

Hearing Sept. 17, 2014 9:00 AM

FILED IN DISTRICT COURT  
OKLAHOMA COUNTY

IN THE DISTRICT COURT OF OKLAHOMA COUNTY  
STATE OF OKLAHOMA

AUG 21 2014

TIM RHODES  
COURT CLERK

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Oklahoma Department of Securities )  
*ex rel.* Irving L. Faught, )  
Administrator, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
2001 Trinity Fund, L.L.C. and )  
Robert Arrowood, )  
Defendants. )

Case No. CJ-2012-6164  
Judge Roger H. Stuart

**DEPARTMENT'S MOTION TO STRIKE THIRD PARTY PETITION**

The Oklahoma Department of Securities *ex rel.* Irving L. Faught, Administrator, (Department) moves to strike Defendant Robert W. Arrowood's Third-Party Petition (Third-Party Petition). Defendant Arrowood filed the Third-Party Petition against Irving L. Faught, the Administrator of the Department (Mr. Faught), and Shaun Mullins, an attorney of the Department (Mr. Mullins), in their individual capacities. It is the Department's position that both Mr. Faught and Mr. Mullins have acted within the scope of their employment at all times in connection with this matter.

The Third-Party Petition should be stricken because: 1) Defendant failed to file a motion requesting the permission of this Court to file the Third-Party Petition as required by 12 O.S. § 2014 and the Scheduling Order; 2) Defendant fails to meet the requirements of 12 O.S. § 2014 in that Mr. Faught and Mr. Mullins cannot be held liable to Defendant for the Department's claims against him nor do the claims made by Defendant against Mr. Faught and Mr. Mullins arise out of the transactions or occurrences that are the subject matter of the Department's claims against Defendant; and 3) Defendant filed the Third-Party Petition against government

employees acting within the scope of their employment in contravention of the Governmental Tort Claims Act, 51 O.S. § 151 et. seq. (GTCA).

**1.) Failure to Move Court for Permission to File Third-Party Petition**

Section 2014 of the Oklahoma Pleading Code requires a party wishing to file a third-party petition more than ten days after their original answer was filed to move the court for permission to file and therewith give the other parties in the action notice of such intent. Furthermore, on August 15, 2013, the Court entered a Scheduling Order in this matter that provided that any joinder of additional parties could only be filed “with leave of Court or written consent of opposing parties.”

Defendant failed to move the Court for leave to file his Third-Party Petition and gave no notice to the Department of his intent to do so. Because Defendant’s Third-Party Petition was filed without leave of this Court, it should be stricken and treated as if it were never filed. *Hunter v. Echols*, 820 P.2d 450, 1991 OK 114 (analyzing the substantially similar provision relating to amended pleadings in 12 O.S. § 2015(c)). The Third-Party Petition should be stricken.

**2.) Failure to Meet the Jurisdictional Requirement for Filing a Third-Party Petition**

Section 2014 of the Oklahoma Pleading Code requires that a defending party may file an action against a third party: 1) “who is or may be liable to him for all or part of the plaintiff’s claims against him” or 2) “who is liable to him on a claim arising out of the transaction or occurrence that is the subject matter of a claim that is asserted against him.” 12 O.S. § 2014. Defendant fails to meet the requirements of either prong of Section 2014.

The first ground for impleading a third party under Section 2014 requires that the third party be liable to the defendant for all or part of the plaintiff’s claims. The third-party’s liability

must be either dependent on the outcome of the main claim or the third-party must be secondarily liable to the defendant. *Armour and Co. v. Jones*, 84 F.R.D. 606, 608 (E.D. OK 1978).

The Department, in its petition against Defendant, has alleged that he violated Oklahoma's securities laws by fraudulently offering and selling unregistered securities. Clearly, Mr. Faught and Mr. Mullins, who are employees of the Department, are not, and cannot be liable for Defendant's violation of the securities laws. See *Commodity Futures Trading Commission v. Hunt*, 591 F.2d 1211, 1224 (7<sup>th</sup> Cir. 1979) (improper to allow defendant to implead CFTC employees because they could not be liable to defendant on the plaintiff's claims against him). It is true, that in the scope of their employment with the Department, Mr. Faught and Mr. Mullins investigated Defendant's activities and determined that it was in the public interest to pursue this civil action against him for violating the securities laws. However, that activity will not make Mr. Faught and Mr. Mullins liable to Defendant for the Department's claims against him.

There can be no transfer of liability from Defendant to Mr. Faught or Mr. Mullins under any scenario. Should Defendant lose this case and be required to make restitution to investors and pay a civil penalty to the Department, the truth of the Department's allegations will have been proven and the claims made in the Third-Party Petition will be proven baseless. If Defendant prevails in this case, then he will not owe anything to investors or the Department for which he could recover from Mr. Faught and Mr. Mullins.

The second ground for impleading a third party under Section 2014 provides that the defendant's claim must arise "out of the transaction or occurrence that is the subject matter of a claim that is asserted against him." Defendant asserts claims against Mr. Faught and Mr. Mullins that sound in tort, specifically, defamation, invasion of privacy, and intentional interference with

business relations, all in connection with an interview given by Mr. Faught to News 9 shortly after the Department filed its case<sup>1</sup>. Defendant's claims have nothing to do with any transaction or occurrence that is the subject matter of any of the Department's claims against him. As described above, the subject matter of the Department's claims against Defendant are all based on his offers and sales of securities and the resulting violations of the securities laws. Defendant's claims in tort have nothing whatsoever to do with the securities laws and do not arise from his violations of the securities laws or any transaction or occurrence relating to his violation of the securities laws.

Because Defendant cannot meet the jurisdictional requirements of Section 2014, the Third-Party Petition should be stricken.

### **3.) Failure to Comply with the Governmental Torts Claim Act**

Finally, Defendant's Third-Party Petition should be stricken because it was improperly filed against government employees acting within the scope of their employment. Section 152.1(A) of the GTCA relieves government employees acting within the scope of their employment from private liability for tortious conduct. *Anderson v. Eichner*, 1994 OK 136, 890 P.2d 1329, 1336-37. The purpose of this provision is to allow "public employees to perform their duties and make decisions on behalf of the state free from fear of suit." *Id.* The GTCA provides that all government employees "acting within the scope of their employment, whether performing governmental or proprietary functions, shall be immune from liability for torts." *Smith v. City of Stillwater*, 328 P.3d 1192, 1198, 2014 OK 42, ¶ 14.

Government employees are considered to be acting within the scope of their employment for purposes of the GTCA "when acting in good faith within the duties of office or employment

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<sup>1</sup> Defendant's only allegation against Mr. Mullins provides that "upon information and belief," Mr. Mullins was involved in communicating defamatory information to the television station. Mr. Mullins was not present for, and did not appear in, the interview.

or while carrying out lawfully assigned tasks.” *Carswell v. Oklahoma State University*, 995 P.2d 1118, 1123, 1999 OK 102, ¶ 17. Defendant, in the Third-Party Petition, clearly makes allegations regarding an activity that occurred within the scope of Mr. Faught and Mr. Mullins’ employment. Defendant does not state or even imply in the Third-Party Petition that the alleged actions occurred outside Mr. Faught and Mr. Mullins’ scope of employment. *Wilson v. City of Tulsa*, 91 P.3d 673, 678-679, 2004 OK CIV APP 44, ¶¶ 16-17 (Police Chief could not be personally liable under GTCA where the agency acknowledges that the activity occurred within his scope of employment). Defendant has no grounds to make such a claim.

Once the petition in this matter was filed, it became a public document. Mr. Faught, in his capacity as Administrator, had the discretion to discuss the filing and its implications publically. 71 O.S. § 1-602(A)(3). Giving an interview to the media was a function of Mr. Faught’s official duties and within his scope of employment. *Wright v. Grove Sun Newspaper Co., Inc.*, 873 P.2d 983, 988, 1994 OK 37 (District Attorney’s participation in news conference was within his official duties); *Wilson v. City of Tulsa*, 91 P.3d 673, 678-679, 2004 OK CIV APP 44, ¶¶ 15-16 (Police Chief’s issuance of press release was made within the scope of his employment and he cannot be held personally liable for allegations of defamation or tortious interference resulting therefrom).

Although the Department did not issue a press release or otherwise reach out to the media in this case, it did respond when contacted by News 9 requesting an interview. The Department had no control over how News 9 edited the interview or whether they aired it.

In the interview, Mr. Faught called the Defendants’ business practices “a classic Ponzi scheme.” While the Department did not specifically use the words “Ponzi scheme” in its petition, it clearly alleged that Defendants used investor money to pay other investors. The use of later

investor money to pay earlier investors is the very definition of a Ponzi scheme. *Adams v. Moriarty*, 127 P.3d 621, fn 2, 2005 OK Civ App 105. Mr. Faught did not deviate from the publically filed petition by referring to the allegations as a Ponzi scheme. All other statements in the News 9 video of which Defendant complains, including the reference to Bernie Madoff, were made by News 9 employees presumably based on their own interpretation of the Department's petition.

To bring an action against a government employee for allegations of tort arising from that employee's duties for a government agency, a petitioner must comply with Section 156 of the GTCA wherein it requires the petitioner to file a claim with the appropriate state authority and give notice of such claim to the government agency. *Pellegrino v. State ex rel. Cameron University*, 63 P.3d 535, 539-540, 2003 OK 2. Defendant is perfectly aware of the procedures for filing a claim under the GTCA. In September 2013, Defendant filed a claim, pursuant to Section 156 of the GTCA, against Mr. Faught, in his official capacity as Administrator of the Department. In December, 2013, that claim was denied, and pursuant to statute, Defendant had 180 days to file a civil case thereunder. See Exhibit A, Letter Denying Claim dated December 9, 2013. That time passed on June 8, 2014, and Defendant now seeks to make an end run around complying with the GTCA by suing Mr. Faught and Mr. Mullins in their individual capacities.

Defendant did not and cannot in good faith allege that Mr. Faught and Mr. Mullins acted outside their scope of employment. Defendant is required to comply with the GTCA. He did not do so prior to filing the Third-Party Petition and it should therefore be stricken.

#### **PRAYER FOR RELIEF**

Despite filing the Third-Party Petition in early August, Defendant has not served process on Mr. Faught and Mr. Mullins. Defendant has not even had process issued by the Court Clerk.

That Defendant filed the Third-Party Petition appears to be merely an attempt to harass Department employees, delay a trial on the merits and/or attempt to coerce the Department into dropping its case against Defendant. For all the reasons stated above, the Department moves this Court to strike the Third-Party Petition.



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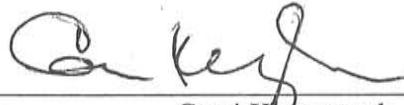
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## CERTIFICATE OF MAILING

The undersigned certifies that on the 21<sup>st</sup> of August, 2014, a true and correct copy of the foregoing was emailed and mailed by first class mail, with postage prepaid thereon, addressed to:

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