

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

In re:

LAND RESOURCE, LLC, *et al.*,

Debtors.

Case No. 6:08-bk-10159-ABB
Chapter 7 (converted)

Jointly administered with cases
6:08-bk-10159 through 6:08-bk-10192
(except 6:08-bk-10173) and
6:08-bk-11675

ORDER

This matter came before the Court on the Objection (Doc. No. 369) filed by KeyBank National Association (“KeyBank”) to the Order entered on January 2, 2009 (Doc. No. 212)¹ directing \$62,500.00 of an earnest money deposit be placed in a segregated account for Habitat, Inc., d/b/a Real Estate Limited (“Habitat”). KeyBank challenges Habitat’s entitlement to the funds.

A hearing was held on March 24, 2009 at which counsel for the Debtor Land Resource, LLC and related Debtors, counsel for KeyBank, counsel for Habitat, and various other parties appeared. The matter was taken under advisement and the parties were granted leave to file post-hearing briefs. Habitat and KeyBank timely filed post-hearing briefs (Doc. Nos. 466, 468).

The above-captioned cases and related cases were converted from Chapter 11 to Chapter 7 and Leigh R. Meininger was appointed the Chapter 7 Trustee (“Trustee”). An Order was entered on July 16, 2009 (Doc. No. 517) directing the Trustee to file a statement setting forth his position on this matter. The Trustee did not file a position statement.

¹ Docket entries, unless otherwise noted, shall refer to the In re Land Resource, LLC case.

KeyBank's Objection is due to be overruled and the funds are due to be disbursed to Habitat for the reasons set forth herein. The Court makes the following Findings of Fact and Conclusions of Law after reviewing the pleadings, hearing live argument, and being otherwise fully advised in the premises.

FINDINGS OF FACT

Land Resource, LLC, and affiliated Debtors including Roaring River, LLC (Case No. 6:08-bk-10179-ABB), Rush Creek Land Company, Inc. (Case No. 6:08-bk-10182-ABB), and Roaring River Holding Company, Inc. (Case No. 6:08-bk-10175-ABB), filed thirty-four Chapter 11 bankruptcy cases on October 30, 2008 ("Petition Date").

Thirty-two of the affiliated cases were converted to Chapter 7 on March 20, 2009 (Doc. No. 441). The Land Resource, LLC case was converted to Chapter 7 on June 30, 2009 (Doc. No. 503).² The Land Resource, LLC case and the affiliated converted cases are being jointly administered pursuant to the Order entered on July 21, 2009 (Doc. No. 522). The Trustee has been appointed the Chapter 7 Trustee of all of the converted cases.

Land Resource, LLC, the affiliated debtors, and several non-debtor affiliates had been in the business of developing vacation and second home residential communities in Florida, Georgia, North Carolina, Tennessee, and West Virginia. Their business strategy was to acquire, sell, and develop mostly rural communities in areas with unique access to natural amenities such as lakes, mountains, and coastline. They marketed and sold pre-developed lots primarily to individuals and investors. The lots were generally sold prior to the completion of road and utility infrastructure.

² One affiliated case, In re Point Peter, LLLP, Case No. 6:08-bk-10173-ABB, remains in Chapter 11.

Listing Contract

Habitat is a West Virginia real estate broker. Roaring River, LLC, Rush Creek Land Company, Inc., and Roaring River Holding Company, Inc., collectively as Seller (collectively, "Seller"), engaged Habitat as their exclusive broker to market and sell certain parcels of real property, surface rights, and subsurface rights located in West Virginia (collectively, the "Property") pursuant to a Listing Contract executed by Seller and Habitat on May 19, 2008 (Doc. No. 466, Ex. 1).

The term of the Listing Contract was one year commencing from May 19, 2008 and could be terminated pursuant to the provisions of Articles 3, 6, and 9. It is governed by the laws of the State of West Virginia. Listing Contract at ¶11.3. Habitat, upon the closing of a sale of the Property, was entitled to a commission calculated on a graduated percentage scale of the gross selling price pursuant to Article 3.

Article 5 of the Listing Contract addresses earnest money deposits:

If [an] earnest money deposit is forfeited by a purchaser through such purchaser's default, Seller *shall receive* seventy-five percent (75%) and Broker twenty-five (25%), not to exceed what the full commission would have been, not as liquidated damages, but to apply to damages which the Seller and Broker may suffer on account of default of purchaser. Upon execution of a purchase and sale agreement, the Seller and buyer shall designate a mutually acceptable escrow holder, not to include Seller or its parent or affiliates.

In the event that any purchase and sale agreement to purchase does not close for any reason other than agreed, and the earnest money deposit is not released by the escrow holder thereof, the earnest money deposit shall be held by the escrow holder until Seller, the purchaser, and Broker mutually agree on its disposition or until such disposition is directed by a court of competent jurisdiction.

Listing Contract at ¶5 (*emphasis added*).

Habitat procured Acadian Energy Resources, Inc. (“Acadian”) as the purchaser of the Property and a Real Estate Purchase Agreement (“Purchase Agreement”) for a sales price of \$7,500,000.00 was executed on June 30, 2008 by Acadian and Seller (Doc. No. 92, Ex. A). The West Virginia law firm of Spillman, Thomas & Battle was engaged as the escrow holder (“Escrow Holder”). Acadian, pursuant to Paragraph 1.2 of the Purchase Agreement, paid an earnest money deposit of \$250,000.00 to the Escrow Holder. An escrow was created.

Acadian breached the Purchase Agreement in August 2008 and Seller terminated the Purchase Agreement. The sale was not consummated and Acadian forfeited the earnest money deposit as a consequence of its default pursuant to the Purchase Agreement. The Escrow Holder did not release and continued to hold the entire earnest money deposit.

Twenty-five percent of the earnest money deposit is \$62,500.00 and seventy-five percent of the earnest money deposit is \$187,500.00. Habitat would have been entitled to a commission of \$487,500.00 pursuant to Article 3 of the Listing Contract had the sale to Acadian been consummated. The \$62,500.00 earnest money deposit portion does not exceed what Habitat’s full commission would have been had the sale been consummated.

Seller did not dispute or challenge Habitat’s entitlement to the \$62,500.00 pre-petition. Seller, post-petition, recognizes Habitat is entitled to \$62,500.00, but contends such entitlement constitutes an unsecured claim of \$62,500.00 against the bankruptcy estates of Seller.

The Court entered an Order on January 2, 2009 (Doc. No. 212) directing the Escrow Holder to turn over the earnest money deposit of \$250,000.00 to Seller with Seller to set aside \$62,500.00 of the deposit in a segregated account pending resolution of the parties' rights to the funds.

Roaring River, LLC Deed of Trust

Roaring River, LLC, as Grantor, and KeyBank, as Lender, executed a Deed of Trust With Assignment of Rents, Security Agreement and Fixture Filing on June 26, 2007 (Doc. No. 468, Ex. B) (“Deed of Trust”) in which Roaring River, LLC granted KeyBank a security interest in the Property and other tangible and intangible property. KeyBank recorded the Deed of Trust and a UCC Financing Statement in the public records of Fayette County, West Virginia on June 28, 2007.

The Deed of Trust delineates eleven categories of property in which Roaring River, LLC granted KeyBank a security interest. Roaring River, LLC also granted KeyBank a security interest in “all income, rents, royalties, revenues, issues, profits and proceeds” from such collateral. The whereas clause and each of the eleven categories of the Deed of Trust set forth Roaring River, LLC granted a security interest to KeyBank insofar as Roaring River, LLC held or may later acquire a right, title or interest in such collateral.

Exhibit A attached to KeyBank's UCC Financing Statement mirrors the Deed of Trust language. Roaring River, LLC granted a security interest to KeyBank in such property in which it held a “right, title and interest now or hereafter acquired” (Doc. No. 468, Ex. C).

KeyBank contends the \$62,500.00 constitutes property of Seller upon which KeyBank holds a first-priority perfected security interest. It alternatively contends the Listing Contract constitutes an executory contract and the Seller's rejection of the Listing Contract terminated Habitat's entitlement to the \$62,500.00.

Analysis

Listing Contract

The Listing Contract was not terminated pursuant to any of the termination provisions contained in Articles 3, 6, and 9. It was in full force and effect when Acadian defaulted and forfeited the earnest money deposit.

KeyBank asserts Seller is entitled to the entire earnest money deposit pursuant to the Purchase Agreement based upon Paragraph 5.5 and such funds constitute KeyBank's cash collateral. Paragraph 5.5 of the Purchase Agreement provides:

Sellers' sole remedy for Buyer's default pursuant to the terms of this Agreement shall be to terminate this Agreement and retain the Deposit as liquidated damages. Sellers specifically waive[] all actual, special or consequential damages Sellers may suffer as a result of Buyer's default in the performance of its obligations pursuant to this Agreement.

Doc. No. 92, Ex. A at ¶5.5. The Purchase Agreement is not relevant to the determination of the Seller's and Habitat's respective rights in and to the earnest money deposit.

The Listing Contract controls the disposition of the earnest money deposit. The Purchase Agreement was executed subsequent to the execution of the Listing Contract. Habitat was not a party to the Purchase Agreement. The Listing Contract was "intended to be [the] entire and complete statement of the terms of the Agreement between the parties" and could only be amended or modified by a written instrument executed by Habitat and Seller. Listing Contract at ¶11.2. The Listing Contract was not amended or

modified. The Purchase Agreement does not amend, modify or affect the terms of the Listing Contract.

The language of the Listing Contract is plain and unambiguous. The plain meaning of the terms of the Listing Contract control the disposition of the earnest money deposit and matters extrinsic, including the Purchase Agreement, are not relevant.

Habitat, pursuant to the plain meaning of the language of Article 5 of the Listing Contract, was entitled to twenty-five percent of the earnest money deposit, \$62,500.00, upon Acadian's forfeiture of the deposit. Seller was entitled to seventy-five percent of the earnest money deposit, \$187,500.00, upon Acadian's forfeiture of the deposit.

Habitat's entitlement to the \$62,500.00 was not contingent upon any other events or conditions. All conditions precedent had occurred. Habitat's entitlement to the \$62,500.00 vested prepetition in August 2008 upon Acadian's default and forfeiture of the deposit pursuant to the Listing Contract's plain and unambiguous language.

The language of Article 5 mandated Habitat was to have possession of the \$62,500.00. The twenty-five percent portion of the forfeited earnest money deposit was not at any time property of the Seller. Seller did not obtain possession or control of the funds.

Escrow

The Escrow Holder was a fiduciary and had duties to Seller and Habitat. It received no interest or rights in the earnest money deposit. It was bound to comply with and fulfill the terms of the Listing Contract. It was authorized to disburse the \$62,500.00 to Habitat when Habitat's entitlement to the funds vested in August 2008.

Acadian retained title to the earnest money deposit until it forfeited the funds. The \$62,500.00 held by the Escrow Holder became the property of Habitat in August 2008 upon Acadian's forfeiture of the earnest money deposit. The Escrow Holder's non-disbursement of the funds to Habitat did not affect Habitat's entitlement to the funds. The Listing Contract specifically provides in Article 5 if the deposit "is not released by the escrow holder," it will release the funds upon the parties' mutual agreement or the directive of a court of competent jurisdiction.

Seller did not have and did not acquire any right, title or interest in the \$62,500.00. It had no power to give KeyBank an effective security interest in the funds. KeyBank does not hold a security interest in the \$62,500.00. The \$62,500.00 is not property of the bankruptcy estate.

Executory Contract Rejection

KeyBank asserts, alternatively, the Debtor's rejection of the Listing Contract terminated Habitat's right to the earnest money deposit. The Listing Contract had not expired and had not been terminated as of the Petition Date. It constituted an executory contract on the Petition Date because certain obligations were unperformed.

The Listing Contract was rejected as an executory contract *nunc pro tunc* to the Petition Date pursuant to the Order entered on February 10, 2009 (Doc. No. 344). The unperformed obligations of Seller are considered to be breached pursuant to the rejection. Habitat has a right to file a rejection damages claim for any damages caused by such breach. A portion of the Listing Contract had been performed as of the Petition Date and was non-executory and unaffected by the rejection.

Article 5 of the Listing Contract was non-executory on the Petition Date. All conditions precedent to Habitat's entitlement to receive twenty-five percent of the deposit had occurred. Habitat's entitlement to the \$62,500.00 was absolute and non-executory as of August 2008. The rejection of the Listing Contract did not affect, alter, or rescind Habitat's entitlement to the \$62,500.00, nor did it create any right, title, or interest of Seller in the funds.

KeyBank's Objection is due to be overruled and the \$62,500.00 is due to be turned over to Habitat plus any interest that has accrued on the funds.

CONCLUSIONS OF LAW

The filing of a bankruptcy petition creates an estate broadly comprised of "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a). Property interests are created and defined by state law, unless a particular federal interest requires a different result. Butner v. United States, 440 U.S. 48, 55 (1979); Southtrust Bank of Ala., N.A. v. Thomas (In re Thomas), 883 F.2d 991, 995 (11th Cir. 1989).

The Listing Contract is to be enforced in accordance with West Virginia law. Listing Contract at ¶11.3. The Deed of Trust and financing statements filed in West Virginia are governed by West Virginia law. Deed of Trust at ¶33. West Virginia statutory and case law govern the determinations of whether the Debtor had or acquired an ownership interest in the \$62,500.00 and whether KeyBank holds an effective security interest in the \$62,500.00. Butner, 440 U.S. at 55. Federal bankruptcy law governs the effect of the rejection of the Listing Contract. Id.

It is a fundamental tenet of West Virginia law that where the language of a valid contract is plain and unambiguous such language controls. Cotiga Dev. Co. v. United Fuel Gas Co., 128 S.E.2d 626, 631 (W. Va. 1962). “When the language of a written instrument is plain and free from ambiguity, a court must give effect to the intent of the parties as expressed in the language employed and in such circumstances resort may not be had to rules of construction.” Id. The Supreme Court of Appeals of West Virginia “has consistently held that the language of a contract must be accorded its plain meaning and, where plain, the language must be given full effect.” Nisbet v. Watson, 251 S.E.2d 774, 780 (W. Va. 1979).

The Listing Contract controls the disposition of this matter. It is a valid contract between Habitat and Seller. It was not modified or amended and expresses the entire and complete intent of Habitat and Seller.

The Listing Contract is plain and unambiguous. It expresses the intent of Habitat and Seller in unambiguous language. The Listing Contract language must be accorded its plain meaning and given full effect. Nisbet, 251 S.E.2d at 780; Cotiga, 128 S.E.2d at 631. “Matters extrinsic” to the Listing Contract are not relevant in determining the disposition of the forfeited earnest money deposit. Babcock Coal & Coke Co. v. Brackens Creek Coal Land Co., 37 S.E.2d 519, 520 (W. Va. 1946).

Habitat was entitled to possession of the \$62,500.00 in August 2008 pursuant to the plain meaning of the language of Article 5 of the Listing Contract. All conditions precedent regarding the earnest money deposit had occurred: (i) Acadian had paid the earnest money in full; (ii) the funds were being held in escrow by the Escrow Holder; (iii) Acadian had defaulted; and (iv) the Purchase Agreement had been terminated. Habitat’s

entitlement to the \$62,500.00 was not contingent or conditional upon any other events or conditions.

The phrase “shall receive” contained in Article 5 is of primary importance. The plain meaning of “shall” denotes a “mandate” or “requirement,” something that is not discretionary. Fife v. Kiawah Island Util., Inc., 131 F.3d 133 (table), 1997 WL 780521, *3 (4th Cir. Dec. 19, 1997). The common meaning of “receive” is “to come into possession of.” Merriam-Webster’s Online Dictionary, [http://www.merriam-webster.com/dictionary/receive\[1\]](http://www.merriam-webster.com/dictionary/receive[1]) (last visited Aug. 19, 2009). Habitat, pursuant to the plain meaning of the language of Article 5, was entitled to obtain possession of twenty-five percent of the earnest money deposit upon Acadian’s forfeiture in August 2008.

An escrow was created upon Acadian’s delivery of the earnest money deposit to the Escrow Holder. 28 AM. JUR. 2d *Escrow* §§ 3, 19 (2009). The “purpose of an escrow arrangement is to place property beyond the reach of the parties unless stated contingencies materialize.” Williams v. C.I.R., 1 F.3d 502, 506 (7th Cir. 1993). Acadian retained title to the earnest money deposit until it forfeited the funds. 28 AM. JUR. 2d *Escrow* § 17 (2009).

The Escrow Holder received no interest or rights in the earnest money deposit. 28 AM. JUR. 2d *Escrow* § 24 (2009). It was a fiduciary with duties to both Seller and Habitat pursuant to the Listing Contract. Id. at § 26. It was “absolutely bound by the terms and conditions of the deposit and charged with the strict execution of the duties thereby voluntarily assumed.” Id. at § 24.

The conditions for Habitat's right to receive twenty-five percent of the earnest money deposit had materialized in August 2008. Habitat's entitlement to the \$62,500.00 vested in August 2008. Meadows v. Wal-Mart Stores, Inc., 207 W.Va. 203, 215 (W. Va. 1999) ("The concept of vesting is concerned with expressly enumerated conditions or requirements all of which must be fulfilled or satisfied before a benefit becomes a presently enforceable right.").

The \$62,500.00 became the property of Habitat in August 2008. The Escrow Holder was authorized to disburse the \$62,500.00 to Habitat pursuant to the Listing Contract in August 2008. The Escrow Holder's non-disbursement of the funds to Habitat did not affect Habitat's entitlement to the funds.

Seller did not have and did not acquire any right, title or interest in the \$62,500.00. Seller did not obtain possession or control of the funds. The \$62,500.00 is not property of the Seller and is not property of the bankruptcy estate pursuant to 11 U.S.C. Section 541.

The plain and unambiguous language of the Deed of Trust reflects Roaring River, LLC granted KeyBank a security interest only in property in which Roaring River, LLC held or later acquired a right, title or interest. It is axiomatic one cannot grant an effective security interest in something he has no right, title or interest. W. VA. CODE §§ 46-9-203(a), (b) (2006). A security interest only attaches to collateral if the "debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party." Id. § 46-9-203(b)(2).

Seller could not grant KeyBank an effective security interest in the \$62,500.00 because Seller did not have any rights in or the power to transfer rights in the \$62,500.00. KeyBank's security interest did not attach to the \$62,500.00. Id. §§ 46-9-203(a), (b).

The rejection of the Listing Contract pursuant to 11 U.S.C. Section 365(d)(2) did not affect Habitat's entitlement to the \$62,500.00. The Listing Contract was in effect on the Petition Date with certain portions unperformed and constituted an executory contract. Sipes v. Atlantic Gulf Communities Corp. (In re General Dev. Corp.), 84 F.3d 1364, 1374 (11th Cir. 1996). The rejection of the Listing Contract released Seller from its outstanding contractual obligations and gave Habitat a pre-petition claim for any damages resulting from such release. Thompkins v. Lil' Joe Records, Inc., 476 F.3d 1294, 1308 (11th Cir. 2007).

The rejection affected the unperformed portions of the Listing Contract, but did not affect the provisions that had been fully executed. Id. at 1307. The provisions of the Listing Contract relating to the forfeited earnest money deposit, specifically Article 5, had been fully executed prepetition and were non-executory. Id. Habitat's entitlement to the \$62,500.00 vested and was absolute in August 2008. The rejection of the Listing Contract did not rescind, reverse, or affect in any way Habitat's entitlement to the \$62,500.00. Id. at 1307-1308.

Habitat is entitled to the \$62,500.00. Seller shall be directed to turnover those funds to Habitat plus any interest that has accrued on the funds.

Accordingly, it is

ORDERED, ADJUDGED and DECREED that KeyBank's Objection (Doc. No. 369) is hereby **OVERRULED**; and it is further

ORDERED, ADJUDGED and DECREED that Roaring River, LLC (Case No. 6:08-bk-10179-ABB), Roaring River Holding Company, Inc. (Case No. 6:08-bk-10175-ABB), and Rush Creek Land Company, Inc. (Case No. 6:08-bk-10182-ABB) are hereby directed to turn over to Habitat forthwith the \$62,500.00 being held in a segregated account pursuant to the January 2, 2009 Order (Doc. No. 212), plus any and all interest that has accrued on such funds.

Dated this 24th day of August, 2009.

/s/ Arthur B. Briskman
ARTHUR B. BRISKMAN
United States Bankruptcy Judge