

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

NOV - 5 2004

PATRICIA PRESLEY, COURT CLERK
By _____
Deputy

Oklahoma Department of Securities)
ex rel. Irving L. Faught, Administrator,)
)
Plaintiff,)
)
v.)
)
Trade Partners, Inc., a Michigan corporation,)
et al.,)
)
Defendants.)

Case No. CJ-2004-6295

REPLY BRIEF OF HAROLD A. KATERSKY IN SUPPORT OF MOTION TO DISMISS

The Plaintiff's response to the Motion To Dismiss is full of conclusory allegations. It fails to distinguish between IWM and Mr. Katersky, or between his conduct only as a representative of IWM, which the Petition alleged, and any conduct by Mr. Katersky as an individual, which the Petition does not allege (and did not happen). Like the Petition, the response is not verified on personal knowledge or supported by an affidavit. Because those conclusory allegations were refuted in Mr. Katersky's affidavit, to which Plaintiff failed to respond, the Plaintiff has not established personal jurisdiction. (See, Proposition A, at pp. 2-4 of the Brief of Harold A. Katersky In Support of Motion To Dismiss).

The Plaintiff attached to its response a promissory note which was issued by IWM as "Borrower" to an individual with an Oklahoma address as "Lender". It was signed for IWM by Mr. Katersky in his representative capacity as its Chief Executive Officer, an important fact which Plaintiff recognized. ("In this case, those investors are in Oklahoma and their IWM notes and stock, which specifically state the investors' names and addresses, are signed by Katersky as Chief Executive Officer of IWM." (emphasis added) Response at p. 3-4.) That note was not "issued" by Mr. Katersky. The obligation runs from IWM, not from Mr. Katersky. Further, as Mr. Katersky said in his affidavit, that note was not signed or "issued" in Oklahoma. On its face, the note states: "Grand Rapids, Michigan". It is also to be "governed by and construed in accordance with the laws of the State of

Michigan". So, even the actual maker of that note, IWM not Mr. Katersky, did not act in Oklahoma by making that note or in any way avail itself of the protection of the laws of the state of Oklahoma. Certainly, Mr. Katersky, by signing in a representative capacity for IWM outside the state of Oklahoma, did not personally act anywhere much less in Oklahoma.

The Plaintiff misunderstands the legal effect of such a promissory note, and stated that Katersky "...continues to be obligated to the Oklahoma investors based on the contract with them." (Response to Motion To Dismiss, page 4, first paragraph, second sentence). The Plaintiff cited two cases, Associates Financial Services of Oklahoma, 550 P.2d 992 (Okla. Ct. App. 1976) and First Texas Savings Association v. Bernsen, 1996 OK CIV APP 24, 921 P.2d 1293, in which the defendants signed promissory notes in their personal capacities.

As a matter of fact and law, the Plaintiff is wrong. Mr. Katersky is not a party to any IWM promissory note. He has no personal obligation to any Oklahoma lender "based on the contract with them," as alleged by the Plaintiff. The cases cited by Plaintiff are easily distinguished. Both cases involved defendants who gave their personal note or guaranty and mortgage to finance the purchase of real estate in Oklahoma and then defaulted. It was held in the Associates Financial Services of Oklahoma case that ownership of property in Oklahoma, which was purchased with the proceeds of a note signed in Texas, was sufficient minimum contacts with Oklahoma to sue the maker of the note and owner of the land in Oklahoma. This case does not involve either the maker of a personal note or the ownership of land in Oklahoma which was purchased with the proceeds of a note.

The First Texas Savings Association case relied on Associates Financial Services of Oklahoma (921 P.2d at 1297) and may be even further distinguished. There, the defendants also waived their objection to personal jurisdiction by filing an unqualified entry of appearance (921 P.2d at 1296). Further, the individual defendants who had signed notes and guaranties were limited partners in a limited partnership which had "as the only partnership business, the acquisition, improvement,

operation, and management of real and personal property in Oklahoma.” (921 P.2d at 1297).

There is no important similarity between this case and either of those cases. Mr. Katersky did not sign a promissory note in a personal capacity. Mr. Katersky does not own any land in Oklahoma. Mr. Katersky personally has no continuing business relationship with Oklahoma. Mr. Katersky acted only outside the state and only in a representative capacity. He is not personally liable and not personally subject to suit in Oklahoma. (See, especially, Proposition C, pp. 4-12 of the Brief in Support of Motion To Dismiss). The law is quite clear that representative acts are not ipso facto personal acts. The Plaintiff has not cited a single case in which a non-resident defendant who acted only outside the state of Oklahoma and only in a representative capacity was found subject to suit personally in Oklahoma.

Finally, the Plaintiff misreads the case of Barnes v. Wilson, 1978 OK 97, 580 P.2d 991, which Mr. Katersky cited for the proposition that, even if his signing of the IWM promissory notes were considered a personal act, that act, outside Oklahoma, is not sufficient to confer personal jurisdiction. The Oklahoma bank’s claim in Barnes was that non-residents who, in Kansas, signed their names, without any other words, on the back of a promissory note from their business associate to the Bank were not only guarantors and liable to the bank, but also amenable to suit in Oklahoma for default on that note. Contrary to Plaintiff’s characterization of the decision, the Court in Barnes expressly stated that it did not prejudge the merits of the case with respect to defendants’ liability as guarantors (1978 OK 97, ¶21). It did not prohibit the trial court from proceeding with trial of the merits because the defendants were not liable on the note, as stated by the Plaintiff. (“The Court in Barnes v. Wilson, supra, found that these non-resident defendants did not guarantee or assume any obligations under the note.” Response at p. 5.) Rather, the Court in Barnes held that, even if the non-residents had the status of guarantors to the bank, there were no minimum contacts with Oklahoma sufficient to sue them here for breach.

Further, the Plaintiff's "economic benefit" analysis is not supported by the Barnes case. The Court in Barnes did not even analyze, much less find or hold (as asserted by Plaintiff in its Response at p. 5), that the trial court lacked personal jurisdiction because the defendants did not anticipate any economic benefit from signing the note. There is a single reference to expectation of economic benefit in a quote from a California case which was cited by the Court in Barnes for a different purpose (1978 OK 97, ¶18), but that factor was not analyzed either in the portion of the California case cited in Barnes or in the Barnes case itself. There is nothing in Barnes that suggests the Kansas defendants would have been subject to suit in Oklahoma if they had expected economic benefit from the note or alleged guaranty. Certainly, they actually received such a benefit, at least indirectly, because the Oklahoma bank loaned money which was used to buy a truck for their venture. The Plaintiff's "economic benefit" analysis is not an adequate basis for personal jurisdiction in this case. The Motion To Dismiss should be granted.

Respectfully submitted,



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ATTORNEYS FOR DEFENDANT,
HAROLD A. KATERSKY

CERTIFICATE OF MAILING

This is to certify that on the 5th day of November, 2004, a true and correct copy of the foregoing instrument was mailed, United States mail, with postage prepaid, to:

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