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COURT OF APPEALS
DIVISION II
2015 SEP 16 AM 10:06
STATE OF WASHINGTON
BY  DEPUTY

No. 47567-7-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

PROTERRA DEVELOPMENT VENTURES, LLC,

Plaintiff/Appellant,

v.

FIRST AMERICAN TITLE INSURANCE COMPANY,

Defendant/Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

In 2006, plaintiff/appellant Proterra Development Ventures, LLC (“Proterra”) purchased a real estate development from defendant Sevier, LLC (“Sevier”) in Clark County, Washington. The purchase and sale closed and title passed for a purchase price. One element of the transaction was an escrow of the payment of engineering services.

Proterra and Sevier negotiated and agreed upon a written escrow holdback with simple and specific terms. Defendant/respondent First American Title Insurance Company (“First American”) acted as escrow agent, disbursing escrow funds at the direction of Sevier’s managing member, Bruce Kirschenbaum, in accordance with the terms of the written escrow agreement. Following disbursement of the funds and closing of the account, however, Proterra and Sevier disagreed as to the payment of engineering services. Proterra sued Sevier, Kirschenbaum and First American.

Proterra claimed in its suit that First American breached its fiduciary duty as escrow agent and negligently paid the engineering expenses as directed by Kirschenbaum under the escrow holdback. The trial court properly dismissed Proterra’s claims against First American on summary judgment, and this appeal ensued. The record will show that

First American acted properly as escrow agent in executing the escrow holdback and that the trial court should be affirmed in granting summary judgment.

II. ASSIGNMENT OF ERROR

Assignments of Error

First American assigns no error to the trial court's decisions.

Issues Pertaining to Assignments of Error

First American restates the issues on appeal as follows:

1. As a matter of law, are an escrow agent's duties defined and limited by the escrow agreement?
2. Did First American strictly comply with the instructions of the parties under the Holdback Agreement?
3. Did First American draft the Holdback Agreement?
4. Did Proterra fail to state a claim for negligence as a matter of law?
 - a. Does the Independent Duty Doctrine bar Proterra's claim that First American was negligent in its duties under the Holdback Agreement?
 - b. Is the disagreement between Sevier and Proterra after completion of the Holdback Agreement irrelevant to First American's duties and their execution?

III. STATEMENT OF THE CASE

On October 18, 2005, Sevier, as seller, and Landmark Development, LLC (“Landmark”), as buyer, executed a Vacant Land Real Estate Purchase and Sale Agreement (the “REPSA”) for land located in Ridgefield, Clark County, Washington. Proterra is the purported assignee of Landmark on the transaction. CP 8-18 (REPSA is attached to the Declaration of Cheryl Costa as Exhibit A).

As part of the REPSA, Addendum A described additional terms between the parties, including the requirement that Sevier exercise due diligence to obtain final engineering approval from the City of Ridgefield, with closing to be no later than February 28, 2006, unless the parties mutually agreed to an extension of the closing date. CP 12. An escrow holdback account would be utilized to pay for the completion of final engineering approval, with Sevier agreeing to put 150% of the remaining costs into the account. Id. The account would be maintained under the First American escrow on the transaction. Id.

Effective February 24, 2006, Sevier and Proterra executed Escrow Instructions Vacant Land appointing First American as escrow agent for the transaction. CP 20-25. First American was provided a copy of the REPSA, and opened an escrow account.

Subsequently, a dispute arose between Sevier and Proterra with regard to a number of matters. Eventually, the parties agreed to extend closing to March 13, 2006, and mutually executed an Escrow Holdback Account Agreement (“Holdback Agreement”) that designated \$75,000 to be paid into an account. CP 28.

Bruce Kirschenbaum, managing member of Sevier, was given exclusive authority to direct First American to pay invoices from the account. Id. Sevier would be required to provide Proterra a final accounting of all invoices after final engineering approval was issued by the City of Ridgefield. Id. Any remaining funds in the account on May 12, 2006 would be distributed to Sevier.

On or about March 13, 2006, the transaction closed, with Sevier granting to Proterra a Statutory Warranty Deed for the vacant land, and the escrow holdback account with First American was funded by deposit of \$75,000.

Kirschenbaum directed First American to pay an Olson Engineering invoice in the amount of \$52,763.07 on March 15, 2006, and to make a second payment to Olson Engineering in the amount of \$18,923.60 on March 26, 2006. As directed, First American duly issued checks to Olson Engineering for these amounts, depleting the escrow holdback account. CP 30-31 (Kirschenbaum March 15, 2006 request),

CP 33-34 (Kirschenbaum March 26, 2006 request), CP 36-37 (First American's checks made payable to Olson Engineering).

Proterra alleges that Kirschenbaum and Sevier requested First American to pay expenses unrelated to final engineering, and that First American paid the requested expenses in breach of the Holdback Agreement. As established below, however, First American strictly followed the Holdback Agreement and breached no duty to Proterra as a matter of law.

IV. SUMMARY OF ARGUMENT

The trial court correctly granted summary judgment dismissing Proterra's claim because Proterra failed to raise any issue of material fact disputing that: (1) an escrow agent's duties are defined and limited by contract, (2) First American strictly complied with the instructions of the parties under the Holdback Agreement, (3) First American did not draft the Holdback Agreement nor undertake to protect Proterra's interests in relation to it, and (4) in any event the disagreement between Sevier and Proterra after completion of the Holdback Agreement is irrelevant to First American's duties.

V. ARGUMENT

A. The Standard of Review on Summary Judgment.

On summary judgment, the moving party bears the initial burden of showing the absence of an issue of material fact. Young v. Key Pharm., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989), rev'd on other grounds, 130 Wn.2d 160, 133 P.3d 944 (1996). Once the moving party meets this initial showing, the inquiry shifts to the non-moving party, which must present evidence that demonstrates that material facts are in dispute. Little v. Countrywood Homes, Inc., 132 Wn. App. 777, 779, 133 P.3d 944 (2006). Ultimately, the party bearing the burden of proof at trial bears the burden of showing sufficient facts to establish the existence of every element essential to the case. Young, 112 Wn.2d at 225.

Review of summary judgment is de novo, and the appeals court performs the same inquiry as the trial court. McDevitt v. Harborview Med. Ctr., 179 Wn.2d 59, 64, 316 P.3d 469 (2013). The appeals court may affirm a trial court's granting of a motion for summary judgment on any grounds supported by the record, regardless of whether the trial court relied upon that ground. LaMon v. Butler, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989); Estep v. Hamilton, 148 Wn. App. 246, 256, 201 P.3d 331 (2008).

B. An Escrow Agent's Duties Are Defined and Limited by Contract.

The essential elements to establish liability for breach of fiduciary duty are: duty, breach, causation and damages. See Senn v. Nw. Underwriters, Inc., 74 Wn. App. 408, 414, 875 P.2d 637 (1994).

An escrow holder is an agent. Nat'l Bank of Wash. v. Equity Investors, 81 Wn.2d 886, 909, 506 P.2d 20 (1973), superseded on other grounds, RCW 60.04.226. The agency arises from contract, typically referred to as escrow instructions, and the duties of an escrow agent are defined and limited by contract. Id. at 910 (escrow agent's duties and limitations are defined by his or her instructions); Delson Lumber Co. v. Wash. Escrow Co., 16 Wn. App. 546, 551, 558 P.2d 832 (1976).

Equity Investors offers the following summary of an escrow agent's duties:

“The duties of a depositary or escrow holder are those set out in the escrow agreement. . . . As a general rule, the escrow holder must act strictly in accordance with the provisions of the escrow agreement; he must comply strictly with the instructions of the parties, and it is his duty to exercise ordinary skill and diligence, and due or reasonable care in his employment. In his fiduciary capacity, he must conduct the affairs with which he is entrusted with scrupulous honesty, skill, and diligence.”

Equity Investors, 81 Wn.2d at 910 (ellipsis in original) (quoting 30A C.J.S. Escrows § 8 (1965)).

Thus, an escrow agent becomes liable to the parties for damage from failing to follow the escrow instructions or exceeding the authority conferred by the instructions. Id.; Sanwick v. Puget Sound Title Ins. Co., 70 Wn.2d 438, 444, 423 P.2d 624 (1967); Kirby v. Woolbert, 48 Wn.2d 141, 144, 291 P.2d 666 (1955).

Importantly, Washington law does not impose a duty on escrow agents independent of the parties' instructions. Denaxas v. Sandstone Court of Bellevue, L.L.C., 148 Wn.2d 654, 663-64, 63 P.3d 125 (2003). For example, in Denaxas, the escrow agent did not have a duty to point out a discrepancy in the legal description without specific instruction to do so. Id. at 663. The law "does not impose a duty on escrow agents to affirmatively identify differences between the closing documents and documents drafted by others." Id. at 664.

Stated another way, it is not the province of the escrow agent to interpret a contract where he has a duty to perform. The escrow agent must be guided by that duty and not more general concerns about the purpose of the agreement correctly interpreted. See Southern v. Chase State Bank, 61 P.2d 1340, 1343 (Kan. 1936) ("It is not the province of the escrow holder to interpret or construe a contract where he has a duty to

perform.”); Summit Fin. Holdings, Ltd. v. Cont’l Lawyers Title Co., 41 P.3d 548, 552 (Cal. 2002) (escrow holder must comply strictly with the instructions of the parties and has no general duty to police the affairs of its depositors; rather, an escrow holder’s obligations are limited to faithful compliance with the instructions).

So, the court must determine First American’s duties under the Holdback Agreement. In determining the parties’ intent under the Holdback Agreement, Washington follows the objective manifestation theory for interpreting contracts. Hearst Commc’ns, Inc. v. Seattle Times Co., 154 Wn.2d 493, 503, 115 P.3d 262 (2005). Accordingly, the court must focus on the written Holdback Agreement, rather than any unexpressed subjective intent of the parties, which is irrelevant. Id. at 503-04. The court should give the words in the Holdback Agreement their ordinary, usual and popular meaning, unless the entirety of the agreement clearly demonstrates a contrary intent. Id. at 504.

Whether a contract is ambiguous is a question of law. GMAC v. Everett Chevrolet, Inc., 179 Wn. App. 126, 135, 317 P.3d 1074 (2014). As illustrated below, the Holdback Agreement is not ambiguous because there is only one reasonable meaning that can be ascribed to First American’s very limited duties. See Martinez v. Miller Indus., Inc., 94 Wn. App. 935, 943, 974 P.2d 1261 (1999) (if only one reasonable

meaning can be ascribed to the agreement when viewed in context, that meaning necessarily reflects the parties' intent and no question of fact is presented). In ascertaining First American's duties, no question of fact is presented.

C. First American Strictly Complied with the Instructions of the Parties Under the Holdback Agreement.

The Holdback Agreement provides in relevant part:

Provisions

1. Funds to establish the account come from the proceeds to the transaction, obtained through the closing process on March 13, 2006.
2. The account duration will not exceed 60 days or May 12, 2006.
3. The amount of the holdback from closing shall be \$75,000.00.
4. Invoice(s) along with authorization to pay same may only be made to First American Title by Seller, Bruce Kirschenbaum, Managing Member of Sevier, LLC.
5. Seller shall provide Buyer a final accounting of all invoices once final engineering approval has been issued by the City of Ridgefield.
6. Any remaining account funds on May 12, 2006 shall be distributed to the Seller, Sevier, LLC, in the form of cashiers check or write transfer.

CP 28 (Holdback Agreement) (attached as Appendix A).

The Holdback Agreement designated \$75,000 in an account to pay for expenses incurred by Sevier to obtain final engineering approval from

the City of Ridgefield. This sum was duly deposited. Importantly, the parties agreed that Kirschenbaum, as managing member of Sevier, was the only person who had authorization to direct First American to pay invoices from the account:

Invoice(s) along with authorization to pay same may only be made to First American
Title by Seller, Bruce Kirschenbaum,
Managing Member of Sevier, LLC.

Id. (Holdback Agreement, ¶ 4).

In accordance with the parties' agreement, Kirschenbaum directed First American to make two payments to Olson Engineering, and First American did so in the amounts of \$52,763.07 and \$18,923.60 respectively.

The Holdback Agreement specifically provides that the final accounting would be provided by Sevier (not First American) once final engineering approval had been issued by the City of Ridgefield (and not before):

Seller shall provide Buyer a final accounting of all invoices once final engineering approval has been issued by the City of Ridgefield.

Id. (Holdback Agreement, ¶ 5).

Moreover, the Holdback Agreement does not direct First American to require proof from Kirschenbaum and Sevier that final engineering had

been completed or that the funds were being used to pay for final engineering costs. First American had no right or obligation to police Kirschenbaum and Sevier. Rather, the Holdback Agreement authorized Kirschenbaum to direct First American to disburse from the account. It was Kirschenbaum's obligation to account to Proterra.

Finally, the Holdback Agreement required First American to distribute any remaining account funds held as of May 12, 2006 to Sevier:

Any remaining account funds on May 12, 2006 shall be distributed to the Seller, Sevier, LLC, in the form of cashiers check or write transfer.

Id. (Holdback Agreement, ¶ 6).

Accordingly, on May 17, 2006, First American wired \$3,313.33 to Sevier's Bank of Clark County account, representing the balance of the escrow holdback. CP 39-41 (Wire Transfer Order and Confirmation to Sevier).

As a matter of law, First American acted as instructed strictly in accordance with the terms of the Holdback Agreement. It was not First American's province to interpret or construe the Holdback Agreement, other than to be guided in its duty by what the contract says. See Hayber v. Dep't of Consumer Prot., 866 A.2d 732, 736 (Conn. Super. Ct. 2004), aff'd, 866 A.2d 644 (Conn. App. Ct. 2005); Southern, 61 P.2d at 1343

(because the escrow agreement is to be strictly executed, the escrow agent is not authorized to interpret or construe its terms). Proterra cannot now impute duties to First American that were not stated in the Holdback Agreement to mitigate Proterra's dispute with Sevier. Nothing outside the Holdback Agreement can modify First American's obligations.

In summary, as a matter of law, First American strictly followed the Holdback Agreement when it disbursed two checks to Olson Engineering at the direction of Kirschenbaum and disbursed the balance to Sevier at the close of the escrow holdback. The Holdback Agreement did not require First American, and it had no obligation, to account to or notify Proterra regarding any payment or disbursement. Nor did the Holdback Agreement provide that First American was to determine the amounts or order of payment or to determine the status of final engineering for the project. First American performed its duties pursuant to the terms of the Holdback Agreement.

D. First American Did Not Draft the Holdback Agreement.

Proterra alleges that First American "drafted" the Holdback Agreement and therefore a duty arose to protect Proterra's interests. Proterra Brief at 12. In fact, there is no evidence that First American undertook to protect the interest of Proterra, nor is there any evidence, beyond mere speculation, as to the drafting of the Holdback Agreement.

In opposing the trial court's summary judgment, Proterra cannot rely upon speculation or argumentative assertions that unresolved factual issues remain, but must set forth specific facts that sufficiently rebut First American's contentions and disclose that a genuine issue of material fact exists. Herman v. Safeco Ins. Co. of Am., 104 Wn. App. 783, 787-88, 17 P.3d 631 (2001).

Likewise, only facts evidentiary in nature—i.e., information as to what took place, an act, an incident or a reality, as distinguished from supposition or opinion—will raise a genuine issue of fact. Snohomish County v. Rugg, 115 Wn. App. 218, 224, 61 P.3d 1184 (2002). Ultimate facts, conclusions of fact, conclusory statements of fact or legal conclusions are insufficient to raise a question of fact. Id.

The following facts are undisputed:

1. First American did not draft the Holdback Agreement. CP 57 (Costa dep., p. 19:5-6).
2. In 2006, First American had an escrow form that was not used for the Holdback Agreement. CP 57 (Costa dep., p. 19:7-9).
3. On March 10, 2006, First American escrow officer Ann Snyder and Sevier's managing member, Bruce Kirschenbaum, consulted on terms First American would require in the Holdback Agreement in

order to act as the escrow agent, but the actual terms discussed are unknown. CP 61 (Costa dep., Ex. 1 (Snyder March 10, 2006 note)).

4. There is no evidence that First American agreed to any undertaking to protect Proterra's interests when discussing terms First American would require in the Holdback Agreement in order to act as escrow agent.

5. There is no evidence First American's escrow officer, Ann Snyder, had any participation in drafting the Holdback Agreement or ever reviewed a draft.

6. On March 11, 2006 (the day after their discussion), Kirschenbaum faxed to Snyder a copy of the Holdback Agreement already signed by Sevier and Proterra. CP 27-28 (Kirschenbaum facsimile to Snyder).

Accordingly, Bowers v. Transamerica Title Insurance Co., 100 Wn.2d 581, 675 P.2d 193 (1983), has no application to this case. Proterra has produced no evidence of any First American undertaking to protect Proterra's interests under the Holdback Agreement, but only evidence of a discussion of what First American would require to act as escrow agent under the Holdback Agreement. The only reasonable inference is that First American was addressing its own interests:

Seller called back. Told him the funds were deposited. He will get back to me by the end of the day. He is talking about doing a holdback agreement. I told him al [sic] of the things FATCO would require to be in that agreement.

CP 61 (Snyder's file notes of March 10, 2006 conversation with Kirschenbaum).

Further, Proterra has produced no evidence that First American chose an escrow form; in fact the evidence is just the opposite. First American's form was not used. Moreover, there is no evidence that First American participated in drafting the Holdback Agreement. Indeed, First American was only supplied with a copy already signed by the parties.

Proterra's argument that somehow First American helped draft the Holdback Agreement and failed to protect Proterra is a mere assertion without the benefit of any evidentiary facts that might disclose a reasonable disagreement as to First American's role on execution of the Holdback Agreement. The trial court should be affirmed in granting summary judgment dismissing Proterra's claim.

E. Proterra Fails to State a Claim for Negligence.

1. The Independent Duty Doctrine Bars Proterra's Claim That First American Was Negligent in Execution of Its Duties Under the Holdback Agreement.

Proterra's purported negligence claim is precluded by the Independent Duty Doctrine. See Jackowski v. Borchelt, 174 Wn.2d 720,

730-31, 278 P.3d 1100 (2012) (providing general discussion of the doctrine). The Independent Duty Doctrine applies to the present case because the Holdback Agreement is the sole source of First American's limited fiduciary duties. Equity Investors, 81 Wn.2d at 910 (escrow agent's duties and limitations are defined by his or her instructions); Delson Lumber Co., 16 Wn. App. at 551 (in accord).

In other words, there is no duty independent of the Holdback Agreement on which to base a negligence claim. Proterra must be held to its contract remedies under the Holdback Agreement. See Borish v. Russell, 155 Wn. App. 892, 902, 230 P.3d 646 (2010) (court properly applied the economic loss rule (the doctrine's prior name) to dismiss plaintiff's negligent misrepresentation claim); see also Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1, 124 Wn.2d 816, 821-22, 881 P.2d 986 (1994) (applying economic loss doctrine to construction contract and precluding negligence claim).

Accordingly, the terms of the Holdback Agreement control First American's duties and their execution. Proterra's negligence claim in tort fails as a matter of law. The trial court should be affirmed in granting summary judgment dismissing it.

2. The Disagreement Between Sevier and Proterra After Completion of the Holdback Agreement Is Irrelevant to First American's Duties.

Following completion of the Holdback Agreement, Sevier and Proterra disagreed on what engineering services were to have been paid. The present action is Proterra's suit against Sevier and Bruce Kirschenbaum, in which competing interpretations of what engineering services were to be paid were presented.

Kirschenbaum testified:

3. The Escrow Holdback Agreement was established to ensure final payment on engineering expenses that Sevier LLC had incurred prior to closing. There were engineering bills owing to Olsen Engineering that had not been paid as of closing, and the parties wanted to ensure that said bills were paid by Sevier LLC, and not assigned or transferred to the plaintiff vis a vis the closing of the transaction.

....

7. The amounts I requested from FATCO to be paid to Olson Engineering from the holdback account were for engineering expenses Sevier, LLC incurred prior to closing. It is not a coincidence that the amount paid from the holdback account (\$71,687) to Olsen Engineering is approximately equal to the overall holdback amount of \$75,000.

CP 112-113 (Declaration of Bruce Kirschenbaum dated August 4, 2014).

Proterra managing member Corey Harris testified:

4. The transaction closed on March 13, 2006. Since final engineering had not been completed by that date, a holdback account at First American Title was created on March 13, 2006 to handle those expenses.
Ex. B.

5. The monies which Kirschenbaum instructed First American to pay from the holdback account were not final engineering expenses. Indeed, at the end of the 60 day holdback period, final engineering had not been obtained.

6. All the expenses paid under the holdback were for preexisting expenses which were incurred even prior to the closing as follows:

\$52,763.07 for Olson Engineering Bill from November, 2005 to January, 2006.

\$18,923.60 for Olson Engineering Bill from February, 2006.

CP 99 (Declaration of Corey Harris dated July 16, 2014).

From this disagreement, Proterra alleges that First American was negligent in paying bills unrelated to final engineering. Proterra Brief at 9-10. On the contrary, First American was bound only by the terms of the Holdback Agreement.

When the Holdback Agreement was signed by the parties and provided to First American, the after-the-fact disagreement about payment

of engineering services did not exist and could not have been communicated to First American.

It was not the province, or the duty, of First American to interpret the Holdback Agreement by inquiring about the intent of the parties. Rather, First American was to follow the parties' instructions to: (1) accept only Kirschenbaum's instructions to pay the engineering invoices provided, (2) pay the engineering invoices from the escrowed fund, and (3) disburse the remaining sum to Sevier after a date certain. See Denaxas, 148 Wn.2d at 664 (refusing to impose a duty on escrow agent independent of the parties' instructions); Hayber, 866 A.2d at 736 (escrow agent need not interpret or construe a contract where he has a duty to perform; he must be guided in his duty by what the contract says).

Proterra argues that First American should have interpreted the Holdback Agreement for itself and stepped between Sevier and Proterra. Proterra would have First American do precisely what it should not do as escrow agent. Madison v. Rightway Partners, LLC, No. 3:10cv1912, 2012 WL 90156, at *4 (D. Conn. Jan. 11, 2012) (“[A]n escrow agent is a neutral third-party who is authorized only to abide by the terms of the agreement, and who has no discretion or further involvement in the transaction.”). The trial court should be affirmed in granting summary judgment dismissing Proterra's negligence claim on this basis alone.

F. The Escrow Instructions Provide That Proterra and Sevier Agree Jointly and Severally to Pay First American's Costs and Reasonable Attorneys' Fees Incurred in Connection with or Arising out of the Escrow.

Section 7 of the Escrow Instructions Vacant Land (hereafter "Escrow Instructions") signed by Proterra and Sevier in February 2006 provides:

7. Buyer agrees jointly and severally with Seller to pay Escrowee all costs, damages, judgments and expenses suffered, expended or incurred by Escrowee in connection with or arising out of this escrow, including but not limited to, reasonable attorneys fees.

CP 23 (Escrow Instructions, p. 4).

Moreover, the Escrow Instructions contemplated additional instructions could be given to First American, even by third parties:

8. Any additional instructions given to the Escrowee herein shall be presented in writing. Buyer and Seller further understand that contemporaneously herewith there may be instructions by third parties which are necessary for the completion of this escrow and are, therefore, made a part hereof; namely, such instructions as may be received from a lender, grantor, vendor, or others, affecting the property which is the subject of this escrow.

Id. (Escrow Instructions, p. 4).

So, the Holdback Agreement supplemented and became part of the Escrow Instructions.

A contractual provision for an award of attorneys' fees at trial, such as the Escrow Instructions here, supports an award of attorneys' fees on appeal. W. Coast Stationary Eng'rs Welfare Fund v. City of Kennewick, 39 Wn. App. 466, 477, 694 P.2d 1101 (1985). Pursuant to RAP 18.1(a), First American asks this court to assess against Proterra all attorneys' fees and expenses First American has incurred on appeal.

VI. CONCLUSION

The trial court correctly granted First American summary judgment dismissing Proterra's claims with prejudice. First American respectfully requests that this court affirm the trial court's decision below and award First American its attorneys' fees and costs on appeal.

Respectfully submitted this 15th day of September, 2015.

STOEL RIVES LLP



D. Jeffrey Courser, WSBA #15466
Attorneys for Respondent First American
Title Insurance Company

APPENDIX A

Escrow Holdback Account Agreement

Dated March 13, 2006

CP 27-28

Mar 11 06 12:33p

Bruce Kirshenbaum

3605743187

p.1

Bruce Kirshenbaum
25011 NB Crossap Road
Battle Ground, WA 98604
360-666-9744 Home
360-904-9563 Mobile

facsimile transmittal

To: Ann Snyder First American Fax: 891-1407

From: Bruce Kirshenbaum Date: 3/11/2006

Re: Sevier Road Transaction Pages: 2

CC:

Urgent For Review Please Comment Please Reply Please Recycle

Ann,

Here is the executed Escrow Holdback Agreement. Do you need any other signatures? Please let me know.

Best Regards,

Bruce Kirshenbaum

.....

03/11/2006 SAT 12:49 [TX/RX ND 66481] 001

FATIC0237

0-000000027

**Escrow Holdback Account Agreement
Sevier, LLC/Protterra, LLC.
First American Title File # 4283-702319**

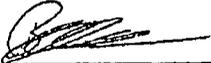
An escrow holdback account will be established on March 13, 2006 simultaneous to the closing (recording and funding) of the above referenced file number. First American Title has agreed to be the custodian of the holdback account for 60 days or through May 12, 2006.

The intention of the holding account is to ensure expenses incurred by Sevier, LLC. to obtain final engineering approval from the City of Ridgefield for the Canyon's Ridge subdivision are paid.

Provisions

1. Funds to establish the account come from the proceeds to the transaction, obtained through the closing process on March 13, 2006.
2. The account duration will not exceed 60 days or May 12, 2006.
3. The amount of the holdback from closing shall be \$75,000.00.
4. Invoice(s) along with authorization to pay same may only be made to First American Title by Seller, Bruce Kirschenbaum, Managing Member of Sevier, LLC.
5. Seller shall provide Buyer a final accounting of all invoices once final engineering approval has been issued by the City of Ridgefield.
6. Any remaining account funds on May 12, 2006 shall be distributed to the Seller, Sevier, LLC. in the form of cashiers check or wire transfer.

Executed this 13th day of March, 2006.



Sevier, LLC.
Bruce Kirschenbaum
Managing Member



Protterra Development Ventures, LLC.
Corey Harris
Principal

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **RESPONDENT'S BRIEF** on the following named person(s) on the date indicated below by

- mailing with postage prepaid
- hand delivery
- facsimile transmission
- overnight delivery

to said person(s) a true copy thereof, contained in a sealed envelope, addressed to said person(s) at his or her last-known address(es) indicated below.

Gideon Caron
Caron, Colven, Robison
& Shafton
900 Washington Street, Suite 1000
Vancouver WA 98660

Grant C. Broer
Broer & Passannante, PS
8904 NE Hazel Dell Avenue
Vancouver WA 98665

Attorneys for Appellant

Attorneys for Defendants Sevier,
LLC, Kirschenbaums and Agees

I also hereby certify that I caused the original to be filed with the appellate court clerk, by mailing the same via Federal Express overnight delivery to the following:

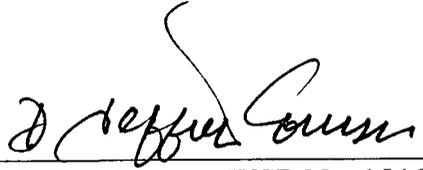
Washington State Court of Appeals
Division II
950 Broadway, Suite 300
Tacoma WA 98402
Attention: Court Clerk

STATE OF WASHINGTON
BY 
DEPUTY

2015 SEP 16 AM 10:06

FILED
COURT OF APPEALS
DIVISION II

DATED: September 15, 2015


D. Jeffrey Courser, WSB No. 15466
Of Attorneys for Respondent
First American Title Insurance Company