

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2004-010393

11/29/2004

THE HONORABLE MICHAEL A. YARNELL

CLERK OF THE COURT  
M. L. Smith  
Deputy

FILED: 12/06/2004

OLYMPIC CASCADE FINANCIAL  
CORPORATION

OLYMPIC CASCADE FINANCIAL  
CORPORATION  
C/O ARIAN COLACHIS  
1001 4TH AVE STE 2130  
SEATTLE WA 98154

v.

J EDWARD LUCAS III, et al.

CHRISTOPHER A LAVOY

ARIAN COLACHIS  
1001 FOURTH AVE  
SUITE 2130  
SEATTLE WA 98154-1143  
STEVEN M FRIEDMAN  
FRANK LEWIS

MINUTE ENTRY

9:00 a.m. In the courtroom.

Time set for continued oral argument on pending Motions For Summary Judgment. Counsel, Arian Colachis, is present for Plaintiff. Counsel, Christopher A. Lavoy, is present for Defendant Lucas. Defendant Frank Lewis, pro se, is present. Steven M. Friedman is present for Defendant Begam Lewis Marks & Wolf.

Court Reporter Steve King is present.

Oral Argument is heard as reflected on the record.

IT IS ORDERED taking this matter under advisement.

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10:05 a.m. Hearing concludes.

**LATER:**

**Background Of The Pending Cross-Motions For Summary Judgment**

By prior order of this court, all prior voluminous pleadings in this action are being treated as cross-motions for summary judgment on Plaintiff's Amended Complaint dated August 16, 2004. A copy of the Amended Complaint is filed herewith along with the original Order On Stipulation signed September 17, 2004.

**Background Of This Case**

In May or June, 2001, J. Edward Lucas, II, ("Lucas") through his attorneys Frank Lewis and Begam Lewis Marks & Wolf ("Lewis") filed a statement of claim against Scott D. Schenk ("Shenk") a registered representative with WestAmerica Group Inc ("WestAmerica") for various State and Federal security law violations, including unauthorized trading. An award in favor of Lucas was entered on or about August 19, 2003, in an NASD Dispute Resolution arbitration, Lucas v. WestAmerica Investment Company, case number 01-02951 against Schenk in the amount of \$54,879.00 plus \$25,000.00 in attorneys' fees. According to Mr. Lewis's statements to the court at oral argument, some, but not all, of this award has been paid by Schenk.

During the NASD proceedings, after it became known that WestAmerica would file bankruptcy, Lucas, through his attorney Lewis, added by amended statement of claim and as individual respondents in the NASD arbitration William F. Groszbruger, Paula M. LaFon, Steven A. Rothstein, and Robert H. Daskal (the "Control Persons"). Steven A. Rothstein and Robert H. Daskal were outside directors of WestAmerica Investment Group, Inc. Paula M. LaFon was the CFO in charge of financial and accounting issues at WestAmerica. William F. Groszbruger carried the license to supervise the brokers, including Schenk, was the CEO of WestAmerica, and was a director of WestAmerica.

The Control Persons requested that the NASD arbitration panel dismiss Lucas control person claims and award the Control Persons their costs and reasonable attorney's fees (page 4 of 10, Arbitration Award). The NASD arbitration panel held that the Control Persons "having answered the claim, appeared and testified at the hearing are bound by the determination of the arbitration panel on all issues submitted. (Page 5 of 10, Arbitration Award).

The NASD arbitration panel award denied the Control Defendants "Mid-Hearing Motion to Dismiss", denied the Control Defendants "Motion for Sanctions against Claimant", specifically held that "All Respondents are responsible for their own legal fees and costs," recommended expungement of all reference to the claim and arbitration in the NSAD records of the Control Persons, and directed that other than the Forum Fees, "the parties shall each bear all

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other costs and expenses incurred by them in connection with this proceeding, including but not limited to attorneys fees.” (Pages 6-7 of 10, Arbitration Award).

On or about October 21, 2003, a Judgment Confirming NASD Arbitration Award was entered In the Superior Court Of The State Of Washington For The County Of King, In re: The Matter of the Arbitration No. 01-02951, An Arbitration conducted by NASD Dispute Resolution, Inc., Captioned: J. Edward Lucas III, Claimant, v. WestAmerica Investment Company, Inc., et. al., Respondents, Cause No. 03-2037694- SEA.

This instant civil action was filed by Olympic Cascade Financial Corporation on May 27, 2003. The Amended Complaint contains two claims for relief: a “First Cause Of Action” titled “Wrongful Institution of Civil Proceedings” and a “Second Cause of Action” titled “Abuse of Process.”

While not included in the allegations of the Amended Complaint, it appears from counsel’s statements that the claims of the Control Persons have been assigned to Plaintiff. Apparently no written assignment of these claims has been produced or is present in this record. While no clear itemization of damages appears in the pleadings to date, it appears from comments by counsel at the oral argument on the pending motions that Plaintiff Olympic Cascade paid the costs and expenses, including legal fees, of defending the Control Persons in the NASD arbitration. This payment was apparently pursuant to some indemnity agreement and related to Olympic Cascade’s position of parent corporation of WestAmerica.

**Issues Presented and Ruling**

Defendants contend that on the undisputed and disputed facts in this record taken most favorably to Plaintiff, no prima facie case for either the tort of Wrongful Institution Of Civil Proceedings or Abuse Of Process is present. Plaintiff contends that on the undisputed and disputed facts in this record taken most favorably to Defendants, a prima facie case of liability on both torts is present, and only the issue of damages remains for a jury.

In particular, the parties present conflicting views and arguments on whether or not probable cause and absence of unlawful purpose existed, or did not exist, to add the Control Persons as respondents in the NASD arbitration. The parties also present conflicting views on whether or not the tort claims of the Control Defendants are assignable under Arizona Law to Plaintiff Olympic Cascade.

Based on and after review of all the authorities cited by the parties, this court concludes that as a matter of law on the admissible disputed and undisputed facts taken most favorably to Plaintiff, Defendants had probable cause to name the Control Persons as respondents in the NASD arbitration. Both as an objective and subjective matter, Defendants had a good faith basis on the application and reasonable extension of existing Arizona law to assert control liability of the Control Persons, subject to any good faith conduct defense. In light of the bankruptcy of

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WestAmerica, the assertion of Control Person liability was not for any wrongful or improper motive – either objectively or subjectively.

Based on and after review of all the authorities cited by the parties, this court concludes that an element of damages for the intentional tort claims of Wrongful Institution Of Civil Proceedings and Abuse Of Process included damages for mental suffering. These damages are not severable and are not assignable under Arizona law. In addition, Plaintiff Olympic Cascade has produced no such assignment as required by Rule 26.1, Rules of Civil Procedure.

As alleged assignee of the Control Persons, to the extent res judicata or issue preclusion (collateral estoppel) would bar a claim by the Control Persons, those doctrines bar such claims by Olympic Cascade. Plaintiff's argument that Defendants here are precluded from arguing probable cause existed due to the NSAD expungement order and a finding that the Control Person claims were "without merit" is not persuasive to this court. The arbitration panel finding of "without merit" may very well have been based on either the "good faith defense" or a requirement for "active participation" as a predicate to finding control person liability. Neither of those basis is a direct (or even indirect) holding of "no probable cause."

While the Control Persons claim for costs and attorneys fees against Lucas has been affirmatively adjudicated against the Control Persons by the NSAD arbitration award – since confirmed by Final Judgment. – from a res judicata standpoint, the claim of Wrongful Institution of Civil Proceedings and Abuse of Process could not and was not litigated in the NASD forum.

This court does not reach, at this time, the issue of whether or not collateral estoppel otherwise bars the Control Persons (or their assignee Olympic Cascade) from claiming those sums under an otherwise permissible Wrongful Institution Of Civil Proceedings or Abuse of Process claim.

This court does not reach, at this time, the Defendants statute of limitations arguments.

IT IS ORDERED granting Defendants Motions For Summary Judgment.

FURTHER ORDERED denying Plaintiff's Motion For Summary Judgment.

FURTHER ORDERED dismissing this action with prejudice.

FURTHER ORDERED each party shall bear its own costs and attorney's fees in this action.

FURTHER ORDERED Defendants shall forthwith lodge a short, simple, form of judgment, granting the Defendants' Motions For Summary Judgment, denying Plaintiff's Motion For Summary Judgment, dismissing this action with prejudice, providing that each party shall bear their own attorney's fees, and providing taxable costs to Defendants.

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FURTHER ORDERED placing this matter on the inactive calendar until **January 15, 2005**, awaiting entry of final judgment.