NO. D-1-GV-10-000454

STATE OF TEXAS	§	**IN THE DISTRICT COURT OF**
Plaintiff,	§	
v.	§	
RETIREMENT VALUE, LLC,	§	
RICHARD H. "DICK" GRAY, HILL COUNTRY FUNDING, LLC, HILL COUNTRY FUNDING, and	§	
WENDY ROGERS,	§	**TRAVIS COUNTY, TEXAS**
Defendants,	§	
and	§	
KIESLING, PORTER, KIESLING & FREE, P.C.,	§	
Relief Defendant.	§	**126TH JUDICIAL DISTRICT**

INTERVENORS' MOTION TO RECONSIDER THEIR MOTION TO RELEASE FUNDS

Intervenors Grant W. Bejcek and Opal E. Bejcek (the "Bejceks") file this Motion to Reconsider Their Motion to Release Funds from the Receiver's control, and in support thereof would show the Court the following:

I. INTRODUCTION.

Offer plus Acceptance equals Contract

The Bejceks' request for relief in this case is based on this bedrock principle of contract law. Simply put, the Bejceks were never "investors" in Retirement Value, LLC ("RV") because RV never accepted their contract. Because RV never accepted their contract, the Bejceks' money never became the property of RV. And because RV never legally held the Bejceks' money, the Receiver has no right to it and he should be ordered to give it back.

The Receiver would rather argue about whether tracing funds is appropriate, and accuse the Bejceks of seeking preferential treatment. However, the Receiver's arguments mischaracterize the Bejceks' position or assume the questions to be determined.

The Court should reconsider its prior ruling, grant this Motion, and order the Receiver to release the Bejceks' money immediately.

II. FACTUAL BACKGROUND.[1]

The Bejceks' attempted investment came just as the State obtained injunctive relief prohibiting RV from making any additional sales of re-sale life insurance interests. Whether as a result of the State's order, or simply as a result of its own inaction, RV never completed the Bejceks' purported transaction in accord with the terms of the Policy Participation Agreement. Thus, the Bejceks' money never became the property of RV.

In spite of these facts, the Receiver continues to treat the Bejceks as "investors," and continues to include their funds as part of the estate of RV. **The Bejceks' money is NOT properly included in the estate of Retirement Value, and it should be released by the Receiver and returned to them as soon as possible.**

III. ARGUMENTS.[2]

While the Receiver has broad discretion to carry out his duties and fashion a plan of distribution, the Receiver's authority is not limitless. *SEC v. Forex Asset Management, LLC*, 242 F.3d 325 (5th Cir. 2001). Rather, the Receiver has no greater interest than the debtor – in this case, RV – had in property. *See, e.g., Knox v. Maurer-Krebs Oil Co.*, 171 S.W.2d 544, 547 (Tex.Civ.App., Eastland, 1943). RV never had an interest in the Bejceks' money; therefore, neither does the Receiver.

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[1] The facts in support of the Bejceks' Motion to reconsider were more fully set forth in (A) their Motion to Release Funds (filed 12/02/2010); (B) their Supplemental Brief in Support of Motion to Release Funds (filed 1/05/2011); and (C) the hearing on their Motion to Release Funds (held on 1/19/2011), which are incorporated herein by reference.

[2] These arguments were fully briefed in the Bejceks' prior pleadings, which are incorporated herein by reference.

A. There was no Policy Participation Agreement between the Bejceks and Retirement Value.

On March 22, 2010, the Bejceks' (via The Gallagher Group) tendered money and a signed copy of the Policy Participation Agreement to RV. This package was received by RV on March 23, 2010. On March 25, 2010, RV replied with a letter which advised the Bejceks that their "***application to participate*** is being processed," and that "it may be an additional three to five weeks from your receipt of this letter before you receive your final confirmation package." (***emphasis added.***). On March 29, 2010, the Texas State Securities Board served the Emergency Order on RV.

Prior to the Emergency Order, the Bejceks did not receive a countersigned copy of the Policy Participation Agreement or anything else that could constitute notice that their investment had been accepted and approved by RV. In fact, the Bejceks have NEVER received a copy of the Policy Participation Agreement countersigned by RV, or anything else that could constitute notice of RV's acceptance and approval of their proposed investment.[3]

The express terms of the Policy Participation Agreement made the Bejceks' acceptance of RV's offer conditional on RV's timely approval. Paragraph 1.2 of the Policy Participation Agreement clearly states that it would not become effective (and, therefore, not become a binding contract) until it "has been approved by [Retirement Value] on a reasonable and timely basis." Policy Participation Agreement at ¶1.2 (entitled "Effective Date"). This never happened.

[3] Likewise, no countersigned Policy Participation Agreement was ever received by Feeken or the Gallagher Group, and no commission was paid to Feeken or the Gallagher Group in connection with the Bejceks' purported contract.

RV never accepted the Bejceks' Policy Participation Agreement. And as of March 29, 2010, the Texas State Securities Board's Emergency Order (and later the TRO and the Agreed Order) barred RV making any additional sales of re-sale life insurance interests. These orders barred RV from accepting the Bejceks' Policy Participation Agreement. As a result, acceptance in "strict compliance" with the express terms of the Policy Participation Agreement did not happen and, in fact, became impossible.

Because there was no acceptance by RV in strict compliance with the Policy Participation Agreement, no contract was formed, and the Bejceks' money never became the property of Retirement Value. As a result, the Bejceks' money should not be considered part of the estate under the control of the Receiver; and that money should be returned to the Bejceks as soon as possible.

B. The Bejceks' money was held in escrow by Kiesling Porter.

The Bejceks were told by Feeken (and RV in marketing materials) that their money would be held in escrow by Kiesling Porter pending RV's approval of their proposed investment; that Kiesling Porter would manage the funds and provide them to RV for the payment of policy premiums; and that RV would **never** handle their money **at any stage of the program.**

Based on these facts, the Bejceks contend that their funds were placed in escrow with Kiesling Porter, and that those funds were still held in escrow by Kiesling Porter when the State shut down RV. Because RV was prohibited by the State from accepting

the Bejceks' money, the funds deposited by the Bejceks remain in escrow to this day and are not part of RV's estate.[4]

To avoid this conclusion, the Receiver attempts to have the benefit of RV's alleged fraud. Specifically, the Receiver argues that a Master Escrow Agreement between RV and Kiesling Porter – of which neither the Bejceks nor Feeken were aware, and which the Receiver claims was a key component of RV's fraudulent scheme – somehow gave RV, and therefore gives the Receiver, the right to hold the Bejceks' money. Because the Master Escrow Agreement is not an escrow agreement at all, and because the Bejceks' were not a party to it, and because it was part of RV's fraudulent scheme, it cannot operate to transfer the rights in the Bejceks' money from Kiesling Porter to RV.

In the case now before the Court, Kiesling Porter, the escrow agent established by agreement of the Bejceks and Feeken, may not have violated its duties to the Bejceks by turning the Bejceks' escrowed funds over to the Receiver since it was done pursuant to an order of this Court. However, the Receiver, who received the funds from Kiesling Porter, is violating his duty by refusing to deliver those funds to the Bejceks.

C. Appeals to Equity are Inapplicable.

In opposing the Bejceks' request, the Receiver falls back on equity – claiming that equitable principles require him to consider the Bejceks "investors" and continue to hold their property as part of the RV estate.

However, the fundamental maxim of equity, *aequistas requiter legas* (equity follows the law), applies. Where a contract has not been formed under fundamental and established rules of law, a court of equity has no jurisdiction to enforce such a contract or

[4] The Receiver, Eduardo Espinosa, to whom these funds were transferred by the Agreed Order, now holds the funds as escrow agent and has all of the liabilities, responsibilities, duties and obligations of an escrow agent.

to modify it so as to make it a binding contract. Courts of equity are bound by rules of law equally with courts of equity. *Huggins v. Johnston,* 120 Tex. 21, 35 S.W.2d 688 (1931); *Hedges v. Dixon County,* 150 U.S. 182, 14 S.Ct. 71, 37 L.Ed. 1044 (1893).

Under the maxim "equity follows the law," equity will not create a remedy where there is no legal liability. *Roy v. Peters,* 422 S.W.2d 615 (Tex.Civ.App.- Waco 1967). It is fundamental contract law that to form a contract there must be an offer and an acceptance. *Searcy v. DDA, Inc.*, 201 S.W.3d 319, 322 (Tex.App.—Dallas 2006, no pet.).

The Intervenors made an offer. As the Receiver says in his brief, "For whatever reason, Retirement Value had not executed their document or spent their funds prior to the appointment of the Receiver." Receiver's Response, p. 11. Even though he admits that RV never accepted the Bejceks' contract, the Receiver concludes that such non-acceptance results in a contract by happenstance. The Intervenors' position is that an acceptance cannot result from happenstance and, as set forth above, equity cannot create a contract where there is none.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been forwarded via email and certified mail return receipt requested, on this the 4th day of August, 2011 to wit:

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IV. CONCLUSION.

For all of the above and foregoing reasons, Intervenors Grant W. Bejcek and Opal E. Bejcek request that the $150,000 they tendered to Kiesling Porter as escrow agent, be released from the control of the Receiver and returned to them as soon as possible.

Respectfully submitted,

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