2011 WL 8191583 (Okl.Dist.) (Trial Motion, Memorandum and Affidavit)
District Court of Oklahoma.
Oklahoma County

Danny L. SELLERS, Successor Co-trustee of the Imogene W. Sellers Trust, and Attorney-if-fact under a Durable Power of Attorney of Imogene W. Sellers, Original Trustee of the Imogene W. Sellers Trust, Plaintiff,

v.

FIRST ENTERPRISE BANK, Defendant.

No. CJ20103030.
March 25, 2011.

Motion for Partial Summary Judgment of Defendant First Enterprise Bank, On Claims of Breach of Fiducairy Duty and Aiding and Abetting Breach of Fiduciary Duty, and Against Plaintiff with Brief in Support

Edward O.Lee, OBA# 5334, Kyle Goodwin, OBA #17036, Jon T. Lee, OBA #19860, William M. Lewis, OBA #19862, L. Matthew Dobson, OBA #20678, Lee, Goodwin, Lee, Lewis & Dobson, 1300 E. 9th, Unit 1, Edmond, OK 73034, (405) 330-0118, (405) 330-0767 (fax).

COMES NOW Defendant, First Enterprise Bank, and moves for Partial Summary Judgment in the above entitled and styled matter against the Plaintiff, the Imogene W. Sellers Trust, pursuant to the provisions of Title 12 O.S. Rules for the District Courts of Oklahoma, Rule 13, and submits the following statement of material facts as to which no substantial controversy exists, argument and citations of authority and brief in support of its Motion for Partial Summary Judgment.

FACTUAL SUMMARY

The facts giving rise to this action begin in the year of 2004 when Ms. Imogene Sellers, then a widow of approximately 78 years of age, determined to establish a revocable trust. Ms. Sellers obtained services from a local attorney named Barry Rice in forming the self administered Imogene W. Sellers Revocable Trust, dated May 26, 2004, attached as Exhibit 1 hereto. It is evident from the language employed in the trust indenture that Ms. Seller's principal aim in establishing this revocable trust was to use it as an estate planning device. The trust document establishes that the trust was funded by Ms. Seller's assets; was to be administered by Ms. Sellers as the sole trustee and the primary beneficiary of the revocable trust was Ms. Sellers herself.

Subsequent to formation of this revocable trust, Ms. Sellers had her accounts at First Enterprise Bank transferred into the name of the revocable trust. *See*, Exhibit 2 (Assignment dated May 26, 2004); Exhibit 3 (Signature Card and Deposit Agreement); Exhibit 4 (Trust Certificate); and Exhibit 5 (Deposit Agreement). First Enterprise Bank never served as trustee for Ms. Seller's revocable trust nor was the Bank a party to any other agreement beyond the standard Deposit Agreements for the accounts of the Ms. Seller's trust. *See* Exhibit 9, Affidavit of Donna Terbush, ¶¶ 9 and 10. Additionally, First Enterprise Bank received no funds from the trust other than those that were for a normal general deposit account and no such funds were earmarked with any special instructions by the depositor beyond the three certificates of deposits referenced in the Plaintiff's Petition. *See* Exhibit 9,¶¶ 5-8.

During the intervening period of time, it appears that Ms. Sellers lived alone. Her husband had died some years before. Ms. Sellers' advanced age apparently induced her son and successor trustee, Danny Sellers, to obtain the services of a Ms. Lynn Davis, a convicted felon on probation at the time, to assist her with her care and well being. Although obtaining the services of Davis, there is no indication that Ms. Sellers was incompetent or incapable of understanding the consequences of her actions. Indeed, up until Ms. Sellers' recent passing, no attempt to establish a conservatorship over either Ms. Sellers' person or her assets occurred. Sometime shortly after Ms. Sellers and her son hired Ms. Davis, the Plaintiff alleges that Ms. Davis began a

scheme to defraud Ms. Sellers of a considerable amount of money. It is without dispute that Ms. Davis was on probation for the conviction of the crime of **financial exploitation** of an **elderly** person while she was allegedly perpetrating the scheme against Ms. Sellers. During a period commencing in 2005 and running through 2008, at least according to the allegations of the Plaintiffs Petition, numerous checks were written to Ms. Davis or to "cash" and the signature of Ms. Sellers was forged thereon. Plaintiff further alleges that these forged checks were also issued to numerous other parties, including: (1) a former employee of the Plaintiff, Sheila Cole who allegedly perpetrated the same scheme in 2004 till 2005; (2) Seller's next door neighbor Lorraine Hammill, who for years drove Ms. Sellers to all of her doctors and various appointments, is alleged to have cashed many of the checks; (3) a cab driver with no apparent affiliation to Ms. Sellers named Kendall Faulk cashed checks at another bank, J.P.Morgan Chase and with the Defendant; and (4) a daughter of Davis received a few checks payable to her. See Exhibit 6, Judicial Notice of Plaintiff's Petition, ¶¶ 34, 35, 36, 37 and Exhibit 10, Deposition of Imogene Sellers, p. 70, line 22. A large number of the total instruments written to "cash" and allegedly forged were, in fact, presented and cashed at another bank, J.P. Morgan Chase. See Exhibit 9, ¶ 13 and Exhibit 6, Third-Party Petition, filed herein February 18, 2011. Indeed of the $189,890 which Plaintiff alleges was improperly obtained from the Imogene Sellers Revocable Trust Accounts, some $79,400.00 of this was cashed through JPMorgan Chase. *See* Exhibit 6, Third-Party Petition and Exhibit 9, 13.

It finally occurred in early 2008 that Ms. Sellers' caretaker, Ms. Davis, was arrested and prosecuted by the authorities. A plea of guilty to a charge of **financial exploitation** of an **elder** *after a former conviction* was entered on July 17th, 2009. See Exhibit 7, OSCN Docket Sheet. The scheme is adequately described in Lt. Shaun Milligan's Affidavits, attached as Exhibit 8 hereto. See also, p. 25, 26 and 27 of Plaintiff's Petition.

INTRODUCTION

The Sellers Revocable Trust, through the successor trustee and son of the now deceased Imogene Sellers, now seeks to maintain this action against First Enterprise Bank. The theory implicit in the action is that First Enterprise Bank is responsible for the **financial** losses suffered by the Sellers Revocable Trust (or Ms. Sellers) because it did not intervene sooner to identify and stop the improper actions of Ms. Davis and other accessories to her schemes. A number of theories are advanced in the Petition.

Notwithstanding First Enterprise Bank's empathy with the plight of Ms. Sellers and the extremely unfortunate circumstances that have resulted in loss to Ms. Sellers' self-administered trust, First Enterprise Bank believes that this attempt to cast the responsibility for Ms. Seller's **financial** well being or her care upon it is ill-considered and without legal support. More specifically, for purposes of this Motion, the claims of breach of fiduciary duty and aiding and abetting the breach of a fiduciary duty are without legal or evidentiary support, and should be dismissed as a matter of law.

STANDARD FOR MOTIONS FOR SUMMARY JUDGMENT

Pursuant to the newly enacted provisions in the Oklahoma Pleading Code, 12 O.S. §2056 now states:
B. BY A DEFENDING PARTY. A party against whom relief is sought may move at any time, with or without supporting affidavits, for summary judgment on all or part of the claim.

Furthermore, the Rules for District Courts, Rule 13(a), 12 O.S. Ch. 2, App. states:

A party may move for judgment in his favor on the ground that the depositions, admissions in the pleadings, stipulations, answers to interrogatories and requests for admissions, affidavits, and exhibits on file, filed with leave of court show that there is *no substantial controversy as to any material fact.*

[emphasis added.]

If the facts set forth show no substantial controversy exists as to any material fact, summary judgment should be granted. *First National Bank and Trust Co. v. Nesbitt,* 598 P.2d 1197, 1198 (Okla. 1979); Rules for District Courts, Rule 13(e), 12 O.S. Ch. 2, App. Furthermore, a court may render a judgment as to those issues not in controversy, and proceed with the action on the remaining issues. *See, RST Service Mfg., Inc. v. Musselwhite,* 628 P.2d 366, 368 (Okla. 1981); Rules for District Courts, Rule 13(e), 12 O.S. Ch. 2, App. *citing, Pettit v. Vogt,* 495 P.2d 395 (Okla. 1972). In this regard, 12 O.S. Ch. 2, App., Rule 13(e), explicitly states, in pertinent part:

> [I]f the Court finds that there is no substantial controversy as to certain facts or issues, it shall make an order specifying the facts or issues which are not in controversy and direct that the action proceed for a determination of the remaining facts or issues...

See also, *Seitsinger v. Dockum Pontiac Inc.,* 894 P.2d 1077, (Okla. 1995):

> "Summary judgment is proper only when it appears that there is no substantial controversy as to any material fact, and that one of the parties is entitled to judgment as a matter of law. *Erwin v. Frazier,* 786 P.2d 61, 62 (Okla. 1989). The trial court may look beyond the pleadings at submitted evidentiary materials such as, but not limited to, affidavits, depositions, and answers to interrogatories. *Hargrave v. Canadian Valley Elec. Co-op.,* 792 P.2d 50, 55 (Okla.1990); 12 O.S.1991, Ch. 2. App., Rule 13. All inferences must be taken in favor of the opposing party. *Manora v. Watts Regulator Co.,* 784 P.2d 1056 (Okla. 1989). The moving party has the initial burden of showing that there is no substantial controversy to any material fact. *Loper v. Austin,* 596 P.2d 544, 545 (Okla. 1979). Thereafter, the opposing party must show, by materials included with the response, that there is a material fact remaining in dispute. *Samuel Roberts Noble Foundation, Inc. v. Vick,* 840 P.2d 619, 623 (Okla. 1992); *Hargrave,* 792 P.2d at 55."

Applying this rule to the facts of this case, it is apparent that the Defendant is entitled to summary judgment as a matter of law.

PROPOSITION I

THE EXISTENCE OF A SELF-CREATED, REVOCABLE TRUST DID NOT GIVE RISE TO A FIDUCIARY DUTY BETWEEN DEFENDANT AND PLAINTIFF

The Plaintiff, Trust, seeks to ground some of its claims upon the theory that because the Plaintiff is denominated a "trust" that there arose a fiduciary duty flowing between First Enterprise Bank and the Plaintiff which had the effect of heightening First Enterprise Bank's responsibility for the disposition of the monies nominally owned by the Imogene Sellers Revocable Trust. Although, as will be seen, there are cases in which a **financial** institution which is dealing with the funds of a trust established for the benefit of others can be held responsible for the misfeasance of a self-dealing trustee, the idea that by establishing a self-created, fully revocable trust of which she was trustor, trustee and primary beneficiary, Ms. Sellers could alter or heighten the responsibility of First Enterprise Bank for the handling of supervision of the Trust's funds is ill conceived.

A. Debtor-Creditor Relationship Between the Parties

The law in Oklahoma has been clear for many years that the normal relationship between a bank and its creditors is an arm's length, debtor/creditor relationship. *W.R. Grimshaw Co. vs. First Nat'l Bank & Trust Co. of Tulsa,* 563 P.2 nd 117 (Okla. 1977); and *First National Bank & Trust Co. of Vinita v. Kissee,* 859 P.2d 502 (Okla. 1993). The question thus posed by these claims of the Plaintiff, Trust, is: Can a depositor impose a fiduciary duty upon a bank by creating a fully revocable, inter vivos trust into which the depositor's funds are then conveyed?

This Defendant respectfully submits that the answer to this question must be: "No."

Plaintiff attempts to characterize the accounts held at First Enterprise Bank as "special" deposits, rather than general deposits. This is clearly not the case under the circumstances of this matter before this Court. Various courts across the country have clarified that just because trust funds are deposited in a bank by a fiduciary, without something more, it does not rise to the level of a special deposit. *See People v. California Safe Deposit & Trust Co.*, 141 P. 1181 (1914); *Wasserman v. Broderick*, 250 N.Y.S. 84 (Sup. 1931); *In re Ecklund*, 75 F.2d 747 (C.C.A. 7th Cir. 1935); *Huston v. Exchange Bank*, 376 N.W. 2d 624 (Iowa 1985) (involving failure to establish a special-account status for lawyer-client trust funds); and *Texas Commerce Bank-New Braunfels, Nat. Ass'n v. Townsend*, 786 S.W.2d 53 (Tex. App. Austin 1990).

Under Oklahoma law, to establish a fiduciary relationship both parties must be aware a fiduciary relationship is being established. *See, Roberson v. Paine Webber, Inc.*, 998 P.2d 193, 198 (Okla. Civ. App. 2000) ("...[A fiduciary relationship] is based on some *form of agreement, either expressed or implied from which it can be said the minds have been met* to create a mutual obligation.") Title 6, Section 425 of the Oklahoma Statutes codifies and restricts further the imposition of fiduciary duties on banks when it sets forth the following:

> Unless a state or national bank shall have expressly agreed in writing to assume special or fiduciary duties or obligations, no such duties or obligations will be imposed on the bank with respect to a depositor of the bank or a borrower, guarantor or surety, and no special or fiduciary relationship shall be deemed to exist.

Similarly, courts in other jurisdictions have held a trust relationship between a bank and its customer cannot be implied unless the understanding was that money was deposited for a specific purpose and was not to be mingled with the general deposits. *Portage Aluminum Co. v. Kentwood Nat. Bank*, 307 N.W.2d 761 (1981). A bank does not become charged with the duties of a trustee merely because it accepts on deposit funds that are subject to a trust except if it is specifically forbidden in some way to receive such funds on general deposit. *See U.S. Fidelity & Guaranty Co. v. Carter*, 170 S.E. 764 (1933). *See also, Meridian Asset Management, Inc. v. Capital City Bank*, 296 B.R. 243 (N.D. Fl. 2003) (Bank at which **financial** services company and its principal officer maintained accounts from which embezzlement occurred had no fiduciary relationship with customer, bank was not alleged to have agreed to oversee disbursement of funds from accounts, or to be trustee, or to undertake special duties, but was simply depository institution and could not be held liable for breach of fiduciary duties).

A bank only becomes charged with fiduciary obligations when it does not accept funds under the normal debtor-creditor relationship but rather under a specific agreement to handle an account in a fiduciary capacity. *Rush v. South Carolina Nat. Bank*, 343 SE.2d 667 (Ct. App. 1986); *Corbett v. Hospelhorn*, 191 A. 691 (1937). Under Oklahoma law, such a specific agreement must be in writing. See 6 O.S. § 425.

For the matter before this Court, it is clear the account created was a general deposit account and no fiduciary obligations were contemplated or imposed upon the monies deposited in the Bank by the Plaintiff. First, the written agreement between the parties contemplated a general deposit account. Also, there exists no "express written agreement" wherein the Bank has agreed to assume any 'special' or fiduciary obligations. Under Oklahoma law, that should be the end of the inquiry. 6 O.S. § 425. Additionally, however, when Ms. Sellers formed the trust and renamed the bank accounts, she opened identical general deposit accounts under identical account agreements that were previously held by her individually. See Exhibits 3 and 5. Ms. Sellers simply changed the accounts name to that of her revocable trust in which she was the trustee, settler and beneficiary. Ms. Sellers went on to testify she used the account to pay her personal bills and expenses. See Deposition of Sellers, pgs. 56, line 18 through 57, line 10. This fact when coupled with the fact that she signed checks in her name (not as a trustee), it is clear this account was not contemplated as a "special account" by the Plaintiff, much less the Defendant. *Id.*

There is no competent evidence, in any form whatever, that Plaintiff intended or informed the Defendant that the funds deposited were to be anything other than general deposits, nor is there any "express written agreement" wherein Defendant agreed to any special or fiduciary obligations. See Exhibits 3, 4 and 5. There is no statutory law demanding the funds of a revocable trust be considered "special deposits" in Oklahoma. Actually, Oklahoma law is exactly the opposite. Nor were there any specific

instructions or agreements between the parties that would give rise to a fiduciary relationship, or any relationship other than debtor-creditor. Here, the Bank rightly mingled the deposits with other account holder's deposits. The mere renaming of accounts on deposit with a bank in the name of a self created, revocable trust in which the trustee, settlor and beneficiary are the same person does not create a "special" deposit or give rise to fiduciary obligations on behalf of the Bank under Oklahoma law.

B. Nature of the Self-Created Revocable Trust

Oklahoma, as do most other states, recognizes the right of a person to establish a revocable trust. *Welch v. Crow*, 206 P.3d 599 (Okla., 2009). - Oklahoma's Supreme Court in the case of *Welch vs. Crow (supra)* dealt with a fact situation in which two grandchildren of the decedent sought to attack a self-created inter-vivos trust as an illusory trust in order to force distribution of some of the decedent's assets to them as pretermitted heirs. Oklahoma's Supreme Court relying largely upon the Restatement of Trusts held that an *inter vivos* trust was not subject to the merger doctrine or illusory merely because the trustor, trustee and beneficiary were identical and the trust was revocable during the trustor's lifetime. Finding that the existence of a contingent beneficiary precluded application of the merger doctrine (merger of legal and beneficial ownership) Justice Opala stated:
"The Trust is not illusory simply because Neighbors was the sole trustee and only vested present beneficiary during her life. Because the Trust provided for Mary K. Crow and Jean Ann Morgan as contingent beneficiaries, it was a valid trust." *Welch vs. Crow, supra,* at p. 606.

However, notwithstanding this conclusion, Justice Opala's opinion took note of prior Oklahoma cases in which revocable, *inter vivos* trusts had been disregarded. For example, in the case of *Thomas v. Bank of Okla., N.A.*, 1984 OK 41, 684 P.2d 553 the Supreme Court had determined that a revocable, inter vivos trust could not be utilized to defeat a surviving spouse's right to force election of a marital share. Rejecting the trustee's argument that the bank identified as trustee owned the trust property, not the trustor, the Supreme Court in that case stated that:
"The court in *Janowitz,* citing *Newman,* said the test of the validity of a trust is whether the transfer is real or illusory; that the test is whether the settlor in good faith divested himself of the property ownership or simply made an illusory transfer as a mask for the effective retention of the property. *It found its trust illusory on grounds that the settlor reserved the right of revocation; reserved for himself the income for life; and reserved a substantial measure of control over trust management."*

Oklahoma law also refuses to allow individuals to utilize revocable, inter vivos trusts to create a "separate" ownership of property in relation to-their creditors. For example, Title 60 O.S. 2010 § 175.25 (H) states in pertinent part that: "Nothing in this act shall authorize a person to create a spendthrift trust or other inalienable interest for his own benefit. ***The interest of the trustor as a beneficiary of any trust shall be freely alienable and subject to the claims of his creditors..."***

This Defendant in this case does not question the right of a citizen of this state to create a self-settled, revocable, inter vivos trust. What the Defendant in this case does question is the attempt made by the Imogene Sellers Revocable Trust, Plaintiff in this case, to assert that simply by reason of creating this fully revocable trust of which at all material times, Ms. Sellers' was sole trustee, the trustor and the primary beneficiary, a "fiduciary relationship" arose between First Enterprise Bank and the Imogene Sellers' Trust because Ms. Sellers had transferred her individual accounts into the name of the Trust.

Notwithstanding Oklahoma's recognition of revocable, *inter vivos* trusts as legitimate creations for estate planning purposes, our law seems also to clearly indicate that the trustor of such an entity will not be allowed to raise the "ownership" by the trust entity in the face of clear retention of control when to do so would defeat legitimate claims of creditors or spouses.

PROPOSITION II

THERE DO NOT EXIST THE ELEMENTS NECESSARY TO SUPPORT A CLAIM OF AIDING AND ABETTING A BREACH OF FIDUCIARY DUTY

A. Aiding and Abetting Breach of Fiduciary Duty Not Explicitly Recognized Under Oklahoma Law.

The State of Oklahoma, through statutory process or caselaw, has not explicitly recognized aiding and abetting a breach of fiduciary duty as an independent basis for imposing tort liability on a Defendant. Various states have adopted the theory of aiding and abetting as a separate tort, while others do not recognize aiding and abetting as-a separate or independent cause of action. *See, Eastern Trading Co. v. Refco, Inc.*, 229 F.3d 647 (7th Cir. 2000) ("we have said that there is no tort of aiding and abetting...but of course without meaning that one who aids and abets a tort has no liability... Although a number of cases do speak of a tort of aiding and abetting most of them also contain language suggesting that aiding and abetting is a basis for imposing liability for the tort aiding and abetted rather than being a separate tort") and *Rael v. Page*, 222 P.3d 678 (N.M.App. 2009) (Extending aiding and abetting liability to a party already owing a fiduciary duty is inconsistent and duplicative of this principal).

The Restatement (Second) of Torts, Section 876 sets out rules for persons acting in concert:

> "For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he, (a) does a tortious act in concert with the other or pursuant to a common design with him, or (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person."

In Oklahoma, courts have recognized a type of aiding and abetting in cases involving assault and battery, but such torts relating to assistance have not been extended to claims involving an alleged breach of a fiduciary duty. *See Keel v. Hainline*, 331 P.2d 397 (1958) (liability imposed on boy who picked up wooden erasers and delivered them to boys throwing wooden erasers on assault and battery claim, when errant throw struck girl in eye and caused loss of use of eye).

Various courts have limited or distinguished the *Keel* holding, including a federal court located in Oklahoma. *Blissit v. Westlake Hardware, Inc.*, 2010 WL 1078453 (N.D. Okla. 2010) (battery claim dismissed because no evidence that any action by Defendant could be construed to have requisite intent necessary to sustain claim). *See also, Jacobs v. Castronovo*, 797 N.E.2d 946 (Mass.App.Ct. 2003)(Distinguishing *Keel*, the doctrine of aiding and abetting "appears to be reserved for application to facts *which manifest a common plan to commit a tortuous act where the participants know of the plan and its purpose and take affirmative steps to encourage the achievement of the result.")*. Therefore, it is Defendant's contention that even if aiding and abetting a breach of fiduciary duty is in fact a cause of action under Oklahoma law (which Defendant contends it is not), the elements of aiding and abetting a breach of a fiduciary duty have (1) not been sufficiently pled, and (2) nor is there any evidence of such elements to create a question of fact under the circumstances of this case.

B. No Fiduciary Relationship Existed Between Davis and the Trust.

In all cases, the existence of a fiduciary relationship depends on the factual circumstances, including the relationships of the parties involved, to each other and to the disputed transaction. *First National Bank and Trust Co. of Vinita*, at 510-511. Fiduciary relationships can be by law, such as a director to its corporation, or an attorney to a client. However, a fiduciary relationship may spring from an attitude of trust and confidence based on some form of agreement, either expressed or implied, from which it can be said the minds have been met to create a mutual obligation. *Roberson v. PaineWebber, Inc.*, 998 P.2d 193, 198 (Okla.Civ.App. 2000); *See also Hamburg v. Doak*, 251 P.2d 510 (Okla. 1952). "The touchstone of determining whether a fiduciary relationship exists depends upon the factual circumstances, including the relationship of the parties involved, to each other and to the transaction in question." *Pain Webber*, at 198 (citing *First National Bank & Trust Co. of Vinita, supra).*

Obviously, no fiduciary duty exists between the Plaintiff and Defendant, as has been explored more fully in Proposition I above and 6 O.S.-§ 425. As to the aiding and abetting claim, the Plaintiff alleges in its Petition that the Defendant aided and abetted an employee of Ms. Sellers in her scheme to defraud the Plaintiff. The employee, one Lynn Marie Davis, was retained by the current trustee, Danny Sellers and the deceased Ms. Sellers, while on probation for **financial** **exploitation** of an **elder**. The Plaintiffs claim that the Defendant aiding and abetted Ms. Davis in her alleged breach of a fiduciary duty must fail as a matter of law for a multitude of reasons.

First, there has been no allegation in the pleadings that Davis was actually a fiduciary of the revocable trust. In fact, all facts and evidence before this Court shows that Davis was clearly not a fiduciary of the trust. Davis was simply a woman hired out of a newspaper by the current trustees of the trust to help care for Ms. Sellers as her health declined. Sellers Deposition, pg. 59, line 12-20; pg. 19, line 20; and pg. 21, line 10. She also happened to be on probation for the **financial** **exploitation** of an **elderly** at the time she was hired by the current trustee, Danny Sellers. Additionally, Ms. Sellers testified that Davis specifically had no authority to participate in the **financial** affairs of the trust, and she further testified that the checkbook was kept away from Ms. Davis. Judicial Notice, Plaintiff's Petition, ¶ 21 and Sellers' Deposition, pg. 20, line 11-23. Obviously, the facts above show that the Plaintiff did not intend to, nor did it create a fiduciary relationship with Davis.

C. The Defendant Could Not Have Known of Any Fiduciary Relationship Between Plaintiff and Davis.

Even assuming, arguendo, that a fiduciary relationship existed between the Plaintiff and Davis, the elements necessary to establishing aiding and abetting a breach of fiduciary duty against this Defendant have not been sufficiently pled and cannot be shown by the Plaintiff. As noted above, Oklahoma has not recognized the tort of aiding and abetting a fiduciary duty, but the sister state of New Mexico has addressed those elements necessary to establish such a tort. New Mexico courts, similar to the few other jurisdictions that have recognized this tort, require the following (1) a fiduciary of the plaintiff breached a duty owed to the plaintiff, (2) the defendant knew of such duty, (3) the defendant intentionally provided substantial assistance or encouragement to the fiduciary to commit an act which the defendant knew to be a breach of a duty, and (4) damages to the plaintiff were caused thereby. *GCM, Inc. v. Kentucky Cent. Life Ins. Co.,* 947 P.2d 143 (N.M. 1997).

Beyond the fact that Davis was not a fiduciary to the Plaintiff, there have been no allegations and there can be no question the Defendant had no knowledge of any alleged fiduciary duty owing from Davis to the Plaintiff. In addition to this fact having not been pled, the evidence establishes the Bank could not have known of a fiduciary duty between Davis and Plaintiff First, Davis was not referenced or included as an authorized signator on any Bank documents establishing the accounts with the Bank or in the trust documentation itself. See Exhibit 1, 3, 4 and 5. Additionally, the scheme described by the Lt. Milligan's affidavit and outlined in Plaintiff's Petition described a process where Davis forged Imogene Seller's name to trust checks, then delivered those forged checks to some third party for the deposit or cashing of such checks. Exhibit 8 and Plaintiff's Petition, ¶ 26, 27. Nowhere in the allegations of Plaintiff nor in the investigation by the police has it been indicated or alleged that Davis had any contact or association with the Defendant whatsoever. Even assuming all the facts in Plaintiff'ss Petition are true, there can be no question the Defendant had no contact with Davis, the alleged fiduciary. See, Exhibit 9, Affidavit of Terbush, ¶ 11. Accordingly, it is without question Defendant could not have known of any alleged fiduciary relationship between Davis and the Trust. Therefore, a required element of the aiding and abetting claim simply cannot be shown by the Plaintiff and such claim must fail as a matter of law.

D. The Defendant Can Not Be Shown to Have the Requisite Intent for the Aiding and Abetting Claim, Nor Has Such Intent Been Pled by the Plaintiff.

Lastly, there appears to be an intent requirement as a prerequisite to liability for aiding and abetting a tort. *See* Restatement (Second) of Torts, § 876; *Blissit v. Westlake Hardware, Inc.,* 2010 WL 1078453 (N.D. Okla. 2010) (battery claim dismissed because no evidence that any action by Defendant could be construed to have requisite intent necessary to sustain claim); *see*

also Jacobs v. Castronovo, 797 N.E.2d 946 (Mass.App.Ct. 2003)(the doctrine of aiding and abetting "appears to be reserved for application to facts which manifest a common plan to commit a tortuous act where the participants know of the plan and its purpose and take affirmative steps to encourage the achievement of the result."); *Thornwood, Inc. v. Jenner & Block*, 799 N.E.2d (III.App. 2003) citing *Wolf v. Liberis*, 505 N.E.2d 1202 (1987) (Court failed to find liability where no allegations that codefendant agreed to assist or substantially assisted in commission of tort resulting in plaintiff's injury).

Clearly, the Plaintiff has not alleged, nor can it in good faith, that the Defendant had the requisite intent to further the scheme or artifices of Davis or was aware of such alleged breach of her duties to the Plaintiff. The Defendant Bank had no relationship or dealings with Davis, accordingly, there could not possibly have been a 'common plan' to breach the alleged fiduciary duties owing from Davis to the Plaintiff. No reasonable person could find such intent existed under the facts before this Court as laid forth in Plaintiff's Petition. Accordingly, Plaintiff's aiding and abetting claims must fail as a matter of law.

CONCLUSION

Oklahoma law seems clear that unless First Enterprise Bank expressly agreed in writing to assume special or fiduciary obligations to the Plaintiff no. such duties or obligations can be implied. Plaintiff additionally has produced no written agreements imposing such duties. Those agreements of which the Defendant is aware which pertain to the issue have been attached hereto and certainly contemplate no such duties. Accordingly, Plaintiff's breach of fiduciary duty claims should fail as a matter of law. Further, it is questionable whether aiding and abetting the breach of a fiduciary duty is a valid cause of action in Oklahoma. However, assuming it were, it appears to this Defendant that the Plaintiff will be unable to establish the elements necessary. Specifically Plaintiffs: (1) do not appear to have the ability to establish the existence of a fiduciary relationship between Davis and either the Trust itself or Ms. Sellers; (2) cannot and have not claimed First Enterprise Bank or its employees had knowledge of the existence of any fiduciary relationship between Ms. Sellers, her Trust and the malefactor, Davis or that a breach of one was occurring (in fact, there is no evidence First Enterprise Bank had any knowledge or dealings with Davis at all); and (3) cannot establish that First Enterprise Bank or its employees had the requisite intent required to establish a claim of aiding and abetting.

WHEREFORE, premises considered, Defendant First Enterprise Bank respectfully requests this Court to grant partial summary judgment in its favor and against the Plaintiff, the Imogene Sellers Revocable Trust, as prayed for herein on the claims of breach of a fiduciary duty and aiding and abetting a breach of fiduciary duty asserted in the Petition of Plaintiff, and for such further and other relief as this Court deems just and proper.

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