

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

Oklahoma Department of Securities)
ex rel. Irving L. Faught,)
Administrator,)
)
Plaintiff,)
)
v.)
)
Bothwell Consulting, LLC, an Oklahoma)
LLC; Lawrence G. Bothwell, an individual;)
Christopher S. VonWerder, an individual;)
and Tommy L. Richardson, an individual,)
)
Defendants,)
)
and)
)
Amy J. Richardson, an individual,)
)
Defendant Solely For)
Purposes of Equitable Relief.)

Case No. CJ-2009-6989

FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.

JAN 21 2010

PATRICIA PRESLEY, COURT CLERK

by _____
DEPUTY

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
AGAINST DEFENDANTS BOTHWELL CONSULTING, LLC
AND LAWRENCE G. BOTHWELL

Plaintiff, Oklahoma Department of Securities *ex rel.* Irving L. Faught, Administrator, pursuant to Rule 13 of the Rules of the District Courts of Oklahoma, moves for summary judgment against Defendants Bothwell Consulting, LLC (Bothwell Consulting) and Lawrence G. Bothwell (Bothwell) (collectively, "Defendants"). Plaintiff seeks an order finding that Defendants violated the Oklahoma Uniform Securities Act of 2004 (Act), Okla. Stat. tit. 71, §§ 1-101 through 1-701 (Supp. 2003), permanently enjoining Defendants from offering and selling securities, and ordering Defendants to make restitution to their victims. Based on the undisputed facts, prior rulings by this

Court in this matter, and the legal authority set forth herein, summary judgment should be entered against Defendants.

**STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO
SUBSTANTIAL CONTROVERSY**

1. At all times material hereto, Bothwell Consulting was an Oklahoma limited liability company with a purported business address in Oklahoma City, Oklahoma. *See* Affidavit of Carol Gruis, Exhibit A, ¶ 7.

2. At all times material hereto, Bothwell conducted business in the name of Bothwell Consulting. *See* Affidavit of Carol Gruis, Exhibit A, ¶ 8.

3. At all times material hereto, Bothwell Consulting was controlled by Bothwell. *See* Affidavit of Carol Gruis, Exhibit A, ¶ 8.

4. Beginning in or about July 2007, Defendants accepted money from individuals (Investors) in exchange for so-called debentures issued by Bothwell Consulting (Debentures). *See* Affidavit of Carol Gruis, Exhibit A, ¶ 9.

5. Defendants promised a guaranteed annual rate of return of between 12% and 20% on the principal investment in the Debentures (Interest Payments). *See* Affidavit of Carol Gruis, Exhibit A, ¶ 9.

6. Bothwell Consulting entered into an agreement (Agreement) with Investors that included a provision that Bothwell Consulting would use the “principle [sic] investment” at its discretion and without influence from and/or control by the investors. *See* Affidavit of Carol Gruis, Exhibit A, ¶ 10.

7. Investors had no role in the outcome or success of the investments or in achieving the promised profit from the Debentures. Investors relied completely on the

judgment and discretion of Defendants for the promised return. *See* Affidavit of Carol Gruis, Exhibit A, ¶¶ 10 and 11.

8. The Investor funds were deposited in bank accounts controlled by Bothwell. *See* Affidavit of Carol Gruis, Exhibit A, ¶ 14.

9. Between November 2007 and August 2009, Defendants received approximately \$640,000 from fifty (50) investors. *See* Affidavit of Carol Gruis, Exhibit A, ¶ 13.

10. Defendants did not use Investor funds to generate operating revenue to fund the guaranteed Interest Payments to Investors. Defendants used the Investor funds primarily to pay Defendant Bothwell's personal expenses. *See* Affidavit of Carol Gruis, Exhibit A, ¶¶ 14 and 15.

11. The Debentures offered and/or sold by Defendants are not and have not been registered under Section 1-301 of the Act. *See* Affidavit of Kenneth Maillard, Exhibit B.

12. Defendants are not and have not been registered under the Act to transact business in this state in any capacity. *See* Affidavit of Carol Gruis, Exhibit A, ¶ 4.

ARGUMENTS AND AUTHORITIES

I. THERE IS NO SUBSTANTIAL CONTROVERSY AS TO THE MATERIAL FACTS AND PLAINTIFF IS ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW

The summary judgment procedure authorized by Rule 13 of the Rules of the District Courts of Oklahoma provides a method to dispose of cases where there is no substantial controversy as to any material fact. When a party demonstrates to the court that no controversy exists as to any material fact, and that the moving party is entitled to

judgment as a matter of law, the Court has a duty to enter summary judgment in favor of that party. Rule 13, Rules of the District Courts of Oklahoma, OKLA. STAT. ANN. TIT. 12, Ch. 2, App. (Rule 13).

II. DEFENDANTS OFFERED AND/OR SOLD SECURITIES IN VIOLATION OF THE ACT

Section 1-102(32) of the Act defines a “security” to include, *inter alia*, a note, a debenture, an evidence of indebtedness, and an investment contract. To determine that the instruments offered and sold by the Defendants are securities under Oklahoma law, the undisputed facts in this case must be analyzed in light of the statutory definition of the term “security” and various court decisions, including decisions of the Oklahoma Supreme Court and the United States Supreme Court.

The United States Supreme Court has ruled that remedial legislation such as the securities laws should be broadly construed to effectuate its purpose. *Tcherepnin v. Knight*, 389 U.S. 332, 336, 88 S.Ct. 548, 553 (1967). Further, in analyzing an investment, “form is to be disregarded over substance and the emphasis should be on (the) economic reality” of the transaction. *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 848, 95 S.Ct. 2041, 2058 (1975).

A. Debentures Offered and Sold by Defendants are Securities under the Act

A debenture is specifically defined as a security by Section 1-102(32) of the Act. In addition, the instruments offered and sold by Defendants are investment contracts pursuant to Section 1-102(32)(d) of the Act. The Act specifically “includes as an ‘investment contract’ an investment in a common enterprise with the expectation of profits to be derived primarily from the efforts of a person other than the investor[.]” This definition codifies the four-pronged test set forth by the United States Supreme

Court in *SEC v. W. J. Howey Co.*, 328 U.S. 293, 66 S. Ct. 1100 (1946), and adopted by the Oklahoma Supreme Court in *State ex rel. Day v. Petco Oil and Gas, Inc.*, 558 P.2d 1163 (Okla. 1977). The four prongs of the *Howey* test, as restated in *Day* and now codified in the Act, are: (1) the investment of money, (2) in a common enterprise, (3) with the expectation of profits, (4) through the efforts of others.

The United States Supreme Court has stated that the definition of a security adopted by it in *Howey* “embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits.” *Howey*, 328 U.S. at 299, 66 S.Ct. at 1103. The court in *Day* also adopted the flexible definition of investment contract under Oklahoma law. 558 P.2d at 1167.

The instruments offered and/or sold by Defendants satisfy all prongs of the *Howey* test. First, there was an investment of money. Defendants received approximately \$640,000 from 50 Investors. Second, the investment involved a “common enterprise.” Section 1-102(32)(d) of the Act provides that a “‘common enterprise’ means an enterprise in which the fortunes of the investor are interwoven with those of either the person offering the investment, a third party, or other investors[.]” All Investor money was combined in bank accounts controlled by Defendants and the use of the funds was determined solely by the Defendants. Therefore, the fortunes of each Investor were interwoven. Third, the Investors expected to make a profit from their investments based on the promised monthly Interest Payments. Fourth, any profits that were to be made by an Investor would only be derived through the efforts of Defendants. Investors had no role in the outcome or success of the investments or in achieving the promised profit

from the Debentures. Investors relied completely on the judgment and discretion of Defendants for the promised return and had no knowledge of how such returns would be generated. Clearly, the instruments offered and/or sold by Defendants are investment contracts and, therefore, securities under the Act.

Section 1-102(32) of the Act includes a note in the definition of a security. As a result of the broad, general definition of the term “note,” a specialized test was declared by the United States Supreme Court in *Reves v. Ernst and Young*, 494 U.S. 56, 65, 110 S. Ct. 945, 951 (1990). In *Reves*, the Supreme Court held that the “family resemblance” test is to be used in deciding whether a note is a security. Under the *Reves* test, there is a presumption that a note or promise to pay in the future is a security.

The Court in *Reves* stated that “[i]f the seller's purpose is to raise money for the general use of a business enterprise or to finance substantial investments and the buyer's interest is primarily in the profit the note is expected to generate, the instrument is likely to be a security.” *Id.* U.S. at 66, 110 S. Ct. at 951-952. The instruments offered and/or sold by Defendant are notes and, therefore, securities under the Act.

B. Defendants Have Offered and Sold Securities in Violation of Section 1-301 of the Act

The first cause of action in the Department’s Petition states that Defendants have sold unregistered securities in violation of Section 1-301 of the Act. The Debentures were required to be registered or exempt from registration pursuant to Section 1-301 of the Act. The securities offered by Defendants are not, and have not been, registered under the Act. Pursuant to Section 1-503 of the Act, the burden of proving an exemption from registration is on the person claiming the exemption. However, Defendants have not raised the affirmative defense of the availability of an exemption from registration for

the offer and/or sale of the unregistered securities. Failure to plead an affirmative defense is a waiver of that defense. *RST Service Mfg., Inc. v. Musselwhite*, 628 P.2d 366, 368 (Okla. 1981). Accordingly, summary judgment on the first cause of action is appropriate.

C. Defendants Were Not Registered to Transact Business in Securities in Violation of Section 1-402 of the Act

The second cause of action in the Department's Petition states that Defendant Bothwell violated Section 1-402 of the Act. Pursuant to Section 1-402 of the Act, persons transacting business in securities in Oklahoma as an agent are required to be registered under the Act or to be exempt from such registration. Defendant Bothwell is not, and has not been, registered under the Act in any capacity. Pursuant to Section 1-503 of the Act, the burden of proving an exemption or exclusion from registration is on the person claiming the exemption. However, Defendant Bothwell has not raised the affirmative defense of the availability of an exemption or exclusion from registration for transacting business in securities. Failure to plead an affirmative defense is a waiver of that defense. *RST Service Mfg., Inc. v. Musselwhite*, 628 P.2d 366, 368 (Okla. 1981). Accordingly, summary judgment on the second cause of action is appropriate.

D. Defendants Fraudulently Sold Securities in Violation of Section 1-501 of the Act

The third and fourth causes of action in the Department's Petition state that Defendants made misrepresentations and omissions in connection with the offer and/or sale of securities and engaged in fraudulent practices against the Investors in violation of Section 1-501 of the Act. Section 1-501 of the Act provides:

It is unlawful for a person, in connection with the offer, sale or purchase of a security, directly or indirectly: 1) To employ a device, scheme, or

artifice to defraud; 2) To make an untrue statement of material fact or to omit to state a material fact necessary in order to make the statement made, in the light of the circumstances under which it is made, not misleading; or 3) To engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person.

Defendants misrepresented that Investors would have a guaranteed return on their investments. Further, Defendants omitted to state that Investor funds would not be used in any way to generate operating revenue to fund the promised Interest Payments to Investors.

Defendants' use of Investor funds to pay Defendant Bothwell's personal expenses along with the misrepresentations and omissions described above, constitute an act, practice, and/or course of business that operated as a fraud on the Investors. The misrepresentations and omissions made by Defendants and their fraudulent acts, practices, and/or course of business clearly are in violation of Section 1-501 of the Act. Accordingly, summary judgment on the third and fourth causes of action is appropriate.

III. DEFENDANTS' FAILURE TO ANSWER PETITION

The Defendants have failed to answer the Petition for Permanent Injunction and Other Equitable Relief filed by the Department on July 24, 2009. As provided by 12 O.S. § 2012, Defendants were required to serve their answers on the Plaintiff within twenty (20) days after their attorney accepted service of the Petition on their behalf. The attorney for Defendants accepted service on behalf of the Defendants on August 17, 2009.

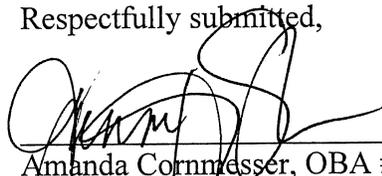
The Defendant has failed to comply with 12 O.S. § 2008 by not filing the required responsive pleading. Therefore, the claims contained in the Petition should be deemed

admitted. Consequently, there are no material facts in dispute thereby making summary judgment appropriate.

CONCLUSION

The facts stated herein and evidentiary materials attached hereto establish that no genuine issue of material fact exists regarding the Department's causes of action for violations of Sections 1-301, 1-402 and 1-501 of the Act. Further, Plaintiff is entitled to summary judgment against Defendants as a matter of law. Plaintiff therefore prays that this Court enter summary judgment against Defendants, permanently enjoining them from the offer and/or sale of securities in and/or from the state of Oklahoma; ordering them to make restitution to the Investors in amounts subsequently established by this Court, with interest accruing thereon at the statutory rate from the date judgment is entered until paid in full; and ordering any other relief the Court deems just and equitable.

Respectfully submitted,



Amanda Cornmesser, OBA #20044
Jennifer Shaw, OBA # 20839
Oklahoma Department of Securities
120 North Robinson, Suite 860
Oklahoma City, OK 73102
(405) 280-7700

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the *Plaintiff's Motion for Summary Judgment Against Defendants Bothwell Consulting, LLC and Lawrence G. Bothwell*, was mailed this 21 day of January, 2010, by depositing it in the U.S. Mails, postage prepaid, to the following:

J. David Ogle
100 Park Ave., Suite 500
Oklahoma City, OK 73102

Stephen Parker
416 SW 79th St., # 100
Oklahoma City, OK 73139-8121

Tommy L. Richardson
1511 Tahoe Lane
Yukon, OK 73099

Amy J. Richardson
1511 Tahoe Lane
Yukon, OK 73099



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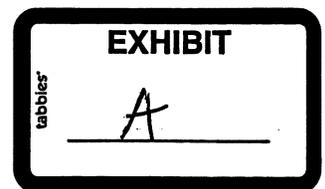
AFFIDAVIT OF CAROL GRUIS

STATE OF OKLAHOMA)
)
COUNTY OF OKLAHOMA)

ss:

Carol Gruis, being of lawful age and duly sworn, deposes and states as follows:

1. I am the Director of Examinations and Licensing of the Oklahoma Department of Securities (Department).
2. I have conducted an examination of the registration files of the Department pertaining to current and past registered investment advisers, broker-dealers, investment adviser representatives, broker-dealer agents, and issuer agents.
3. I have also conducted an examination of the records of the Central Registration Depository (CRD). CRD is a central database that holds all registration files for investment advisers, broker-dealers, investment adviser representatives, and broker-dealer agents.



4. Nowhere within such registration files of the Department or the records of the CRD did I find a record of registration in any capacity pursuant to the Oklahoma Uniform Securities Act of 2004, Okla. Stat. tit. 71, §§1-101 to 1-701 (Supp. 2003), for Bothwell Consulting, LLC, Lawrence G. Bothwell, Christopher S. VonWerder, or Tommy L. Richardson.

5. I have also conducted an investigation into the activities of Bothwell Consulting, LLC, Lawrence G. Bothwell, Christopher S. VonWerder, and Tommy L. Richardson.

6. As a part of the Department's investigation, I have reviewed bank account records, investment documents and other business records of the Defendants and conducted interviews of Bothwell Consulting, LLC employees and investors.

7. Bothwell Consulting, LLC is an Oklahoma limited liability company with a purported business address in Oklahoma City, Oklahoma.

8. During the Relevant Time Period as defined below, Lawrence G. Bothwell controlled Bothwell Consulting, LLC and did business in the name of Bothwell Consulting, LLC.

9. Investors began investing in the debentures offered by Defendants (Debentures) in or about December 2007. Defendants accepted money from investors in exchange for the Debentures issued by Bothwell Consulting, LLC. The Debentures had stated annual rates of return of between 12% and 20%.

10. The Debentures entered into between individual investors and Bothwell Consulting, LLC included a provision that the use of the "principle [sic] investment" would be at the company's discretion and without influence from and/or control by the investors.

11. Investors had no role in the outcome or success of the investments or in achieving the promised profit from the Debentures.

12. At all times material hereto, Lawrence G. Bothwell controlled several bank accounts. I have reviewed and analyzed the deposit items to and the disbursements from these accounts for the period beginning December 2007 and ending July 2009 (Relevant Time Period).

13. During the Relevant Time Period, Defendants accepted funds totaling approximately \$640,000 from fifty (50) individuals for the Debentures.

14. The majority of the funds obtained by Defendants from investors were deposited into the accounts controlled by Lawrence G. Bothwell and were commingled

with other investors' monies. The investors' funds were primarily used to pay the personal expenses of Lawrence G. Bothwell.

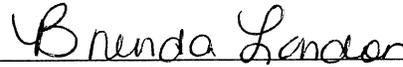
15. Defendants failed to generate operating revenue to fund the promised interest payments to the investors.

FURTHER AFFIANT SAITH NOT.

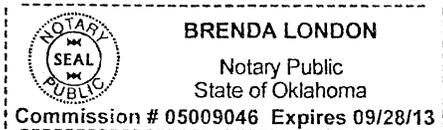


Carol Gruis

Subscribed and sworn to before me this 20th day of January 2010.



Notary Public



**IN THE DISTRICT COURT OF OKLAHOMA COUNTY
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AFFIDAVIT OF KENNETH G. MAILLARD

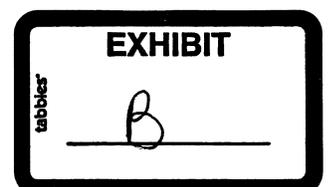
STATE OF OKLAHOMA)
) **ss:**
COUNTY OF OKLAHOMA)

Kenneth G. Maillard, being of lawful age and being duly sworn, deposes and states as follows:

1. I am the Director of Registrations of the Oklahoma Department of Securities (Department).

2. I have conducted an examination of the registration and exemption files of the Department pertaining to current and past registrations and exemptions from registration for the offer or sale of securities in Oklahoma.

3. Nowhere within the registration files of the Department did I find a record of an application for the registration of securities under the Oklahoma Uniform Securities

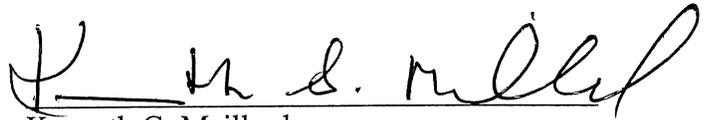


Act of 2004, Okla. Stat. tit. 71, §§1-101 to 1-701 (Supp. 2003) (Act), for or on behalf of Bothwell Consulting, LLC.

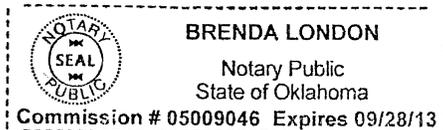
4. Nowhere within the registration files of the Department did I find a record of a registration of securities under the Act for or on behalf of Bothwell Consulting, LLC.

5. Nowhere within the exemption files of the Department did I find a record of a notice of intent to claim exemption from registration of securities under the Act for or on behalf of Bothwell Consulting, LLC.

FURTHER AFFIANT SAITH NOT.


Kenneth G. Maillard

Subscribed and sworn to before me this 20th day of January, 2010.




Notary Public