

THE STATE OF TEXAS	§	IN THE DISTRICT COURTS
<i>Plaintiff,</i>	§	
	§	
V.	§	OF TRAVIS COUNTY, TEXAS
	§	
AMERITRUST TITLE COMPANY	§	
<i>Defendant.</i>	§	261 st JUDICIAL DISTRICT

**JOSÉ MILTON VILLELAS' OBJECTION TO SPECIAL DEPUTY RECEIVER'S
TURNOVER APPLICATION [ENTERPRISE BANK]**

TO THE HONORABLE JUDGE OF SAID COURT:

José Milton Villelas (hereinafter called "Villelas"), a Respondent in the above-captioned matter, comes forth to present his objection to the turnover application filed in this matter by the Special Deputy Receiver appointed in this matter, Cantilo & Bennett, L.L.C. (hereinafter called "SDR"). In support of this objection, Villelas would respectfully show:

INTRODUCTION

1. In its turnover application, the SDR is asking the Court to order Enterprise Bank to turn over \$64,621.18 to the receivership estate. Villeas is objecting to the SDR'S application because he believes the money is his, and has never belonged to Ameritrust Title Company (hereinafter called "Ameritrust"). Another Respondent herein, Commonwealth Land Title Insurance Company (hereinafter called "Commonwealth") has already filed its objection to the SDR'S application. In effect, Commonwealth agrees with

Villelas, that the money has always belonged to Villelas. However, it is claiming that it has subrogation rights to the entire amount thereof.

BACKGROUND

2. The \$64,621.18 made the subject of the SDR'S turnover application was part of a larger sum of money (\$123,213.13) that was deposited on behalf of Villelas by his lender, Encore Credit Corporation (hereinafter called "ECC") in 2006 into an escrow account that then belonged to Ameritrust. As an escrow agent, Ameritrust was only supposed to use the money to finalize the closing on a house Villelas was purchasing. At the time of the deposit, the money belonged to Villelas, who had only borrowed it from ECC for the purpose of purchasing the house.

3. The deposit made on Villelas' behalf into Ameritrust's escrow account was not made to pay Ameritrust for services rendered, or for any other reason. Villelas only entrusted the money to Ameritrust so that Ameritrust could finalize the closing on his newly purchased house. Two of the parties expecting payment from Ameritrust were, respectively:

- a. The home builder, FCH Construction (hereinafter called "FCH"); and
- b. The bank that had loaned money to FCH to develop the subdivision in which the Villelas house was eventually built, Compass Bank (hereinafter called "Compass").

4. Upon lending FCH the money needed to develop the subdivision,

Compass had placed a partial lien over the property that would become Villelas' newly purchased house. The partial lien was to be released as soon as Ameritrust delivered to Compass a payment of \$85,489.20. Ameritrust timely paid the home builder and other parties. However, it deliberately tried to "shortchange" Compass by delivering a cashier's check to Compass for just \$64,621.18. The bank refused to accept the \$64,621.18, and eventually returned the check to Ameritrust. After attempting in vain to get Ameritrust to pay the full amount of the lien, Compass repossessed the property.

5. Villelas, and his wife and children, were eventually evicted from their home, even though Villelas had been making timely monthly mortgage payments to ECC. After the eviction, Villelas was forced to find another place in which he and his family could live. As a result, he was unable to keep on paying his monthly mortgage payments to ECC.

6. Villelas eventually filed suit against FCH, Ameritrust, Compass, Commonwealth, and others. In February 2009, Villelas agreed to settle his claims against Ameritrust and Commonwealth in exchange for the payment of \$122,500.00. The payment was to be made to Villelas by Ameritrust's insurance carrier, Zurich North America (hereinafter called "Zurich"), and *not* by Ameritrust itself. The settlement would have relieved Ameritrust of

having to contend with Villelas' claims against Ameritrust's estate, without requiring Ameritrust to personally pay any money to anyone. Unfortunately, as the settling parties were in the process of exchanging settlement documents and funds, Villelas' lawsuit was stayed when this receivership matter was instituted. Villelas' thereafter attempted to have the stay lifted so that the aforementioned settlement could be made final. All such efforts have failed due to the SDR'S insistence that the \$122,500.00 offered by Zurich to settle Villelas' claims against Ameritrust and Commonwealth somehow form a part of the receivership estate.

7. The SDR is now asking the Court to compel Enterprise Bank to turn over Villelas' \$64,621.18 to the SDR because the SDR believes the funds should also form a part of the receivership estate.

BASIS OF THE OBJECTION

8. As stated above, the \$64,621.18 represented by the cashier's check issued in 2006 by Ameritrust to Compass never belonged to Ameritrust. Ameritrust was merely an escrow agent with respect to such funds. Therefore such funds, pursuant to statute, were trust funds, as opposed to property of Ameritrust.

9. Funds held in trust do not become the property of a bankruptcy trustee or a receiver, but instead retain their identity as trust funds. *In re Fresh Approach, Inc., Debtor*, 51 B.R. 412 (Bkrtcy. N.D. Tex. 1985); *Houston Avocado Company, Inc. v. Monterey*

House, INC., 71 B.R. 244 (Bkrcty. S.D. Tex. 1986). Additionally, Section 443.004 of the Texas Insurance Code ("Insurer Receivership Act") specifically defines what is deemed to be 'General Assets' of the insurance company in receivership, and which are subject to the claims of unsecured creditors. Specifically, subsection (a)(9) of Section 443.004 excludes property or assets that are "subject to a secured claim or a valid and existing express trust for the security or benefit of specified persons or classes of persons". See Sect. 443.004 (a)(9)A(i).

10. The language found in Subsections (a)(27) and (28). Subsection (27) defines what is considered a 'Special Deposit'. It says that a 'Special Deposit' includes a 'deposit established pursuant to statute for the security or benefit of a limited class or limited classes of persons.' Section (28) makes clear that a 'Special Deposit Claim' means "any claim secured by a special deposit." It further says that it does not include any claim secured by the 'general assets of the insurer.' (See Sect. 443.004, (a)(27) and (28).) The funds in question were clearly provided to Ameritrust in its capacity as 'escrow agent'. They were deposited into Ameritrust's account for the use and benefit of Villelas. They were easily identifiable as such, and can be directly traced to the transaction in question. Villelas unquestionably falls into the category of 'specified persons or classes of persons'. Under these circumstances, the funds cannot rationally or legally be deemed the property of Ameritrust; and they cannot be used to satisfy the

claims of unsecured parties who were not in privity with the transaction.

11. The funds belong to Villelas. The very purpose of the deposit Villelas made into Ameritrust's escrow account was to entrust Ameritrust with the responsibility of using the funds to pay Compass secure the release of Compass' lien over the property. In view of the fact that the payment was never made, Ameritrust (acting as an escrow agent) had a duty to return the money to Villelas. Irrespective of all that has transpired since 2006, Texas law requires that the money be returned to Villelas. To do otherwise here would be to give a windfall to Ameritrust's creditors by giving them access to funds that never belonged to Ameritrust.

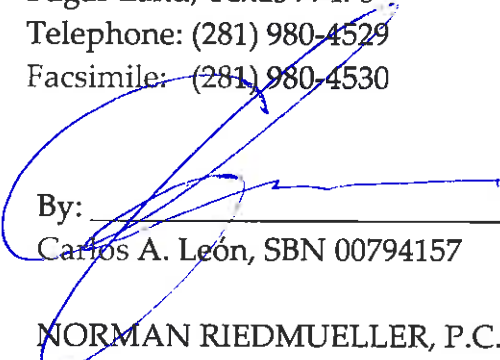
12. The funds in question were disbursed from Ameritrust's general escrow account for the use and benefit of Villelas, i.e., for the purchase of Villelas' house. At that time, the funds became a part of a special escrow for that particular transaction. They no longer formed a part of Ameritrust's general escrow account; and were no long intermingled with Ameritrust's general escrow funds.

RELIEF REQUESTED

13. WHEREFORE, PREMISES CONSIDERED, Villelas requests that the Court order Enterprise Bank to pay the \$64,621.18 in question, together with any interest accrued thereon, to Villelas. Villelas also requests any other and further relief to which he may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 5, 2010, a true and correct copy of "José Villelas'

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