

THE STATE OF TEXAS,
Plaintiff,
v.

AMERITRUST TITLE COMPANY
Defendant.

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IN THE DISTRICT COURT
OF TRAVIS COUNTY, TEXAS
TRAVIS COUNTY, TEXAS
261st JUDICIAL DISTRICT

Filed in The District Court
of Travis County, Texas

JL JAN 11 2011
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Armas Rodriguez-Bendoza, Clerk

MEMORANDUM RECOMMENDATION
(Special Deputy Receiver's ["SDR"] Turnover Application [Enterprise Bank])

This matter has an involved history in all respects, including a very complicated set of underlying facts, litigation in Harris County, and prior proceedings in this receivership.

The SDR has urged two forms of relief in its Turnover Application. First, the SDR sought to require Enterprise Bank to turn over to the receivership estate certain funds that it was holding on behalf of Ameritrust Title Company, the company now in this receivership. The parties subsequently reached agreement whereby Enterprise Bank did turn over to the receivership estate and deposit in the Court's Registry pursuant to an Agreed Order the amount of \$64,621.18. The question of what party has a right to the funds so deposited was reserved in the Agreed Order for subsequent determination.

Secondly, the SDR seeks a determination that Jose and Leydi Villelas ("the Villelases") and Commonwealth Land Title Insurance Company ("Commonwealth") do not have a claim to the interpled funds. The Texas Title Guaranty Association ("TTIGA") supports the SDR's request. The subject matter of this sought relief is referred to the Special Master pursuant to Paragraph III of the Order of Reference to Master dated March 25, 2009. This Memorandum Recommendation thus addresses this second request for relief.

Summary of Pertinent Facts

The key facts generally are not in dispute and this factual summary therefore is based on the briefs filed by the parties and the factual recitations agreed to by counsel for the parties in the August 16, 2010 Agreed Order Granting Interpleader and Dismissing Enterprise Bank. This summary is not based on an independent presentation of the facts by counsel at any hearing and therefore does not constitute findings of fact as to any disputed fact issues---except as stipulated by counsel in prior orders.

The Players: In January, 2006, the Villelases were set to close on the purchase of a home in Houston. Ameritrust served as the escrow agent. Ameritrust had a bank account with Enterprise Bank. Encore Credit was the lender for the Villelases. Compass Bank had a lien on the property in the amount as of the January 26, 2006 closing date of

\$85,489.20. Commonwealth issued an owner's policy of title insurance to the Villelases and a mortgagee policy of title insurance to Encore as their lender.

Encore, as the lender for the Villelases, deposited \$123,213.13 in escrow with Ameritrust for payment of various third parties, including the builder/seller and Compass Bank on its lien. On the January 26, 2006 closing date, Ameritrust issued a check drawn on its bank, Enterprise Bank, in the amount of \$64,621.18 (check number 4970) made payable to Compass Bank, although the amount due Compass Bank on its lien apparently was \$85,489.20. Compass Bank thus rejected tender of the check and it was returned to Ameritrust.

Ameritrust tried again nine months later. As found by the Court in its August 16, 2010 Agreed Order referenced above: (1) on or about October 4, 2006, Ameritrust caused \$64,621.18 in cash or other funds to be paid to its bank Enterprise Bank in consideration for Enterprise Bank issuing a cashier's check payable to Compass Bank in the amount of \$64,621.18 (cashier's check number 75650); (2) Compass Bank again rejected tender of this cashier's check for this insufficient amount; (3) the cashier's check subsequently was lost; (4) Enterprise Bank thus held \$64,621.18 in cash for a cashier's check that was not negotiated and such monies were held by Enterprise Bank on the date of receivership; (5) this is the \$64,621.18 that Enterprise Bank has now deposited into the Court's Registry; and (6) this is the \$64,621.18 amount made the subject of the SDR's Turnover Application.

According to the Villelases, Compass Bank---holding a lien on the property that was not extinguished at closing as a result of the errors described above---repossessed their home and they were evicted from their home in June 2006. Commonwealth, as the Villelases' title insurer on the property and pursuant to its mortgagee title policy, eventually paid off the Villelases' lender, Encore, approximately \$155,000.00. Encore therefore does not assert any claim to the \$64,621.18. In addition, Compass Bank does not assert any claim to the funds.

The Villelases and Commonwealth, on the one hand, argue that the \$64,621.18 in issue should not be turned over to the SDR. Commonwealth argues that it is subrogated to all rights of Encore since it paid off the Villelases' indebtedness to Encore (which would include the \$64,621.18 amount in dispute which was part of the \$123,213.13 amount originally deposited by Encore with Ameritrust as a loan to the Villelases), and that it accordingly also is subrogated to all rights of the Villelases. Jose Milton Villelas contends that he is entitled to the money (as he has asserted in the stayed lawsuit filed by him in Harris County) and that it should not be turned over to the SDR. Commonwealth and Villelas do not seek a determination as to which one of them is entitled to the monies; they just seek a denial of the SDR's motion seeking (1) a declaration that they do not have any claim to the funds and (2) a turnover of the monies to the Estate.

On the other hand, the SDR and TTIGA argue that the \$64,621.18 is property of the Estate and should be so paid to the Estate.

Analysis

There is absolutely no doubt that all the equities in this matter favor the Villelases and Commonwealth. For reasons unknown to the Special Master from the evidence presented, Ameritrust apparently failed twice to pay off the existing Compass Bank lien on the property, and ultimately apparently cost the Villelases the loss of their home and Commonwealth approximately \$155,000.00 in monies paid by Commonwealth to Encore pursuant to the mortgagee policy of title insurance. Counsel for the Villelases further note repeatedly in their pleadings that in February, 2009, they reached a settlement in principle on behalf of their clients with Ameritrust's insurance carrier, Zurich North America, and that they were in the process of formally settling the matter when this receivership proceeding was filed in March, 2009, thereby staying their Harris County lawsuit, and that Zurich has not gone forward with the settlement on behalf of its insured Ameritrust.

From a legal standpoint, these most unusual facts present the straightforward legal question to be resolved pursuant to the receivership provisions of the Texas Insurance Code: is the interpled \$64,621.18 property of the Estate?

The Special Master recommends that the Court determine that the monies are property of the insurer/Estate and that the Ameritrust receivership Estate and/or TTIGA is entitled in the first instance to the monies.

Commonwealth and the Villelases ("the objecting parties") argue that Ameritrust never owned the funds in question, that Ameritrust as escrow agent held in trust the monies deposited with it by Encore, the Villelases' lender, for the singular benefit of Encore and the Villelases to be paid by Ameritrust on their behalf to third parties, including the lienholder Compass Bank and that such monies thus were held pursuant to an "express trust" as defined in Section 443.004(9)(A)(i); that in the alternative the monies constituted a "special deposit" under Section 443.004(27); and that as such, such monies do not constitute "property of the insurer" or "property of the estate" as set forth in Section 443.004(20).

On the date an order of liquidation is entered, the liquidator (as represented by the SDR) is vested by operation of law with the title to all property of the insurer ordered liquidated. "Property of the insurer" and "property of the estate" are defined very broadly in Section 443.004(20) of the Insurer Receivership Act and includes "all right, title and interest of the insurer in property, whether legal or equitable . . . and any other interest recognized under the laws of this state." The SDR argues that property such as the interpled funds are presumed to be property of the insurer/estate unless the objecting parties can overturn the presumption---and it is the burden of the objecting parties to prove that the SDR's requested relief should not be granted (see Section 443.007(e).

Ameritrust had an interest in the monies on deposit with Enterprise Bank as Ameritrust had paid such monies to its bank (Enterprise Bank) for the issuance by the bank of a cashier's check. As of the date of receivership, such monies remained on

deposit with Enterprise Bank because the payee on the cashier's check, Compass Bank, had not cashed the cashier's check.

The question thus becomes whether the objecting parties have established an exception in the Insurer Receivership Act that takes the interpled funds out of the general definition of "property of the insurer."

First, the objecting parties argue that the monies were "subject to . . . a valid and existing express trust for the . . . benefit of specified persons . . ." There is no evidence that there was any "express trust" language in any of the documentation establishing Ameritrust's role as escrow agent, or that there were any writings establishing Ameritrust's duties as would be required to establish an "express trust." In addition, the "express trust" language is found in the definition of "general assets" in Section 443.004(a)(9)(A)(i), and the "general assets" term is used in the Insurer Receivership Act for reasons unrelated to the determination as to whether property is "property of the insurer" or "property of the estate."

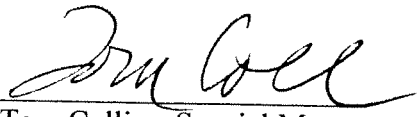
Next, the objecting parties contend that the monies constituted a "special deposit" as defined in Section 443.004(27). The problem with this argument is, again, that this "special deposit" term is used only once in the Insurer Receivership Act, that being in Section 443.402 relating to "Domiciliary Receivers Appointed in Other States" which provides that a special deposit is to be distributed to the relevant Texas guaranty association as an early access payment. The term "special deposit" is not tied in the Act in any way to the determination of "property of the insurer" or "property of the estate."

The case authorities cited by the objecting parties which apply the trust concepts of the Perishable Agricultural Commodities Act are not pertinent because that Act has special statutory trust provisions that do not apply here.

The interpled funds may very well be "escrow funds." If so, there is a procedure in place under Section 2602 of the Texas Insurance Code and in this case for the handling of escrow funds by the TTIGA. The SDR and TTIGA have agreed that that determination is not ripe for decision now, that it is one they will address in the days ahead, and therefore it is not a part of this Recommendation.

Therefore, the Special Master RECOMMENDS that the SDR's Turnover Application [Enterprise Bank] be GRANTED. Any Order on this Recommendation should not be entered by the District Court until the time for the objecting parties to seek *de novo* review in the District Court has expired.

SIGNED this 5th day of January, 2011


Tom Collins, Special Master