

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
SEVENTH JUDICIAL DISTRICT, STATE OF OKLAHOMA

FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.

SEP - 7 2010

PATRICIA PRESLEY, COURT CLERK
by ~~DEPUTY~~

OKLAHOMA DEPARTMENT OF SECURITIES)
ex rel. IRVING L. FAUGHT, Administrator, et al.,)
)
Plaintiffs,)
vs.)
)
ROBERT W. MATHEWS, et al.,)
)
Defendants.)

Case No. CJ-2005-3796

**OBJECTION OF MARVIN AND PAMELA WILCOX TO PLAINTIFFS' MOTION
FOR SUMMARY JUDGMENT COMBINED WITH BRIEF IN SUPPORT**

Marvin and Pamela Wilcox (the "Defendants") object to the motion for summary judgment filed by Douglas L. Jackson (the "Receiver") and the Oklahoma Department of Securities (the "ODS")(collectively referred to as the "Plaintiffs"). In support of their objection, the Defendants state as follows:

MATERIAL FACTS TO AS WHICH A GENUINE DISPUTE EXISTS

1. The Plaintiffs' paragraph 5 states that "Defendants Wilcox reported to the Internal Revenue Service that they were partners with Schubert in Schubert & Associates." This fact is disputed. The Defendants did not prepare their own tax returns, and given that the Defendants were not partners of Schubert and Associates nor ever received any K-1's from the partnership, the Defendants are unaware of why Schubert and Associates was listed in their tax returns, but dispute that they were ever partners of Schubert and Associates. See, *Affidavits of Pam and Marvin Wilcox*, at ¶ 3 (Exhibits 1 and 2).

2. The Plaintiffs' paragraph 12 states that "...the deposits to Schubert from Defendants Wilcox totaled in excess of Seventy-Seven Million Dollars...and [d]isbursements from Schubert to

Defendants Wilcox totaled in excess of Seventy-Eight Million Dollars....” This fact is disputed. The Defendants did not receive in excess of Seventy-Eight Million Dollars from Schubert. Rather the Defendants received \$77,583.050.00 over the course of their dealings with Schubert, for a net profit of \$133,945.00. Exhibit 3 (Defendants’ cumulation of net profits); Exhibit 4; *Affidavits of Pam and Marvin Wilcox*, at ¶ 4 (Exhibits 1 and 2).

3. The Plaintiffs’ paragraph 13 states that “Defendants Wilcox netted \$509,505.00 in fictitious investments.” This fact is disputed. The Defendants netted approximately \$133,945.00 over the course of their dealings with Schubert, not \$509,505.00. The Exhibit 4 attached hereto, which appears to be accounting upon which the Plaintiffs rely to substantiate the Defendants’ profits, reflects several questionable entries, which are reflected in the notations in the margins. See, Exhibit 3; Exhibit 4; *Affidavits of Pam and Marvin Wilcox*, at ¶ 4 (Exhibits 1 and 2).

4. The Plaintiffs’ paragraph 14 states that “[t]he \$509,505 in net returns (“Net Amount”) were paid by Schubert to Defendants Wilcox from the Commingled Funds¹.” Again, this fact is disputed. The Defendants netted \$133,945.00 from the Commingled Funds, not \$509,505.00. See, Exhibit 3; Exhibit 4; *Affidavits of Pam and Marvin Wilcox*, at ¶ 4 (Exhibits 1 and 2).

5. The Plaintiffs’ paragraph 16 states that “[d]efendants Marvin Wilcox never saw any record of or relating to a day trading account.” This fact is disputed. While the Defendants never received anything that specifically referred to a certain day trading account, the Defendants did receive written notes of account balances from Marsha Schubert, which allegedly contained account

¹The terms defined herein have the same meaning as those terms are defined in the *Plaintiffs’ Motion For Summary Judgement Against Defendants Marvin And Pamela Wilcox And Brief in Support*.

balances as a result of such day trades. See, Wilcox Transcr. 49: 3-20 (Sept. 2006)(identified as Plaintiffs' Exhibit "B").

BRIEF IN SUPPORT

I. THE PLAINTIFFS ARE NOT ENTITLED TO SUMMARY JUDGMENT BECAUSE THERE IS A SUBSTANTIAL CONTROVERSY AS TO GENUINE MATERIAL FACTS.

A moving party is entitled to summary judgment as a matter of law only when the pleadings, affidavits, depositions, and admissions or other evidentiary materials establish that no genuine issue of material fact exists. *Miller v. David Grace, Inc.*, 2009 OK 49, ¶ 10, 212 P.3d 1223, 1227; *Davis v. Leitner*, 1989 OK 146, ¶ 9, 782 P.2d 924, 926. As shown by the exhibits and accompanying affidavits of Pam and Marvin Wilcox, there are genuine issues of material fact, which prevent the entry of summary judgment against them.

II. THE DEFENDANTS WERE NOT UNJUSTLY ENRICHED AT THE EXPENSE OF THE SHORT INVESTORS IN THE PONZI SCHEME

The Plaintiffs assert that they are entitled to summary judgment against the Defendants for unjust enrichment, for the reason that the Defendants received a benefit from the amounts paid to them at the expense of short investors. This argument, however, falls well-short of the standard set by the Court in *Oklahoma Department of Securities, et al. v. Blair, et al.*, 2010 OK 16. In *Blair*, the Court held that the Plaintiffs "may proceed against the innocent investors to recover *unreasonable* profits received in excess of their investments in the Ponzi scheme." *Blair* at ¶ 1. Whether the \$133,945.00 in profits the Defendants received were unreasonable, is a question for the trier of fact, and is not appropriate for disposition on summary judgment. Moreover, given the discrepancy between the Defendants' and Plaintiffs' ledgers of the Defendants' net profit in the scheme, there is

a genuine issue of material fact, which prevents the entry of summary judgment. See also, Rule 13(d) of the Rules of the District Courts.

III. THERE IS NO REQUIREMENT THAT THE PROFITS DEFENDANTS WILCOX RECEIVED MUST HAVE BEEN IN SATISFACTION OF AN ANTECEDENT DEBT

The Plaintiff relies upon *Carrozzella & Richardson*, 286 BR 480 (D. Conn. 2002), for the proposition that any profits received by the Defendants are unreasonable as a matter of law, due to a purported lack of antecedent debt. However, the *Blair* Court specifically held that “...equitable recovery against an innocent investor must be based upon that investor’s receipt of an unreasonably high dividend on his or her investment, [which is] is a mixed question of law and fact that must be decided by the trier of fact on remand.” *Blair*, supra, at ¶ 52. The *Blair* Court did not hold that lack of an antecedent debt renders all profits gained from a Ponzi scheme as an “unreasonable high dividend.” Rather, the Court pointed out that there are two distinct lines of authority: 1) the first line of authority makes all Ponzi profits unsupported by the exchange of a reasonably equivalent value, as a matter of law; and 2) the second line of authority makes the issue of reasonably equivalent value a question of fact. *Id.* at ¶ 25. The Court cited *Carrozzella & Richardson* one of the cases in the second line of authority. The Court did not, however, adopt the *Carrozzella & Richardson* case *in toto*, nor did the Court hold that the absence of an antecedent debt owed to victims of a Ponzi scheme renders all profits received “unreasonably high dividends.”

Even if this Court should find that the reasonableness of the Defendants’ profit depends upon whether there is an antecedent debt, it seems that such antecedent debt existed as soon as the Defendants gave money to Schubert to invest, and Schubert failed to invest it. However, given that almost eight years has past since the Defendants’ initially made their investment with Schubert and

Associates, the Defendants cannot recall whether they contracted with Schubert for a particular interest rate, which necessarily would require the Defendants to conduct discovery to determine that issue. *Affidavits of Pam and Marvin Wilcox*, at ¶ 4 (Exhibits 1 and 2). Rule 13(d) of the Rules for the District Courts of Oklahoma provides that should it appear from an affidavit of a party opposing a motion for summary judgment that for reasons stated the party cannot present evidentiary material sufficient to support the opposition, the court may deny the motion for summary judgment, to allow discovery to be taken. As a result, the Defendants would request that the Plaintiff's motion for summary judgment be denied, to allow the Defendants an opportunity to conduct further discovery.

IV. WHETHER THE NET AMOUNT RECEIVED BY DEFENDANTS WILCOX WAS AN UNREASONABLY HIGH DIVIDEND AND/OR AN "ARTIFICIALLY INFLATED" PROFIT IS A QUESTION OF FACT

The Plaintiff asserts that they "may seek relief against Ponzi investors who received profits that are artificially high dividends" but may not seek relief against "innocent Ponzi-scheme investors who receive their investment with a reasonable rate thereon." However, the *Blair* Court did not hold that failure to contract for a certain rate is the indubitable equivalent of an artificially high dividend. The issue of whether the Defendants received a reasonable return on their investment is a subjective issue for the trier of fact, and is not appropriate for summary disposition.

V. THE DEFENDANTS ARE INNOCENT INVESTORS

Contrary to the Plaintiffs' allegations, the Defendants were innocent victims of Schubert's Ponzi-scheme. The Defendants were never partners with Marsha Schubert in Schubert & Associates nor materially aided Schubert's Ponzi scheme. *Affidavits of Pam and Marvin Wilcox*, at ¶ 3 (Exhibits 1 and 2). Any allegation that the Defendants participated in Schubert's Ponzi-scheme or ever knew about it prior to its discovery, is strongly disputed. As a result, the extent of the Defendants'

relationship with Schubert & Associates and knowledge of Schubert's Ponzi-scheme is a genuine issue of material fact, and as a result, summary judgment must be denied.

CONCLUSION

The Plaintiffs motion for summary judgment must be denied. The pleadings, affidavits, depositions, and evidentiary materials attached to the Plaintiffs' motion and the Defendants' objection establish the existence of several genuine issues of material fact, which renders this case unsuited for summary disposition.

WHEREFORE, the Defendants request that the Plaintiff's motion for summary judgment be denied, and for all such other further relief as is just and proper.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that on September 7, 2010, a true and correct copy of the above and foregoing Objection was mailed by first class mail, postage prepaid, to the following:

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