**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY**
**FIRST JUDICIAL DISTRICT OF PENNSYLVANIA**
**CIVIL TRIAL DIVISION**

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|---|---|---|
| WILLOW SPRINGS RANCH, LLC | : | October Term, 2001 |
| | : | |
| Plaintiff, | : | No. 00979 |
| | : | |
| v. | : | Control No. 060940 |
| | : | |
| DENNIS R. PRIMAVERA, ESQUIRE, | : | |
| Individually and d/b/a and a/k/a | : | |
| DENNIS R. PRIMAVERA ASSOCIATES, | : | |
| Defendant. | : | |

**ORDER**

**AND NOW**, this 30 day of October, 2003, upon consideration of defendant's Motion for Summary Judgment, plaintiff's response thereto, the memoranda in support and opposition, and all other matters of record, it is hereby **ORDERED** that said Motion for Summary Judgment is **DENIED**.

**BY THE COURT,**

_____
**GENE D. COHEN, J.**

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| Defendant. | : | |

## MEMORANDUM OPINION

The court hereby considers the Motion for Summary Judgment of defendant, Dennis R. Primavera, Esq., individually and d/b/a and a/k/a Dennis R. Primavera Associates ("Primavera"). Primavera acted as escrow agent with respect to a loan transaction entered into between plaintiff, Willow Springs Ranch, LLC "(WSR"), as borrower, and a non-party Bahamanian entity, B.L Securities, Ltd. ("BLS"), as lender. The terms of the loan were memorialized in an Offshore Investment Agreement. In addition to the Offshore Investment Agreement, Primavera, WSR, and BLS entered into an Escrow Agreement, which incorporated by reference the Offshore Investment Agreement.[1] EA, p. 1.

During the course of the loan process, which is detailed in the Escrow Agreement, BLS called a default against WSR, which WSR disputed, and Primavera forwarded to BLS the escrow monies given to him by WSR. Before transferring the escrow funds to

[1] The Offshore Investment Agreement is attached to the Motion for Summary Judgment as Exhibit B, and the Escrow Agreement is attached as Exhibit C. For citation purposes in this opinion, the Offshore Investment Agreement shall be denoted as "OIA", the Escrow Agreement as "EA", the Motion for Summary Judgment as "MSJ", and the Response to Motion for Summary Judgment as "RMSJ".

BLS, Primavera first deducted his fee for serving as escrow agent. WSR never received any loan monies from BLS because of WSR's alleged default, and instead WSR lost the money it had put into escrow.

WSR brought this suit against Primavera claiming that Primavera breached his escrow agent's fiduciary duty to WSR by transferring the escrow funds to BLS when WSR was not in default under the Offshore Investment Agreement or the Escrow Agreement. Primavera now moves for summary judgment on the grounds that his duties to WSR were limited to the terms of the parties' two Agreements, that he complied with all such terms applicable to him, and that he properly forwarded the escrow monies to BLS.

## I. The Law

The court previously denied Primavera's Motion for Judgment on the Pleadings, which ruling constitutes the law of the case. In the court's prior order, the court ruled that Bahamanian law, which is based on the English common law, governs the claims brought by plaintiff in this suit. RMSJ, Ex. E, p.3. The court further held that "the issue of liability at trial . . . is limited to whether [Primavera] was negligent in the release of the escrow funds."[2] *Id*. Ex. E, p. 1. Primavera now asks the court to enter summary judgment based on the fact that WSR has failed to offer any evidence that Primavera was negligent. However, the court cannot grant Primavera's requested relief if there is evidence from which a jury could find that Primavera breached his duties to WSR.

> Summary judgment is proper when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits demonstrate that there exists no genuine issue of material fact and the moving party is

[2] The court also previously held that the "indemnification clause" in the Escrow Agreement did not preclude WSR from prosecuting a claim for negligence against Primavera, and the court declines to revisit this issue as urged by Primavera in his Motion for Summary Judgment. RMSJ, Ex. E, p. 4.

> entitled to judgment as a matter of law. In determining whether to grant summary judgment, a trial court must resolve all doubts against the moving party and examine the record in a light most favorable to the non-moving party. Summary judgment may only be granted in cases where it is "clear and free from doubt that the moving party is entitled to judgment as a matter of law.

Horne v. Haladay, 728 A.2d 954, 955 (Pa. Super. 1999) (citing Pa. R. Civ. P. 1035.2).

Primavera correctly points out that his fiduciary duties as an escrow agent are defined by the terms of the Escrow Agreement and, by incorporation therein, the Offshore Investment Agreement.[3] EA, p. 1. Therefore, in order to determine whether there are disputed issues of material fact regarding Primavera's breach of his duty to WSR, the court must analyze the terms of the Agreements governing the parties' relationship, as well as the proffered evidence regarding the parties' attempts to comply with the terms of the Agreements.

## II. The Facts

The parties apparently do not dispute that the parties properly performed the first steps in the loan process set forth in the Escrow Agreement.[4] However, the parties disagree whether WSR properly performed its next obligation under the Escrow Agreement, which was to provide an approved Letter of Credit guaranteeing that WSR could pre-pay certain costs.[5] *See* OIA ¶ 4.3.

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[3] Under applicable English common law, an escrow agent's duties are defined by the escrow agreement, and the escrow agreement must be interpreted based upon common sense using a reasonable man standard. *See* Halley v. Law Society, 2002 Ch. 139 (MSJ, Ex. K, LEXIS printout, p. 36); Biggin Hill Airport Ltd. V. Bromley London Borough Council, 2001 Ch. 1089 (C.A.) (MSJ, Ex. K, LEXIS printout, pp. 8-9).

[4] Specifically, the parties agree that WSR transferred the escrow amount, $115,083.00 to Primavera's account, as required under the Escrow Agreement. EA ¶ 2; MSJ ¶¶ 10,11; MSJ, Ex. J; RMSJ ¶ 10;RMSJ, Ex. A, T-41. The parties further agree that BLS provided the requisite "Transaction Commitment Notice and Confirmation of Reserved and Nominated Funds" to WSR. EA, ¶¶ 4,5; MSJ ¶¶ 11,12; RMSJ ¶ 11; RMSJ, Ex. A, T-44.

[5] Once it received the Transaction Commitment Notice from BLS, WSR was obligated to submit a Letter of Credit or a Bank Guarantee and certain "transferable preferred stock certificates." EA ¶ 6. There is

The Escrow Agreement requires that "copies of [the Letter of Credit] shall be submitted to BLS for approval prior to delivery to [Primavera]." EA, ¶ 6. This apparently was done. *See* RMSJ, Ex. A, T-33. Upon receipt of a copy of the Letter of Credit, BLS was then required to "notify [Primavera] and [WSR] of the approval as to the form of the [Letter of Credit]." EA ¶ 7(B). WSR has proffered a letter from Mr. Kelley, acting on behalf of BLS, to Mr. Dietrich, acting on behalf of WSR, (the "Kelley Letter") which could be viewed as satisfying the requirement that BLS approve the form of WSR's Letter of Credit.[6] *See* RMSJ, Ex. A, T-33.

Upon approval of the Letter of Credit by BLS, WSR was required to deliver the original of the approved Letter of Credit to Primavera. EA ¶ 7(C). The parties do not dispute that WSR delivered a Letter of Credit to Primavera, nor do the parties dispute that, after WSR delivered the Letter of Credit to Primavera, BLS informed Primavera that WSR was in default for failing to deliver a Letter of Credit identical to the form Letter of Credit attached to the Offshore Investment Agreement. MSJ ¶¶ 17-18; RMSJ ¶¶ 17-18; OIA ¶ 4.3. However, if BLS did indeed approve the form of the Letter of Credit submitted by WSR, then it may be irrelevant that the approved Letter of Credit was not

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apparently no dispute that WSR provided the requisite stock certificates, so the court will not bother to mention them in its subsequent discussions regarding whether WSR provided an approved Letter of Credit, even though many of the Escrow Agreement's provisions that apply to the Letter of Credit also apply to the stock certificates.

[6] Although the Kelley Letter is arguably ambiguous, a reasonable reading of it is as follows: " . . . the form of this L.C. is similar to our Attachment "B" in form and substance, and therefore will be acceptable once [delivery is] confirmed in accordance with the Offshore Investment Agreement, subject to review of the original once placed in Escrow [to ensure that it is the same as the copy you sent for approval.]" RMSJ, Ex. A, T-33.

the same as the "sample" Letter of Credit attached to the Offshore Investment Agreement.[7] *See* OIA ¶ 4.3, EA ¶ 7(B)-(C).

There is no express provision in the Escrow Agreement that permits BLS to withdraw its approval of the Letter of Credit after BLS has approved the form of the Letter of Credit and after WSR has delivered the approved form to Primavera, which appears to be what BLS did in this instance. The Escrow Agreement does permit Primavera to release the escrow funds to BLS in the event that WSR fails to obtain BLS's approval of the form of Letter of Credit, and/or BLS fails to deliver the original of the approved form to Primavera.[8] OIA ¶ 6.2. *See also* EA ¶ 7(D).

Upon being notified by BLS of WSR's alleged default, WSR informed Primavera that it disputed the default because the Letter of Credit WSR delivered to Primavera had been approved by BLS. RMSJ, Ex. A, T-53. In the event of a dispute under the Escrow Agreement, Primavera is given some discretion to decide what to do with the escrow funds, in that he "may, but shall not be required to, deposit the escrow funds in a court having jurisdiction over the Agreement between the parties . . ." EA ¶ 12 . However, Primavera chose to release the funds to BLS, rather than hold the funds pending a resolution of such dispute. Therefore, Primavera assumed the risk that WSR was not

[7] The Offshore Investment Agreement refers to the form Letter of Credit, which is attached thereto as "Attachment B", as a "sample", which implies that other forms may be used. OIA ¶ 4.3. The Escrow Agreement, however, states that WSR shall deliver a copy of an executed Attachment B to BLS, which implies that only that particular form may be used. EA ¶ 6. However, if the Kelley Letter is read as approving the different form of Letter of Credit submitted by WSR, then it may be viewed as an amendment or waiver of the Escrow Agreement's apparent requirement that an exactly identical Attachment B be submitted.

[8] The Escrow Agreement also provides that "[u]pon [WSR's] production of the documentation required by the Agreement, BLS [may] refuse the transaction if there has been a material misrepresentation on behalf of [WSR]," but in such a case Primavera is supposed to refund the First Month's Rent to WSR, not forward it to BLS after taking out his own fee. EA ¶ 8.

actually in default. If WSR delivered to Primavera a Letter of Credit in a form approved by BLS, then the default claimed by BLS was likely improper and Primavera should not have delivered the First Month's Rent to BLS (or retained his fee out of such funds). *See* Halley v. Law Society, 2002 Ch. 139, MSJ (Ex. K, LEXIS printout, p. 36) ("Until the time came when it would be determined whether or not the conditions [of the Escrow Agreement] had been satisfied, [the escrow agent] could not dispose of [the escrow monies] without the agreement of both parties.")

Because there are disputed issues of material fact as to whether WSR submitted a proper Letter of Credit to Primavera, whether WSR breached the governing Agreements, and whether Primavera breached his duties to WSR as defined by the Agreements, this court cannot enter summary judgment in favor of Primavera on the issue of whether he was negligent in releasing the escrow funds to BLS.

**CONCLUSION**

For all of the foregoing reasons, defendant's Motion for Summary Judgment is denied in its entirety.

**BY THE COURT,**

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**GENE D. COHEN, J.**

**Dated: October 30, 2003**