insurance policies ("Sale Order"). The arguments, cases, and even an example used in the Defendants/Appellants' Petition for Rehearing are indistinguishable from Defendants/Appellants' Brief In Chief. The Department asserts that this Court's decision affirming the Sale Order issued by the District Court was correct and asks that the Petition for Rehearing be denied.

A. DEFENDANTS/APPELLANTS RAISE NO GROUNDS FOR REHEARING

Defendants/Appellants' Petition for Rehearing raises no grounds to justify a rehearing. In fact, the arguments, cases, and even an example used in the Defendants/Appellants' Petition for Rehearing are identical to those argued in the Brief In Chief. See the following examples:

- ξ Appellants' Brief in Chief, pgs. 10-12 and Petition for Rehearing, pgs. 2-4.
- ξ Appellants' Brief in Chief, pgs. 18-19 and Petition for Rehearing, p. 6.
- ξ Appellants' Brief in Chief, pgs. 19-21 and Petition for Rehearing, pgs. 6-9.

The grounds asserted in support of the Petition for Rehearing are that the Court was bound by the "settled-law-of-the-case" doctrine and that investors were denied due process. Because these issues have already been fully briefed, argued, and considered in this appeal,

the Department urges this Court to reject the Petition for Rehearing. No basis exists to justify a rehearing and no new issue has been raised for this Court's consideration.

B. THE SETTLED-LAW-OF-THE-CASE DOCTRINE DOES NOT CONTROL THE SALE ORDER

Defendants/Appellants' sole legal basis for the appeal of the Sale Order was that the settled law of the case requires that the Sale Order be reversed and vacated. *See*, Appellants' Brief in Chief, pgs. 21-25. Once again, the Defendants/Appellants argue the "settled-law-of-the-case" doctrine and rely on the same cases and arguments as those cited in Appellants' Brief in Chief.

Like the Oklahoma Supreme Court in *In re Application of Eaton Enterprises*, 2003 OK 14, this Court properly distinguished the facts and issues of the prior appeal in this case from the facts and issues raised by Defendants/Appellants in this appeal. In *Eaton*, as here, the parties took steps in response to the court's first ruling on appeal to eliminate issues for a second appeal. Thus, the facts and issues in this second appeal are clearly different. The "settled-law-of-the-case" doctrine is not controlling where the facts or issues are different in subsequent proceedings. *Wilson v. Harlow*, 1993 OK 98.

Defendants/Appellants point to no new argument that would support rehearing. Rather, Defendants/Appellants' argue for rehearing by attempting to turn the Court's attention from the differences that were identified by this Court. This Court correctly found factual differences in this appeal that rendered the "settled-law-of-the-case" doctrine inapplicable. Among the differences in this case were: the "Motion to Sell" and a "Notice to Investors" were mailed by certified mail, return receipt requested, to all 4,477 investors and investors were asked to state their preference regarding the sale. Investors were also notified well in advance of the date, time and location of a hearing on the Sale Order and given a

meaningful opportunity to be heard. Responses were received from 4,331 investors and were considered by the Conservator. The majority of the investors responding favored the sale of the portfolio. Some investors actually attended the hearing on the Sale Order. Finally, since the issuance of the Sale Order, no investor has filed an appeal or sought any other relief.

Further, the Department raised issues involved in the appeal of the Sale Order that were different than those in the first appeal. In its Answer Brief, the Department argued that the completion of the sale in March, 2003, and the substantial performance of the purchase contract by the parties thereto (payment to investors of approximately Ten Million Dollars (\$10,000,000.00) by October, 2003, made this appeal moot. The passing of more than a year since purchase contract performance further enhances that position. The Department also argued that if the Court were inclined to find that the "settled-law-of-the-case" doctrine applies to the Sale Order, its application would cause a gross and manifest injustice and, as such, would be an exception to the doctrine. *Tibbetts v. Sight'n Sound Appliance Centers, Inc.*, 2003 OK 72.

This Court did not feel compelled to consider the "gross and manifest injustice" exception or the mootness of the appeal, as it properly found the "settled-law-of-the-case" doctrine does not control.

C. DUE PROCESS MANDATES HAVE BEEN MET

The second argument for rehearing asserted by Defendants/Appellants is that the Sale Order violated the federal and state due process rights of the investors. In support of this argument, Defendants/Appellants quote language from their Brief in Chief relating to jurisdictional issues from the first appeal that are completely irrelevant to this appeal. *See*, Appellants' Brief in Chief, p. 10-12.

1. The actual role of investors dictates the due process issue.

The Administrator of the Department is charged by statute with administering the Oklahoma Securities Act ("Act"), Okla. Stat. tit. 71, §§ 1-413, 501, 701-703 (2001 and Supp. 2003). The Act authorizes the Administrator to bring an action in district court whenever any person has violated or is about to violate the Act or its implementing regulations. The Administrator may seek injunctive relief, civil penalties and restitution. § 406.1. The Administrator may also seek the appointment of a receiver or conservator for a defendant or the defendant's assets. § 406.1. After succeeding in obtaining a judgment against Defendants/Appellants, the Department sought the appointment of a conservator for the policies owned by Defendants/Appellants. The Conservator ultimately sought approval to sell the policies, consistent with the authority granted to him by the District Court and with the blessing of the Defendants/Appellants.

Critical to this Court's consideration is the clarification of the position of investors in this case. Defendants/Appellants address arguments about the investors as if these investors had an ownership interest in the insurance policies at issue. The policies that were the subject of the Sale Order were owned by Accelerated Benefits Corporation ("ABC") and/or American Title Company of Orlando, until voluntarily transferred by Defendants/Appellants to a court-appointed conservator pursuant to the "Order Appointing Conservator and Transferring Assets" ("Conservatorship Order"). Defendants/Appellants were the proper parties to execute and approve the Conservatorship Order because they were the owners and beneficiaries of the policies.

The relationship of the investors to Defendants/Appellants was created only by contract. Investors entered into a contract with Defendants/Appellants to purchase the right to future receipt of the death proceeds of a life insurance policy or group of policies.

Investors did not at any time have an ownership or beneficial interest in the policies. Defendants/Appellants improperly attempt to assert the rights of investors by advocating that the due process rights of the investors have been violated. Clearly this Court believes, as the court did *Paoloni v. Goldstein*, 200 F.R.D. 644 (D.C. Co. 2001), citing *Warth v. Seldin*, 422 U.S. 490, that standing principles generally require a plaintiff to assert his own rights, rather than those belonging to third parties.

In executing its enforcement role, the Department acts independently of victimized investors. See, *Feigin v. Alexa Group, Ltd.*, 19 P. 3d 23 (Co. 2001). As the Department stated in its Answer Brief, the regulatory action against Defendants/Appellants does not interfere with any action that investors may bring for breach of contract and any other violations of law perpetrated against them. The Defendant/Appellants' relationship with the investors was established when the Defendants/Appellants illegally and fraudulently sold the contracts to them. A regulatory enforcement action does not foreclose the investors' rights to seek private redress.

Defendants/Appellants attempt to confuse the role of the investor in this appeal and the Petition for Rehearing. Defendants/Appellants improperly argue the position of investors by attempting to characterize investors as "parties" or "defendants" and by using phrases such as "recourse," "affirmative defenses" and "opportunity to litigate to a full and fair final conclusion." These characterizations have no connection to the investors. Defendants/Appellants attempt to confuse the role of the investor in a regulatory action. A careful review of the actual characterization of the ABC investors is necessary to a complete understanding of due process rights in this case. This issue was fully considered in the

parties' previous briefs. Defendants/Appellants have simply rehashed old facts and issues that do not justify a rehearing.

2. Investors received appropriate notice and an opportunity to be heard.

Due process dictates that a person cannot be deprived of property without adequate notice and an opportunity to be heard. The question that arises is what constitutes adequate notice to interested parties to satisfy the requirements of due process of law. A leading case on notice and due process requirements is *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). The United States Supreme Court in *Mullane* found:

[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance.

Id., at 314 (citations omitted).

In *Mullane*, the Court addressed the sufficiency of notice by publication to beneficiaries of various trusts participating in a common trust fund established under the New York banking laws. Once issued, the court's decree in connection with each judicial accounting was binding on all trust fund beneficiaries. Notice of the first account settlement by the common trustee to the many beneficiaries, some of whom did not reside in the State of New York, was given by publication. The appellant in *Mullane* argued that the notice to the beneficiaries was inadequate to afford due process and that the court lacked jurisdiction to render a final and binding decree.

The United States Supreme Court concluded that personal service is not required to assure compliance with due process. The Court further concluded that notice by publication is sufficient as to unknown beneficiaries only. However, as to known beneficiaries with

known addresses, due process, at a minimum, requires notice by ordinary mail. "Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency." *Mullane*, at 318.

The *Mullane* Court, while discussing the large number of small interests represented by the common trust fund, found that actual notice did not have to reach each and every beneficiary. The Supreme Court said:

[t]he individual interest does not stand alone but is identical with that of a class. The rights of each in the integrity of the fund and the fidelity of the trustee are shared by many other beneficiaries. Therefore notice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all, since any objections sustained would inure to the benefit of all. We think that under such circumstances reasonable risks that notice might not actually reach every beneficiary are justifiable. . . . The statutory notice to known beneficiaries is inadequate, not because in fact it fails to reach everyone, but because under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at hand.

Id., at 319.

Oklahoma's appellate courts have on numerous occasions followed the *Mullane* decision regarding the sufficiency of notice for purposes of complying with due process of law. See, *Bomford v. Socony Mobil Oil Co.*, 1968 OK 43, ¶ 16, 440 P.2d 713, 719; *Cate v. Archon Oil Company, Inc.*, 1985 OK 15, ¶ 7, 695 P.2d 1352, 1355-1356; *Johnson v. Scott*, 1985 OK 50, ¶ 11, 702 P.2d 56, 58; and *Federal Deposit Insurance Corporation v. Duerksen*, 1991 OK CIV APP 39, ¶ 6, 810 P.2d 1308, 1310. The Oklahoma Supreme Court has restated the principle of *Mullane* and its progeny as follows: "if the party's name and address are reasonably ascertainable, notice by mail or other means certain to insure actual notice is a constitutional prerequisite to a proceeding which will affect the liberty or the property interests of any party." See, *Cate, supra*, at 1356.

In *In re Commissioner of Banks and Real Estate, supra*, each of the 17,000 account holders was mailed a notice by first class mail. This notice informed the account holders of the scheduled hearing to determine the allocation of cash shortage. The appellate court found that mailing the notice of the hearing to each account holder by first class mail "was reasonably calculated, under the circumstances . . . , to apprise them of the pendency of the action in which their interests would be affected and provided them reasonable opportunity to appear." *Id.*, at 93.

In this case, the "Motion to Sell" and a "Notice to Investors" were mailed to all 4,477 investors by certified mail, return receipt requested, utilizing the names and addresses of the investors from the books and records of Defendants/Appellants. Investors were notified well in advance of the date, time and location of the hearing on the Sale Order and were given a meaningful opportunity to be heard. Investors were also asked to state their preference regarding the proposed sale. Responses were received from 4,331 investors and were considered by the Conservator. The majority of those responding favored the sale of the portfolio. Some investors actually attended the hearing on the Sale Order. Finally, since the issuance of the Sale Order, no investor has filed an appeal or sought any other relief.

The notice was reasonably calculated, under all circumstances, to apprise the ABC investors in a timely manner of the pending "Motion to Sell" before the District Court. There was no other more reliable, yet fiscally and administratively efficient, form of notice that could have been provided to the investors. Furthermore, the investors were afforded an opportunity to present their objections in writing and were notified of the date and time of the hearing on the "Motion to Sell." The notice was reasonable, adequate and sufficient to afford due process of law to all investors.

D. THE DISTRICT COURT IS VESTED WITH BROAD EQUITY POWERS

In *State v. Southwest Mineral Energy, Inc.*, 1980 OK 118, the Oklahoma Supreme Court found that the Oklahoma Legislature intended equitable remedies be available for enforcement of the Oklahoma Securities Act. The Oklahoma Supreme Court has also recognized that the district courts of Oklahoma are empowered to do equity in actions brought under the Act. Once the equity jurisdiction of the district court has properly been invoked, the district court possesses the necessary power to fashion appropriate remedies.

The *State v. Southwest Mineral Energy, Inc.* decision provided an analysis by this Court of the equity powers of district courts in securities enforcement actions brought by the Department. There, the issue before the Court was whether a district court had the power to issue a mandatory injunction against violators of the Act to disgorge illegally obtained profits. The Court relied on the United States Supreme Court for support for the equitable authority of district courts by quoting *Porter v. Warner Holding Company*, 328 U.S. 395, 66 S. Ct. 1086, 90 L.Ed. 1332 (1946):

"Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake.... Power is thereby resident in the District Court, in exercising this jurisdiction, 'to do equity and to mould (sic) each decree to the necessities of the particular case.' "

Id., at 1336-7.

The Court went on to state:

"Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied."

Id., at 1337.

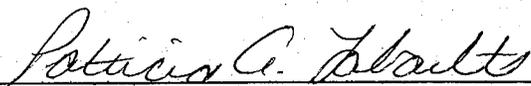
The United States Supreme Court affirmed this position in *Mitchell v. DeMario Jewelry, Inc.*, 361 U.S. 288, 80 S. Ct. 332, 4 L.Ed. 2d 323 (1960):

“When Congress entrusts to an equity court the enforcement of prohibitions contained in regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purpose. As this Court long ago recognized, ‘there is inherent in the Courts of Equity a jurisdiction to...give effect to the policy of the legislation.’”

By granting the Sale Order, the District Court properly and completely exercised its equitable powers by appointing the Conservator and allowing the Conservator to act within the agreed terms of the Conservatorship Order. The District Court molded the Sale Order to the necessities of this case in order to maximize the return to investors who cling to hope for at least a partial return of the money fraudulently taken from them through Defendants/Appellants’ meritless promises of extraordinary earnings.

CONCLUSION

For the reasons set forth above, the Department respectfully requests this Court deny the Petition for Rehearing of Defendants/Appellants.



Patricia A. Labarthe, OBA #10391
Melanie Hall, OBA #1209
Oklahoma Department of Securities
120 North Robinson, Suite 860
Oklahoma City, Oklahoma 73102
Telephone: (405) 280-7700
Facsimile: (405) 280-7742

Attorneys for the Oklahoma Department of Securities

CERTIFICATE OF MAILING AND FILING

I hereby certify that a true and correct copy of the foregoing was mailed by U.S. Mail, with postage prepaid thereon, this 2nd day of September, 2004, to the following:

The Honorable Daniel L. Owens
Judge of the District Court of Oklahoma County
304 Courthouse
321 Park Avenue
Oklahoma City, OK 73102

Melvin R. McVay Jr.
Thomas P. Manning
Phillips McFall McCaffrey McVay & Murrah, P.C.
Twelfth Floor, One Leadership Square
211 N. Robinson
Oklahoma City, OK 73102

Dino E. Viera
William H. Whitehill
Fellers, Snider, Blankenship, Bailey & Tippens
100 North Broadway, Suite 1700
Oklahoma City, OK 73102-8820

I further certify that a copy of the foregoing was mailed to, or filed in, the office of the Oklahoma County Court Clerk this 2nd day of September, 2004.

Patricia A. Schultz