

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

FILED
SUPREME COURT
STATE OF OKLAHOMA

JUL 3 2003

MICHAEL S. RICHIE
CLERK

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

Plaintiff/Appellee,)

v.)

ACCELERATED BENEFITS CORPORATION,)
C. KEITH LAMONDA, AMERICAN TITLE)
COMPANY OF ORLANDO, AND DAVID)
PIERCEFIELD,)

Defendants/Appellants,)

v.)

TOM MORAN,)

Court-Appointed Conservator/Appellee.)

No. 98663
Case No. CJ-99-2500-66
D.C. Oklahoma County
The Honorable
Daniel L. Owens
Action for Violations of
Oklahoma Securities Act

**SUR-REPLY BRIEF OF THE
OKLAHOMA DEPARTMENT OF SECURITIES**

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SUR-REPLY BRIEF OF THE OKLAHOMA DEPARTMENT OF SECURITIES

Plaintiff/Appellee, the Oklahoma Department of Securities ("Department"), hereby submits its sur-reply brief, in opposition to the appeal filed by Defendants/Appellants of two journal entries filed in the Oklahoma County District Court ("District Court") on November 20, 2002 ("November Orders"). The only issue before this Court is whether the Defendants/Appellants were to be the source of the money for premium payments until ownership of 75% of the Conservatorship assets were transferred to the Conservator.

I. LIBERTIES TAKEN BY DEFENDANTS/APPELLANTS WITH RECORD

A. The Joy LaMonda Affidavit And All Related Pleadings Have Been Stricken From This Record

Defendants/Appellants blatantly mislead this Court by repeatedly citing as authority an affidavit of Joy LaMonda. This affidavit was stricken from the record by the District Court. *See* Journal Entry filed October 18, 2002. Defendants/Appellants tried numerous times to urge the District Court's consideration of the affidavit (much in the same manner as here) by filing:

1. Defendants' Offer of Proof, filed on September 6, 2002, in which Defendants/Appellants describe what Ms. LaMonda's statements in the affidavit would have been;
2. Verification of Joy LaMonda in Support of Defendants' Offer of Proof, filed on September 13, 2002, in which Ms. LaMonda seeks to verify the information submitted in the Defendants' Offer of Proof; and
3. Affidavit in Support of Defendants' Motion to Enforce or, Alternatively, to Construe the Court's Order Appointing Conservator and Transferring Assets,

filed on September 19, 2002, to which the Affidavit of Joy LaMonda is attached.

See Defendants' Offer of Proof filed September 6, 2002, Verification of Joy LaMonda filed September 13, 2002 and Affidavit in Support of Defendants' Motion to Enforce or, Alternatively, to Construe the Court's Order Appointing Conservator and Transferring Assets, filed September 19, 2002. However, after considering such, the District Court issued the referenced Journal Entry on October 18, 2002, by stating:

"IT IS THEREFORE ORDERED, ADJUDGED AND DECREED as follows:

- (a) Defendants' Offer of Proof is ordered stricken from the record;
- (b) The Verification of Joy Lamonda In Support of Defendants' Offer of Proof is ordered stricken from the record;
- (c) Defendants' Affidavit in Support of Defendants' Motion to Enforce or, Alternatively, to Construe the Court's Order Appointing Conservator and Transferring Assets is ordered stricken from the record; and
- (d) All documents and pleadings to which the above and foregoing are attached are ordered stricken from the record;" (sic)

See Journal Entry filed October 18, 2002. The Journal Entry, striking from the record every pleading related to the Joy LaMonda affidavit, was never appealed. Any argument made to this Court by Defendants/Appellants that references this affidavit is wholly unsupported.

B. Defendants/Appellants Notified Investors That The Premium Account Was Depleted In April, 2001

The Department stands on its claim that there was a premium shortfall crisis at ABC by April, 2001, approximately one month after the District Court issued its Findings of Fact and Conclusions of Law. *See* page 2 of Plaintiff's Application for Emergency Relief attached as Exhibit B to the Response of Oklahoma Department of Securities to Defendants'

Motion to Enforce or, Alternatively, to Construe the Court's Order Appointing Conservator and Transferring Assets and Brief in Support. On April 24, 2001, Defendants/Appellants notified investors that the ABC premium account had been depleted. *See* Response of Oklahoma Department of Securities to Defendants' Motion to Enforce or, Alternatively, to Construe the Court's Order Appointing Conservator and Transferring Assets and Brief in Support, Exhibit "B" to Exhibit B. These documents firmly establish Defendants/Appellants knowledge of the premium shortfall crisis that they now represent to this Court did not exist. *See* Reply Brief of Defendants/Appellants, page 8.

Defendants/Appellants would like to persuade this Court of their philanthropic nature by stating "ABC has always been willing to assume premium payment responsibility, including covering shortfalls in premium collections, because of the potential liability it faces if any of the policies lapse." *See* Reply Brief of Defendants/Appellants, page 8. Then, why has this Court been forced to address this appeal?

However, in the next breath, Defendants/Appellants assert that they were "blackmailed" into paying premiums and that they would never have allowed policies to lapse. *See* Defendants/Appellants Brief, pages 8 and 9. Then, Defendants/Appellants mention that "Only a few of the over 1,500 policies transferred to the Conservatorship have lapsed[.]" *See* Reply Brief of Defendants/Appellants, page 8. This may not seem significant but one of those "few" policies is a policy with a face value of \$9.5 million that lapsed prior to the issuance of the Conservatorship Order. *See* Transcript of Proceedings dated October 30, 2002, pages 12 and 20. The reality is that Defendants/Appellants are before this Court to rid themselves of their financial obligations to investors.

**C. The District Court Has Never Found That Defendants/Appellants
Are Entitled To Any Reimbursement**

Defendants/Appellants alarmingly state the District Court “found” that ABC should be reimbursed for premiums advanced. *See* Reply Brief of Defendants/Appellants, pages 6 and 9. The District Court did not so find; rather, the District Court specifically reserved a decision regarding reimbursement until after an audit of the premium accounts is made. *See* Transcript of Proceedings dated September 27, 2002, pages 37-38. Defendants/Appellants state to this Court that the following excerpt from the Transcript of Proceedings dated September 27, 2002, pages 37-39, supports such a “finding” by the District Court:

“We’re not going to have [ABC] pay the premium payments and have the premium payment sitting there and then not get it back.”

However, in its Brief to this Court, the Defendants/Appellants changed the District Court’s statement and omitted the next sentence that is critical to the reimbursement issue. The District Court actually stated:

“We’re not going to have **Mr. LaMonda** pay the premium payments and have the premium payment sitting there and then not get it back. **But I can’t make that determination until we do--that’s what the audit will accomplish.**”
(Emphasis added.)

See Transcript of Proceedings dated September 27, 2002, pages 37-38. The transcript also reveals that the District Court uses Mr. LaMonda’s name throughout the section quoted by Defendants/Appellants, and not ABC as Defendants/Appellants represent to this Court. *See* Transcript of Proceedings dated September 27, 2002, pages 37-38 and Reply Brief of Defendants/Appellants, pages 6-7. In addition, the November Orders clearly state that the “Court will make a future determination of any amounts to be reimbursed to ABC for amounts advanced for payment of premiums for which investor funds have been collected.”

See November Orders. To date, there has not been a "finding" by the District Court that Defendants/Appellants are entitled to any reimbursement.

D. Purpose of Audit Was To Address Court's Concern About A "Ponzi" Scheme

Defendants/Appellants also tell this Court that the District Court ordered an audit to remedy some inequity allegedly suffered by them. See Reply Brief of Defendants/Appellants, page 9. On the contrary, the audit was suggested by the Defendants/Appellants, who offered to pay the expenses of such audit. See Transcript of Proceedings dated September 27, 2002, pages 35-36. The suggestion was made after the District Court learned that Defendants/Appellants could not account for how Defendants/Appellants were paying premiums prior to the Conservatorship for investors on policies in which they invested. See Transcript of Proceedings dated September 27, 2002, pages 35-36. The District Court expressed its concern as follows:

What concerns me here is placing lump sum premiums--placing premiums into a lump sum pile and not breaking those down by the person whose paid them indicates--what is that called in securities law? It's the ponzi. I take your money, pay for somebody else's business and then you may lose at the end. Isn't that what that is?

E. The Conservatorship Order Required Defendants/Appellants to Pay All Bills

With regard to the statement by Defendants/Appellants that the "Conservatorship Order was not meant to be punitive", and their cite to the Transcript of Proceedings dated September 27, 2002, page 39, it is clear that the District Court was only referring to the fact that it did not intend to impose a double payment of the same premiums on Defendants/Appellants. In an earlier statement in the same transcript, the District Court more generally discussed the purpose of the Conservatorship Order and stated:

“The underlying essence and purpose of that order is to make sure there was no dilatory activity on the part of the folks involved in this operation in getting the assets transferred so we could gather all these assets. That’s the reason for the 75 percent cutoff. And that was the reason, I think sort of a punishment type factor, to require until you do you’re going to have to take care of the bills.”

See Transcript of Proceedings dated September 27, 2002, at page 13. Beginning on February 6, 2002, and continuing until at least 75% of the assets were transferred to the Conservator, Defendants/Appellants were required to “take care of the bills.” *See* Transcript of Proceedings dated September 27, 2002, page 13.

Defendants/Appellants criticize the Department’s claims that at the time of the Conservatorship Order, the Conservator would initially have no money with which to fund the substantial premium payments or any expenses of the Conservatorship and the insurance policies had to be kept in full force and effect pending the transfer. *See* Answer Brief of Department, page 5. Defendants/Appellants describe the Department’s claims as “self-serving hindsight”. *See* Reply Brief of Defendants/Appellants, page 5. However, the Conservatorship Order was crafted with tremendous foresight. The reality of the situation was that on February 6, 2002, the Conservator had no assets. The Conservator did not have access to the assets until they were transferred to him. *See* Conservatorship Order, page 4. He did not have records on which to determine what premiums had to be paid and in what amounts until the assets and records were transferred to him. *See* Conservatorship Order, page 4. The ninety (90) day period was the time within which the Conservatorship Order stated those duties could be accomplished. *See* Conservatorship Order, page 4. After the substantial transfer of the assets (75%), the Conservator would assume those expenses. *See* Conservatorship Order, pages 4-5.

Defendants state that "All that the Conservator had to do was to direct the payment of premiums from the premium accounts, and he would have fulfilled his obligations." How could he have done so without an accounting from Defendants/Appellants to tell him whose money he was directing to be paid? At the October hearing, the District Court discussed the need for such an accounting to determine what happened to investor funds that were paid to Defendants/Appellants, what premiums had been paid and with whose money, and the premium due dates. *See* Transcript of Proceedings dated October 30, 2002, pages 31, 32, 36. The District Court, in considering the money deposited in the accounts of Defendants/Appellants stated:

The Court: No. I think the larger issue in my mind is where did it go and what did it go for?

Mr. Manning: Exactly.

The Court: I don't care who sent it in. That's easy. Usually the problem the courts have and anyone dealing with these is, yes, I got the money from Peter but I gave it to Paul and I didn't pay Peter's premium. That's the question I'm asking.

Transcript of Proceedings dated October 18, 2002, page 37.

II. ISSUE OF OFFSET IS NOT RIPE FOR REVIEW

The majority of the response of Defendants/Appellants relates to the issue of whether the payment of **premiums** was to be made by Defendants/Appellants under the Conservatorship Order and as continually ordered by the District Court. Equally important is the fact that one of the two November Orders requires Defendants/Appellants to pay to the Conservator "all Conservator fees, expenses and attorney's fees approved by the Court to date within 30 days." *See* Journal Entry filed November 20, 2002. Defendants/Appellants do not contest the obligation to pay these expenses in their Brief. Instead, Defendants/Appellants ask this Court to order the District Court to rule on the issue of

whether the amount paid by Defendants/Appellants for premiums can be offset against the amount owed by Defendants/Appellants for attorneys fees and non-premium related expenses associated with the Conservatorship. This requested offset is not ripe for review by this Court as the issue has not yet been considered by the District Court. As stated above, there is no ruling on this issue from the District Court from which Defendants/Appellants can appeal. In addition, Defendants/Appellants argue that they are not obligated to pay expenses once 75% of the assets have been transferred to the Conservator; yet, Defendants/Appellants have provided no proof to the District Court that 75% of the assets have been transferred.

III. THE CONSERVATORSHIP ORDER REQUIRES THAT DEFENDANTS/APPELLANTS TEMPORARILY PAY ALL EXPENSES OF THE CONSERVATORSHIP

This basis of the Conservatorship was to remedy the serious securities law violations, including fraud and deceit, committed by ABC against unsuspecting investors. *See Findings of Fact and Conclusions of Law.* The remedies of restitution or rescission were considered as was stated by counsel for the Department in the Transcript of Proceedings dated September 27, 2002, pages 24-25:

“At the time that this order was drafted, ABC had--we were in the middle of trying to figure out what remedy was appropriate after our trial and all of a sudden investors started getting premium notices. And I get a call about this and think uh-oh, now we really are not looking at restitution or rescission (sic) as an option because they're running out of money. Now they're going back to the investors for more money that the investors were told they were never going to have to pay, so you know, there's a problem.

That was why we kind of went into this negotiation to try to figure out what other type of remedy would be appropriate.

* * *

But as far as what was intended by the order and what the order of--the language of the order clearly states is that ABC was going to pay all the expenses until 75 percent of the assets were transferred over to give--get

ABC--give them the responsibility to get the job done and then let the conservator take over payment of premiums and running the policies.”

Defendants/Appellants admit that the Order Appointing Conservator and Transferring Assets (“Conservatorship Order”) was entered in lieu of requiring Defendants/Appellants to make restitution to the Oklahoma investors, but argue that this does not “address any issue in this appeal nor does it support the contention that, *ipso facto*, Defendants were required to make premium payments from the very start even though the Conservatorship Order says otherwise.” *See* Reply Brief of Defendants/Appellants, page 5. First, the Conservatorship Order does require Defendants/Appellants to pay all costs of the Conservatorship temporarily, that is, until ownership of at least 75% of the assets have been transferred to the Conservator. *See* Conservatorship Order, page 5. Second, Defendants/Appellants initially assumed the obligation to “make premium payments from the very start” in their own Purchase Request Agreement, the ABC document that memorialized the investment of ABC investors. *See* Response of Oklahoma Department of Securities to Defendants’ Motion to Enforce or, Alternatively, to Construe the Court’s Order Appointing Conservator and Transferring Assets and Brief in Support, Exhibit “A” to Exhibit B, page 3. In the Purchase Request Agreement, Defendants/Appellants contract to pay “policy(ies) premiums until maturity(ies), out of operating cost withdrawal(s) and/or a Special Trust Account.” *See* Response of Oklahoma Department of Securities to Defendants’ Motion to Enforce or, Alternatively, to Construe the Court’s Order Appointing Conservator and Transferring Assets and Brief in Support, Exhibit “A” to Exhibit B, page 3. Defendants/Appellants continued to assume the obligation to pay premiums when they consented to the Conservatorship Order.

IV. THE CLEAR AND UNAMBIGUOUS LANGUAGE OF THE CONSERVATORSHIP ORDER REQUIRES PAYMENT OF PREMIUMS BY DEFENDANTS/APPELLANTS

Defendants/Appellants seek to apply a statutory canon of construction to a provision in the Conservatorship Order that describes the expenses and costs the District Court ordered them to pay to the Conservator. However, the Court in *Commissioners of Land Office v. Butler*, 1987 OK 123, 753 P.2d 1334, found:

“Ejusdem generis is one of many guides to statutory interpretation. Other canons of construction are equally potent. The ejusdem generis doctrine must yield to the rule that an act should be so construed as to carry out the object sought to be accomplished by it, so far as that object can be collected from the language of the statute. If the use of the ejusdem generis rule would hinder or defeat the plain legislative purpose or intent, it may not be applied in statutory construction.

In *Panhandle Cooperative Royalty Co. v. Cunningham*, 495 P.2d 108 (1972), the court held that:

'Ejusdem generis' is not a rule of property but a rule of construction useful in ascertaining the meaning of words of doubtful import. Merely because this rule of construction is used with other rules of construction to interpret words of doubtful meaning does not render the application of the rule dictum. This rule of construction is a useful part of our law. See *Cronkhite v. Falkenstein*, 1960 OK 118, 352 P. 2d 396, 398.

In *Cronkhite*, supra, the court stated:

In construing contracts or conveyances, primary purpose is to give effect to mutual intention of parties as it existed at time of contracting. 15 O.S.1951 § 152.

The statement of Defendants/Appellants that the “rule” of ejusdem generis “requires” any finding is incorrect. See Brief-in-Chief of Defendants/Appellants, page 19. The rule is only one of many guides that can be used if ambiguity exists. The District Court found that the Conservatorship Order was unambiguous. See November Orders. If there was a need to look beyond the findings of these November Orders, a reading of the stated purpose of the Conservatorship Order would resolve any question of intent as to the Defendants/Appellants’

obligations under the order; that is, "in lieu of a judgment for restitution and in order to prevent potential irreparable loss, damage or injury to purchasers of interests in the right to receive the proceeds from the viatical and/or life settlement policies effectuated by ABC Purchase Request Agreements." See Conservatorship Order. In order to satisfy the stated purpose of the Conservatorship Order, Defendants/Appellants were the only source of the funds necessary to pay premiums to ensure that the purchasers did not suffer "irreparable loss, damage or injury" due to the lapse of the insurance policies.

CONCLUSION

For the reasons set forth above, the Department respectfully requests this Court affirm the November Order and deny all relief requested by Defendants/Appellants.



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CERTIFICATE OF MAILING AND FILING

I hereby certify that a true and correct copy of the Sur-Reply Brief of the Oklahoma Department of Securities was mailed by U.S. Mail, with postage prepaid thereon, this 3rd day of July, 2003, to the following:

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I further certify that a copy of the Sur-Reply Brief of the Oklahoma Department of Securities was mailed to, or filed in, the office of the Oklahoma County Court Clerk this 3rd day of July, 2003.

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