

IN THE DISTRICT COURT OF OKLAHOMA  
STATE OF OKLAHOMA

FILED IN THE DISTRICT COURT  
OKLAHOMA COUNTY, OKLA.

MAY 16 2007

PATRICIA PRESLEY, COURT CLERK  
by \_\_\_\_\_ DEPUTY

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

Plaintiff, )

v. )

Case No. CJ-2005-3799

Barry Pollard and Roxanne Pollard, )

Defendants. )

**PLAINTIFF'S REPLY TO DEFENDANT'S RESPONSE TO MOTION TO STRIKE  
DEFENDANTS' AMENDED PETITION ADDING  
THIRD-PARTY DEFENDANTS**

Plaintiff, Oklahoma Department of Securities, *ex rel.* Irving L. Faught, Administrator (Plaintiff), respectfully replies to the Defendants' response to the motion to strike Defendants' amended petition adding third-party defendants, Farmers & Merchants Bank, Farmers & Merchants Bancshares, Inc., John V. Anderson, and John Tom Anderson (F&M Third-Party Defendants).

On January 25, 2006, Defendants Barry and Roxanne Pollard filed their answer to Plaintiff's petition and included a third-party petition against AXA Advisors, LLC (AXA Advisors) and AXA Equitable Life Insurance Company (Equitable). AXA Advisors and Equitable objected and filed a motion to compel the Defendants' claim to arbitration. On March 29, 2007, this Court granted AXA Advisors' motion to compel arbitration and permitted Defendants to amend their third-party petition accordingly.

On April 9, 2007, the Defendants amended their third-party petition to omit their claim against AXA Advisors, LLC, and unilaterally added the F&M Third-Party Defendants. The Defendants did not ask leave of this Court to add the F&M Third-Party Defendants and did not provide notice to the other parties in this case, as required by the Oklahoma Pleading Code.

**I. Defendants did not follow the applicable statute defining when a defendant may bring in a third party defendant.**

The plain language of 12 O.S. § 2014 expressly outlines third-party practice including the required process to add parties to a suit. Defendants needlessly cite a string of inapplicable statutes to support their argument that third-party pleadings are liberally allowed. Defendants also conveniently omit from their response the vital part of § 2014 that requires a defendant to obtain leave of court by motion and to give notice to all parties to the action if he files a third-party petition later than ten (10) days after he serves his original answer. In *Dow Corning Corporation v. Owens*, 842 P.2d 749, 1992 OK 152, the Oklahoma Supreme Court ruled that pursuant to § 2014, leave to file a third-party petition more than ten (10) days after service of an original answer **must be obtained by motion** upon notice to all parties to the action. (Emphasis added.)

The Supreme Court ruled in *Hunter v. Echols*, 820 P.2d 450, 1991 OK 114, that filing an amended petition pursuant to 12 O.S. § 2015(A) without leave of court, or by written consent of the adverse party, is without effect. If a responsive pleading has been served, failure to obtain leave of court renders the amended petition totally ineffective and, as a result, deemed not to have been filed. *Id.* at 451. Relying on the Court's rationale in *Hunter*, Defendants' addition of the F&M Third-Party Defendants in this case is ineffective and should be ignored.

Defendants erroneously argue that they can amend to add the F&M Third-Party Defendants without leave of court because Equitable has not yet filed an answer. This argument

is totally without merit. The timing of Equitable's answer has no effect whatsoever on whether Defendants should have obtained leave from this Court to add the F&M Third-Party Defendants. Application of the § 2014 requirement to obtain leave depends on whether the third-party *plaintiff*, not the third-party defendant, has served his answer. Defendants' answer was filed over 15 months ago.

**II. This Court should not permit Defendants to proceed against the F&M Third-Party Defendants as part of this case.**

The language of Section 2014 of the Oklahoma Pleading Code is permissive. Therefore, the granting of leave to the Defendants to add third-party defendants is within the discretion of this Court. "In exercising this discretion, courts 'generally balance the benefits of allowing the claim to proceed against the potential prejudice to the [parties] in the lawsuit and the third party.'" *Wells v. Lowe's Home Centers, Inc.*, 2007 WL 981773 (N.D. Okla.), citing *Oklahoma ex rel. Edmondson v. Tyson Foods, Inc.*, 237 F.R.D. 679, 681 (N.D. Okla. 2006).<sup>1</sup> Among the factors to be considered by the Court are (a) judicial efficiency or economy; (b) the delay of the third-party plaintiff in asserting the claim; and (c) the potential prejudice to the other parties in the action and to the third-party defendant. *Edmondson v. Tyson Foods, Inc.*, 237 F.R.D. 679, 681 (N.D. Okla. 2006).

***a. Judicial Efficiency or Economy***

The addition of the F&M Third-Party Defendants will not achieve judicial economy. The F&M Third-Party Defendants are not indispensable parties for a determination by this Court of whether the Defendants were unjustly enriched. Likewise, a determination regarding the unjust enrichment claim against the Defendants is not instrumental to resolution of the causes of action against the F&M Third-Party Defendants.

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<sup>1</sup> Since the provisions of the Oklahoma Pleading Code are very similar to those within the Federal Rules of Civil Procedure, federal decisions provide authority when construing Oklahoma's procedural statutes.

The third-party causes of action stand separate and apart from Plaintiff's claim. As dictated by third-party practice, the F&M Third-Party Defendants will not be bound by the resolution of the Plaintiff's claim against Defendants. *See Liberty Nat. Bank and Trust Co. of Oklahoma City v. Garcia*, 776 P.2d 1265, 1989 OK 96. The third-party causes of action against the F&M Third-Party Defendants remain even if Defendants ultimately prevail against Plaintiff's unjust enrichment claim.

The Defendants, as third-party plaintiffs, assert multiple causes of action against the F&M Third-Party Defendants, to include: aiding and abetting a securities fraud, constructive fraud, negligence and unjust enrichment. The Defendants' third-party aiding and abetting cause of action is identical in substance to the Plaintiff's suit currently pending before Judge Parrish against Farmers & Merchants Bank, Farmers & Merchants Bancshares, Inc., John V. Anderson, and John Tom Anderson. *See* CJ-2006-3311. Plaintiff's suit, filed over a year ago, seeks restitution for participants who suffered damages in Marsha Schubert's "Ponzi" scheme. Plaintiff's petition, excluding exhibits, exceeds fifty (50) pages in length and describes in extensive detail the movement of more than \$200,000,000 through F&M Bank over approximately a five year period. Discovery will be extensive. If the Defendants are permitted to bring the F&M Third-Party Defendants into this case, the same discovery will be necessary for the third-party claims. That discovery process will be intricate, time consuming and duplicative.

***b. Defendants' Delay in Asserting Third-Party Claims***

For two years, Defendants have been very successful in delaying, by procedural means, the hearing of this case on its merits. Defendants have requested extensions of multiple

deadlines.<sup>2</sup> Defendants filed third-party claims against AXA all the while knowing that they were required to go to arbitration pursuant to an agreement between AXA and the Defendants. Defendants have forced Plaintiffs to seek at least one order compelling discovery.

Plaintiff filed this case on May 11, 2005. Defendants never brought up in pleadings or oral argument that they were even considering causes of action against the F&M Third-Party Defendants. In fact, during the March 29, 2007 hearing, Defendants verbally asked this Court's permission to amend their third-party petition to omit their claim against AXA, thereby leaving Equitable as the remaining third-party defendant. At that time, Defendants remained silent regarding the addition of the F&M Third-Party Defendants in this matter.

To date, Defendants' motion to dismiss has been addressed by this Court, discovery has commenced, and Plaintiff has filed a motion for summary judgment to which Defendants have responded. The motion is scheduled to be heard by this Court in less than two weeks.

The Defendants' assertion of claims against the F&M Third-Party Defendants is untimely.

### *c. Prejudice to the Parties*

The preceding arguments against bringing the F&M Third-Party Defendants into this case apply equally when considering the prejudice to the Plaintiff as well as those third-party defendants. Plaintiff will be prejudiced by further delay. Further, Plaintiff and the F&M Third-Party Defendants will be subjected to the duplication of resources, time and efforts.

### **Conclusion**

Defendants ignored the Oklahoma Pleading Code and unilaterally added the F&M Third Party Defendants. To permit them to proceed with their claim against these additional parties

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<sup>2</sup> Plaintiff cooperated with Defendants by agreeing to an extension for the filing of their response to Plaintiff's summary judgment motion in order that Defendants could conduct written and deposition discovery. To date, Plaintiff has not been noticed or served with any type of discovery request.

would further complicate and delay the pending case. This Court should not permit the addition of the F&M Third-Party Defendants to this lawsuit.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 16<sup>th</sup> day of May, 2007, a true and correct copy of the above and foregoing was mailed by U.S. Mail, with postage prepaid thereon, addressed to:

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