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NOT FOR OFFICIAL PUBLICATION

JOHN D. HADDEN
CLERK

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION I

SECURITY BANK AND TRUST)
COMPANY, successor by merger to)
FIRST STATE BANK OF COMMERCE,)
an Oklahoma state chartered bank,)

Plaintiff/Appellee,)

vs.)

Case No. 117,248

JOHN THEODORE LINTHICUM,)
individually and d/b/a TL Ranch,)
TL Linthicum Land & Cattle,)
Linthicum Angus Ranch, and JT)
Linthicum; LINTHICUM RANCHES,)
INC., an Oklahoma Corporation; and)
LINTHICUM ANGUS RANCH, LLC,)
an Oklahoma Limited Liability Company,)

Defendants/Appellants,)

and)

ANGELA ASBELL, individually;)
DOUG MAYFIELD, individually and)
d/b/a Rafter M Angus; GROVE)
LIVESTOCK, LLC, an Oklahoma)
limited liability company; and JOHN)
DOES 1-10, individually and or entities,)

Defendants,)

and)
)
DAMAR FARMS,)
)
Intervenor.)

APPEAL FROM THE DISTRICT COURT OF
OTTAWA COUNTY, OKLAHOMA

HONORABLE ROBERT G. HANEY, JUDGE

AFFIRMED

Robert J. Carlson,
Brandon C. Bickle,
GABLE GOTWALS,
Tulsa, Oklahoma,
and
N. Georgeann Roye,
Miami, Oklahoma,

For Plaintiff/Appellee,

Ryan A. Ray,
NORMAN, WOHLGEMUTH,
CHANDLER, JETER,
BARNETT & RAY, P.C.,
Tulsa, Oklahoma,

For Defendants/Appellants.

Opinion by Kenneth L. Buettner, Judge:

¶1 Defendants/Appellants John Theodore Linthicum, individually and d/b/a TL Ranch, TL Linthicum Land & Cattle, Linthicum Angus Ranch, and JT Linthicum; Linthicum Ranches, Inc.; and Linthicum Angus Ranch, LLC (collectively,

Linthicum), appeal partial summary judgment granted to Plaintiff/Appellee Security Bank and Trust Company, successor by merger to First State Bank of Commerce (Bank) against Linthicum and Defendant Angela Asbell. The trial court certified the judgment as an appealable order and Bank dismissed its claims against Defendants Doug Mayfield, individually and d/b/a Rafter M Angus, and Grove Livestock, LLC. The record on appeal shows the material facts were undisputed and Bank was entitled to judgment as a matter of law. We affirm.

¶2 Bank alleged Linthicum and the other Defendants conspired to present bogus checks to Bank to fraudulently obtain money. Bank asserted causes of action against Linthicum for breach of contract, fraud, fraudulent transfer, conspiracy, and racketeering. Bank also asked the court to appoint a receiver, order an accounting, and impose a constructive trust. After the trial court appointed a special master and denied Linthicum's motion to dismiss, Linthicum answered and asserted his Fifth Amendment right to remain silent.

¶3 Bank then filed its Motion for Partial Summary Judgment against Linthicum and Asbell.¹ Bank argued it was entitled to summary judgment on its breach of

¹ Bank asserted there was no dispute that Linthicum held accounts at Bank since September 2014; Bank froze his accounts February 13, 2017; Asbell was employed by Bank from 2012 to 2017 and during that time she oversaw all debit and credit transactions Linthicum had with Bank, and also during that time, Asbell was employed by Linthicum as a bookkeeper, in violation of Bank's policies; between November 2, 2016 and January 3, 2017, at least 24 identified bogus checks, signed
(continued...)

contract claim because the undisputed facts showed Linthicum was an account holder at bank and was indebted to Bank for over \$1.2 million due to the overdrafts. Bank further argued the undisputed evidence showed it was entitled to summary judgment on its claims for fraud and conspiracy because Linthicum and Asbell submitted bogus checks knowing they would not be honored and with the intent that Bank would rely on them to its detriment. Bank asserted Linthicum and Asbell conspired to repeatedly withdraw funds based on bogus check deposits. Bank alleged these facts showed Linthicum and the other Defendants formed an enterprise for the purpose of carrying out their scheme, which constituted a pattern of racketeering activity. Bank asserted

¹ (...continued)

by Mayfield, for \$100,000 (2), \$125,000 (1), and \$375,000 (21) were presented by or on behalf of Linthicum; Asbell failed to place a hold on Linthicum's account at any time during that period, contrary to Bank's policies; from October 2016 to January 2017, Asbell falsely represented to Bank's proof operator that she had contacted the president of Grand Savings Bank to confirm Mayfield's accounts had funds to cover the checks; when Bank learned Mayfield's checks would be returned, Asbell notified Linthicum so that he could arrange additional fraudulent deposits to mask the overdraft so that Bank would continue to honor his debit transactions; Asbell allowed Linthicum to overdraw his account despite specific instructions from Bank not to approve any overdraft over \$500; Asbell and Linthicum conspired to send letters to third parties to assure them Linthicum's accounts had funds and his checks would be honored; in reliance on false representations, Bank allowed Linthicum to withdraw cash and write checks to himself, his family, the other Defendants and third parties before Bank discovered the fraud; the bogus checks resulted in an overdraft of Linthicum's checking account of \$1,215,137.60; in December 2017, Asbell agreed to an "Order of Prohibition Issued upon Consent Pursuant to Section 8(e) of the Federal Deposit Insurance Act, as Amended" by the Board of Governors of the Federal Reserve System; the Order of Prohibition provided that Asbell worked as a bookkeeper for Linthicum and that she permitted him to deposit checks and withdraw funds without any hold for the checks to clear, resulting in an overdraft of \$1,220,000; the Order of Prohibition established that Asbell used her position at Bank to intentionally permit Linthicum to incur the overdraft; and due to her violation of her fiduciary duty to Bank, Asbell was barred from working at any federally insured bank in the future by the Order of Prohibition.

the undisputed facts therefore showed it was entitled to judgment as a matter of law on its RICO claim.

¶4 In response, Linthicum did not dispute the material facts asserted by Bank nor attach any evidentiary materials. Linthicum argued Bank's statement of facts did not show it was entitled to judgment. In particular, Linthicum averred Bank had no contract with Linthicum Ranches, Inc. or Linthicum Angus Ranch, LLC, and therefore Bank could not state a claim for breach of contract against those entities. Linthicum also asserted Bank had failed to attach evidentiary materials establishing all the elements of its RICO claim. Linthicum further contended that Bank had failed to present evidence showing any act or omission furthering a conspiracy made by Linthicum Ranches, Inc. or Linthicum Angus Ranch, LLC. Finally, Linthicum asserted Bank had failed to show any damages caused by any Linthicum Defendants except for Linthicum individually.

¶5 Following a hearing, the trial court entered its Journal Entry of Judgment June 29, 2018, in which it granted Bank's motion for partial summary judgment against Linthicum individually on breach of contract, and against Linthicum and the Linthicum entities on fraud, conspiracy, and racketeering. The court awarded actual damages of \$1,215,137.60, plus treble damages of \$3,645,412.80 and attorney fees to be determined. The trial court certified the judgment for appeal pursuant to 12

O.S.2011 §994(A).²

¶6 Summary judgment proceedings are governed by Rule 13, Rules for District Courts, 12 O.S.2011, Ch. 2, App.1. Summary judgment is appropriate where the record establishes no substantial controversy of material fact and the prevailing party is entitled to judgment as a matter of law. *Brown v. Alliance Real Estate Group*, 1999 OK 7, 976 P.2d 1043, 1045. Summary judgment is not proper where reasonable minds could draw different inferences or conclusions from the undisputed facts. *Id.* We review the evidence *de novo*, in the light most favorable to the party opposing summary judgment. *Vance v. Fed. Natl. Mortg. Assn.*, 1999 OK 73, 988 P.2d 1275. As noted above, Linthicum did not dispute the material facts alleged by Bank. Accordingly, we consider whether those facts show Bank was entitled to judgment as a matter of law. We note that at the May 29, 2018 hearing, Linthicum conceded Bank had shown it was entitled to judgment against him individually for breach of contract.

¶7 Linthicum first asserts the trial court erred in granting summary judgment to Security Bank and Trust without evidentiary materials showing Security owned the

² In the same judgment, the trial court granted partial summary judgment against Asbell for fraud, conspiracy, and racketeering and awarded the same amount of damages. Asbell has not appealed. Bank later dismissed its claims against Mayfield and Grove Livestock, LLC. The Oklahoma Supreme Court issued its order August 27, 2018 finding that Bank had satisfied the Supreme Court's inquiry whether the judgment on appeal here is a final, appealable order.

claims of First State Bank of Commerce as Security's successor. Bank filed its Motion to Substitute Plaintiff Due to Merger April 27, 2018, in which it averred that First State Bank of Commerce initiated this case in May 2017 and that as of January 23, 2018, Security Bank was the successor by merger to First State Bank of Commerce and owned all right, title and interest in its claims in this case. First State Bank of Commerce therefore sought to have Security substituted as the plaintiff pursuant to 12 O.S.2011 §2025.

¶8 At a hearing on motions held May 29, 2018, the trial court asked Linthicum if it had any objection to the substitution. Counsel for Linthicum responded: "We have no particular objection to them being a Plaintiff in this case. It may come up as to the [propriety] of summary judgment at the current time" When asked how that would affect summary judgment, Linthicum asserted there were no evidentiary materials showing Security owned the debt. The trial court indicated its understanding was that Security owned the assets of First State Bank and ordered the substitution. On June 8, 2018, Bank filed the affidavit of its president, the Certificate of Merger issued by the Oklahoma State Banking Commissioner, and the Certificate of Merger filed by the Oklahoma Secretary of State, all certifying that First State Bank of Commerce merged with and into Security Bank January 23, 2018. The Journal Entry of Judgment was filed June 29, 2018. We find no error in granting

summary judgment to Bank where the evidentiary materials showed Security was the successor by Merger to First State Bank.

¶9 Linthicum's remaining arguments all address whether Bank was entitled to judgment as a matter of law on its claims against Linthicum and his related entities for fraud, conspiracy, and racketeering. The undisputed evidence showed that between November 2016 and January 2017, Linthicum deposited in Bank and obtained cash for over twenty bogus checks from Mayfield or his entities for up to \$375,000 each, and that Linthicum, Asbell, and Mayfield acted in concert to wrongfully obtain over \$1 million from Bank. Dustin Matthews, a contract risk manager Bank hired to assist it in recovering from Linthicum's overdrafts, testified that Linthicum and the other Defendants operated a basic check kiting scheme. Check kiting constitutes a scheme to defraud under federal bank fraud statutes. See *United States v. Swanson*, 360 F.3d 1155, 1163 (10th Cir. 2004). The only reasonable inference is that Linthicum acted with fraudulent intent and intent to do an unlawful act.

¶10 The elements of a fraud claim are: 1) a material misrepresentation, 2) which is either known to be false or is made recklessly without knowledge of the truth, 3) with the intention that it be acted upon, and 4) which is relied on by the other party to its detriment. *Bowman v. Presley*, 2009 OK 48, ¶13, 212 P.3d 1210. The undisputed

evidence showed Linthicum knew the checks would bounce at the time he deposited them for cash and that he continued to deposit such checks repeatedly until Bank detected its loss. Bank was entitled to judgment for fraud as a matter of law. “A civil conspiracy consists of a combination of two or more persons to do an unlawful act, or to do a lawful act by unlawful means.” *Brock v. Thompson*, 1997 OK 127, 39, 948 P.2d 279. To prove a civil claim for racketeering, a plaintiff must show the defendant, as part of an enterprise, received money from participation in a pattern of racketeering activity, as defined by the Oklahoma Racketeer-Influenced Corrupt Organizations Act (RICO).³ 22 O.S.2011 §1403. The undisputed evidence in the summary judgment record shows Linthicum, Asbell, and Mayfield conspired to write the checks, deposit them, and obtain cash from Bank without detection, all in furtherance of Linthicum’s cattle operations. Emails between Asbell and Linthicum

³ 22 O.S.2011 §1402(5) defines “pattern of racketeering activity” as two or more occasions of conduct:

- a. that include each of the following:
 - (1) constitute racketeering activity,
 - (2) are related to the affairs of the enterprise,
 - (3) are not isolated, and
 - (4) are not so closely related to each other and connected in point of time and place that they constitute a single event, and
- b. where each of the following is present:
 - (1) at least one of the occasions of conduct occurred after November 1, 1988,
 - (2) the last of the occasions of conduct occurred within three (3) years, excluding any period of imprisonment served by any person engaging in the conduct, of a prior occasion of conduct, and
 - (3) for the purposes of Section 1403 of this title each of the occasions of conduct constituted a felony pursuant to the laws of this state.

show their efforts to avoid detection. Bank was entitled to judgment as a matter of law on each of its claims against Linthicum.

¶11 We next consider Linthicum's contention that the evidence did not show Linthicum Ranches, Inc. or Linthicum Angus Ranch, LLC were participants in the fraud or scheme. We note that in response to discovery, Linthicum asserted that he is the *only* representative of the corporation or LLC and that his invocation of the Fifth Amendment likewise resulted in the corporate entities' inability to respond to discovery. As noted by Bank, a court may find an inference against a corporation where an employee or officer has invoked the Fifth Amendment privilege.⁴ In this case, the record showed Linthicum individually and his corporate and LLC entities operated interchangeably as participants in the scheme to defraud Bank and that Linthicum and his entities were liable as a matter of law for fraud, conspiracy, and racketeering.

¶12 AFFIRMED.

BELL, P.J., and JOPLIN, J., concur.

⁴ A federal appeals court has identified factors which may be considered in determining whether to draw an inference against a corporation from a non-party's invocation of the Fifth Amendment, including: (1) the nature of the relationship between the corporation and the employee; (2) the degree of control of the corporation over the employee; (3) the compatibility of the interests of the corporation and the employee in the outcome of the litigation; and (4) the role of the employee in the litigation. *LiButti v. U.S.*, 107 F.3d 110, 123–24 (2d Cir. 1997).