

**IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA**

Oklahoma Department of Securities)
ex rel Irving L. Faught, Administrator)
)
Plaintiff,)
)
vs.)
)
Seabrooke Investments, LLC, an)
Oklahoma limited liability company:)
Seabrooke Realty, LLC, an)
Oklahoma limited liability company:)
Oakbrooke Homes, LLC, an)
Oklahoma limited liability company:)
Bricktown Capital, LLC, an)
Oklahoma limited liability company:)
KAT Properties, LLC, an)
Oklahoma limited liability company:)
Cherry Hill, LLC, an Oklahoma limited)
liability company doing business as)
Cherry Hill Apartments:)
Tom W. Seabrooke, individually and as)
trustee of Tom Seabrooke 2007 Revocable)
Trust and J. Karyn Seabrooke 2007 Revocable)
Trust:)
Judith Karyn Seabrooke, individually and as)
trustee of Tom Seabrooke 2007 Revocable)
Trust and J. Karyn Seabrooke 2007 Revocable)
Trust)
)
Defendants)

Case No. CJ-2014-4515

**FILED IN DISTRICT COURT
OKLAHOMA COUNTY**
JAN 15 2015
**TIM RHODES
COURT CLERK**
75

**DEFENDANT’S MOTION FOR ORDER INSTRUCTING ESCROW AGENT TO
DISBURSE ESCROW FUNDS, INSTRUCTING RECEIVER TO PAY HOTEL
VENDORS AND OBJECTION TO QUAIL CREEK BANKS’S MOTION FOR ORDER
INSTRUCTING AGENT TO DISBURSE ESCROW FUNDS TO QUAIL CREEK BANK
AND
BRIEF IN SUPPORT**

COMES NOW, Defendants Bricktown Capital LLC (“Defendant”) and for its Motion for Order Instructing Escrow Agent to Disburse Escrow Funds, Instructing Receiver to pay Hotel

Vendors and Objection to Quail Creek Bank's Motion for Order Instructing Escrow Agent to Disburse Escrow Funds to Quail Creek Bank, and pursuant to Okla Stat. Tit. 71 § 1-603-(B)(3), respectfully submits the following.

BACKGROUND

1. On August 11, 2014 this Court granted Plaintiff's Application for Temporary Restraining Order, Order Freezing Assets, Order Appointing Receiver, Order Accounting and Temporary Injunction against Defendant Bricktown Capital and other defendants herein.

2. On September 9, 2014, (the "September Order") this Court found that the Bricktown Hotel and Convention Center (Bricktown Hotel), an asset owned by Defendant Bricktown Capital LLC should be released from the receivership.

3. The Court further ordered in the September Order that "if the Bricktown Hotel is sold for an amount greater than the amounts owed on valid mortgages existing as of the date of this order, the remaining funds will be used to pay, on a pro rata basis, investor restitution owed by Defendants as determined by this Court." (See: transcript of 9-9-14 page 3, lines 17-20)

4. Defendant subsequently entered into a contract for the sale of the Bricktown Hotel to Prominent Hotels, LLC for the purchase price of \$2,550,000.00. Under that Contract, Defendant agreed that as of the closing, all debts, liabilities and obligations arising from the ownership and operation of the Property shall have been paid. A copy of the relevant provision is attached hereto as Exhibit "A".

5. Prior to closing, \$17,797.94 (the "escrow funds") was placed by the receiver into an escrow account maintained by Stewart Abstract & Title of Oklahoma.

6. The escrow funds are now claimed by Quail Creek Bank as funds secured by the

Bank's mortgage on the Bricktown Hotel.

7. The Seller's Closing Statement prepared by Stewart Abstract & Title of Oklahoma, dated December 10, 2014 at 12:33 p.m. lists in addition to that first mortgage loan to Quail Creek Bank in the amount of \$1,911,290.69 and the second mortgage loan to SBA in the amount of \$327,487.72, additional charges totaling \$191,143.84. A copy of Seller's Statement is attached hereto as Exhibit "B".

8. The "additional charges" listed on Seller's Statement, totaling \$191,143.84 include vendors of Seller owed money at the time of closing for goods and services needed in the operation of the hotel. This list does not include the \$17,797.94 previously placed in escrow.

9. The receiver refused to close the transaction unless the funds allocated to the vendors was escrowed.

10. The sale between Bricktown Capital LLC and Prominent Hotels, LLC ("Buyer") closed December 19, 2014.

11. On January 7, 2015 the Quail Creek Bank filed a Motion for Order Instructing Escrow Agent to Disburse Escrow Funds to Quail Creek Bank ("Quail Creek Motion").

ARGUMENT AND AUTHORITIES

PROPOSITION I

THE ADDITIONAL MONEY REMAINING AFTER SATISFACTION OF THE FIRST AND SECOND MORTGAGES IS NOT A SURPLUS OF FUNDS, BUT MONEY OWED TO VENDORS OF BRICKTOWN HOTEL AND IT IS IMPROPER FOR RECEIVER TO USE THESE FUNDS TO PAY OTHER INVESTORS

As this Court is well aware, a closing statement makes known to buyer and seller all debts

that must be satisfied at the time of closing. Vendors were listed by Defendant in order to comply with its contractual agreement with buyer to pay as of the closing, all debts, liabilities and obligations arising from the ownership and operation of the Property. A closing will not conclude unless such debts have been paid. Seller's Closing Statement lists a total of \$191,143.84 in "additional charges" owed to vendors of Hotel at the time of Hotel Closing. These costs are itemized on Exhibit B hereto. As stated above, this Court has previously ordered that "if the Bricktown Hotel is sold for an amount greater than the amounts owed on valid mortgages existing as of the date of this order, the remaining funds will be used to pay, on a pro rata basis, investor restitution owed by Defendants as determined by this Court." (See: transcript of 9-9-14 page 3, lines 17-20) However, in this case there are no such remaining funds.

Those "remaining funds" are money owed to various vendors, creditors and suppliers of the hotel. Stated another way, the remaining funds are costs associated with the hotel doing business and should have been satisfied at the time of closing. Any surplus of funds available to the receiver would only then occur after these costs were paid. The closing costs in this case have not been paid, but rather in direct contravention of the terms of sale, the receiver is withholding money that is legally and validly owed vendors of this hotel and which should have been paid at the time of closing. Many of these vendors still owed payments are vendors the hotel needed to operate the hotel and the buyer will need to continue operations. The receiver cannot and should not escrow these funds to pay other investors who are party to the receivership. Instead he should be directed to release those escrowed funds and pay the vendors those costs as itemized on Exhibit B attached hereto.

PROPOSITION II

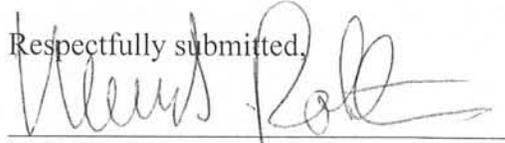
THE \$17,797.94 IN ESCROW ARE UNSECURED FUNDS AND NOT SUBJECT TO THE MORTGAGE OF QUAIL CREEK BANK

Defendant and Quail Creek Bank entered into a Mortgage dated October 16, 2007 in the principal amount of \$3,238,031.53. At the time of the sale of the Bricktown Hotel, according to the Seller's closing statement, a balance of \$1,911,290.69 remained on this property. This amount was satisfied at closing with a payment to Quail Creek Bank on December 15, 2014. Quail Creek Bank states in its Motion that the additional indebtedness owed to the Bank was secured by Bank's mortgage. Defendant contends that the mortgage was satisfied in full upon payment to Bank of the principal indebtedness at closing. Had the additional \$17,797.94 become a part of the original indebtedness and thus a secured interest, then it would have been added to the first mortgage loan principal and paid at the time of closing.

Black's Law Dictionary defines a tacit agreement as "existing, inferred or understood without being openly express or stated, implied by silence or silent acquiescence." Black's Law Dictionary 1623 (4th ed. 1968). By not objecting to placement of this money into escrow or demanding payment of these additional funds at the time of closing, the Bank tacitly agreed that this money was not part of the principal indebtedness. Rather it is unsecured and not subject to priority or payment at this time. As no additional collateral has been pledged to secure this interest, the bank cannot unilaterally deem it so. Quail Creek Bank should therefore be required to make application to this Court for the disbursement of funds like any other unsecured creditor, and Quail Creek Bank's Motion should be denied.

CONCLUSION

WHEREFORE, premises considered Bricktown Capital LLC respectfully requests this Court deny the Quail Creek Motion for Order Instructing Escrow Agent to Disburse Escrow Funds to Quail Creek Bank; issue its Order that Stewart Abstract & Title of Oklahoma immediately releasing from Escrow all of the \$17,797.94 currently in the possession of Stewart Abstract & Title and that the entire remaining balance after the satisfaction of the mortgages be disbursed to those vendors listed in the Seller's Closing Statement in the amounts listed thereto; and that the Court award it any and all other relief that is deemed just and proper.

Respectfully submitted,


Mark A. Robertson, OBA #7663
Michael Paul Kirschner, OBA #5056
Robertson & Williams
9658 N. May Ave., Suite 200
Oklahoma City, OK 73120

Jim W. Lee, OBA #5336
One Broadway Executive Park, Suite 230
201 NW. 63rd Street
Oklahoma City, OK 73117
ATTORNEYS FOR DEFENDANT

CERTIFICATE OF MAILING

This is to certify that on this ____ of January, 2015 a true and correct copy of the above and foregoing was mailed to:

Patricia A. Labarthe
Jennifer Shaw
Oklahoma Department of Securities
120 North Robinson, Suite 860
Oklahoma City, OK 73102
Attorneys for Plaintiff

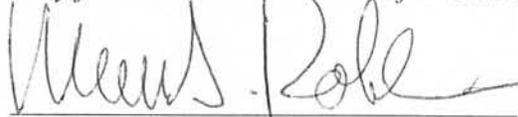
Robert D. Edinger
Robert Edinger PLLC
116 East Sheridan, Suite 207
Oklahoma City, OK 73104
Attorney for Receiver

Rollin Nash, Jr.
Nash, Cohenour, Kelley, Giessman &
Knight, P.C.
4101 Perimeter Center Dr., Suite 200
Oklahoma City, OK 73112
Attorney for Quail Creek Bank

John M. Thompson
Crowe & Dunlevy
Braniff Building
324 N. Robinson Avenue, Suite 100
Oklahoma City, OK 73102
Attorney for Bank of the West

R. Stephen Haynes
R. Stephen Haynes, P.C.
First Commercial Bank Building
3805 W. Memorial Road
Oklahoma City, OK 73134
Attorney for First Commercial Bank

David L. Nunn
212 East Second Street
P. O. Box 230
Edmond, OK 730873-0230
Attorney for First National Bank of Weatherford



Mark A. Robertson

CONTRACT OF SALE

THIS CONTRACT OF SALE (the "Contract") is made between BRICKTOWN CAPITAL LLC (the "Seller") and NICKY JARIWALA and/or ASSIGNS, (collectively, the "Purchaser"). In consideration of the agreements herein contained and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Seller and Purchaser agree as follows:

ARTICLE I Sale and Purchase

Subject to the terms and provisions of this Contract, Seller hereby agrees to sell and convey to Purchaser, and Purchaser hereby agrees to buy and pay for all of the following described property (sometimes referred to herein in the aggregate as the "Property"):

- (a) that certain tract of land located in Oklahoma County, Oklahoma, as depicted on Exhibit "A" attached hereto and incorporated herein by reference for all purposes, together with all of Seller's right, title and interest in and to the rights and appurtenances pertaining to such tract of land, including, any right, title and interest of Seller in and to adjacent strips and gores between such tract of land and any abutting properties, adjacent roads, streets, alleys, easements or rights-of-way (collectively, the "Real Property");
- (b) the buildings, structures, fixtures and other improvements on the Real Property, including without limitation, a One Hundred (100) room Bricktown Hotel and Convention Center located at 2001 E Reno Ave, Oklahoma City, OK 73117 (collectively, the "Improvements");
- (c) All of Seller's proprietary, privileged or confidential information relating to the Property, including but not limited to, Seller's internal financial analyses, materials relating to Seller's cost to acquire the Property and any documents or communications subject to the attorney/client or work product privilege (collectively the "Excluded Items"). Excluded Items also includes eight (8) vending machines currently in use and located in various areas around the hotel unless Purchaser wishes to purchase the vending machines from the Seller (See Article 7.6(d)).
- (d) All of Seller's right, title and interest in and to all equipment, fixtures, machinery, building materials and other personal property used in connection with the operation, management and maintenance of the Real Property and the Improvements, including without limitation, all keys, licenses, permits, books, records, plans and specifications, architectural and engineering drawings, trade names, trademarks, contract rights, licenses, permits, consents and other intangible property pertaining to the Real Property and Improvements located on

CONTRACT OF SALE-BRICKTOWN HOTEL AND CONVENTION CENTER_OKC Purchaser  Seller  Page 1 of 22

EXHIBIT A

disrepair. Seller has informed Purchaser that these 14 rooms will require asbestos remediation. Seller shall provide a complete list of the damaged rooms within 5 days of the date hereof.

Warranties and Representations

6.1 Seller's Warranties and Representations. Seller represents and warrants to Purchaser as of the date hereof and as of the Closing Date that:

- (a) Seller has good and indefeasible fee-simple title to the Real Property and Improvements, and at the Closing, Seller shall have and shall convey to the Purchaser good and indefeasible fee-simple title to the Real Property and Improvements, free and clear of all liens, defects, encumbrances, conditions, exceptions, restrictions or other matters affecting title, except the Permitted Exceptions. Seller has the right, title and authority to execute and perform this Contract and to consummate the transaction contemplated herein.
- (b) Seller has not received any written notice of any pending condemnation or similar proceeding affecting the Real Property and Seller has not received any written notice and has no actual knowledge that any such proceeding is contemplated.
- (c) Seller has not received written notice of any action, suit, proceeding or claim affecting the Property, or affecting Seller and relating to or arising out of the ownership, operation, use or occupancy of the Property.
- (d) Except for debts, liabilities and obligations for which provision is made herein for proration or other adjustment at the Closing, as of the Closing, all debts, liabilities and obligations arising from the ownership and operation of the Property shall have been paid.
- (e) There are no attachments, executions, assignments for the benefit of creditors, receiverships, conservatorships or voluntary or involuntary proceedings in bankruptcy or pursuant to any other debtor relief laws pending against Seller or to Seller's actual knowledge threatened against Seller or the Property.

For purposes of this Section 6.1, references to the "actual knowledge" or "knowledge" of Seller shall refer only to the actual knowledge of the Designated Employee (as hereinafter defined) of Seller, and shall not be construed, by imputation or otherwise, to refer to the knowledge of Seller, to any property manager, or to any other officer, agent, manager, representative or employee of Seller or to impose upon such Designated Employee any duty to investigate the matter to which such actual knowledge, or the absence thereof, pertains. As used herein, the term "Designated Employee" shall refer to Tom Seabrooke. Seller represents and warrants to Purchaser that Tom Seabrooke is the person with the most knowledge of the operations conducted at the Property, and to whom notices concerning the matters described in this Section 6.1 would typically be sent.

Buyer's Closing Statement

Stewart Abstract & Title of Oklahoma, Stewart Abstract & Title of Oklahoma
 701 North Broadway, Suite 300, Oklahoma City, OK 73102, (405) 232-6764

Buyer(s) Prominent Hotels, LLC
Seller(s) Bricktown Capital LLC
Lender(s) Cash
Property 2001 E Reno Oklahoma City, Oklahoma 73117

133626030

Section Number 36Township 12N, Range 03W Oklahoma

PT SW4 SEC 36 12N 3W BEG SW/C SW4 TH N225FT E50FT N250FT E605.12FT S425FT W380.12FT S50FT
 W275FT TO BEG EX BEG 50FT E & 33FT N OF SW/C SW4 TH E225FT N17FT W205.02FT NW28.30FT S37FT TO
 BEG & EX BEG 445.82FT N & 50FT E OF SW/C SW4 TH N30FT E30FT SW42.77FT TO BEG SUBJ TO ESMTS ON
 W & S

Closing Date 12/12/2014 **Disbursement Date** 12/12/2014 **Proration Date** 12/12/2014

	Debit	Credit
Sales/Price		
Contract sales price	\$2,550,000.00	
Deposits		
Deposit or earnest money		\$50,000.00
Prorations		
County taxes 12/12/2014 to 1/1/2015	\$2,108.45	
Title Charges		
Settlement or closing fee to Stewart Abstract & Title of Oklahoma	\$150.00	
Title Service Fee to Stewart Abstract & Title of Oklahoma	\$150.00	
Additional Charges		
Survey to Manley Survey Co	\$3,900.00	
Subtotal:	\$2,556,308.45	\$50,000.00
Balance due from Buyer:		\$2,506,308.45
Totals:	\$2,556,308.45	\$2,556,308.45

Prominent Hotels, LLC

EXHIBIT B

Seller's Closing Statement

Stewart Abstract & Title of Oklahoma, Stewart Abstract & Title of Oklahoma
701 North Broadway, Suite 300, Oklahoma City, OK 73102, (405) 232-6764

Seller(s) Bricktown Capital LLC
Buyer(s) Prominent Hotels, LLC
Lender(s) Cash
Property 2001 E Reno Oklahoma City, Oklahoma 73117

133626030

Section Number 36Township 12N, Range 03W Oklahoma

PT SW4 SEC 36 12N 3W BEG SW/C SW4 TH N225FT E50FT N250FT E605.12FT S425FT W380.12FT S50FT
W275FT TO BEG EX BEG 50FT E & 33FT N OF SW/C SW4 TH E225FT N17FT W205.02FT NW28.30FT S37FT TO
BEG & EX BEG 445.82FT N & 50FT E OF SW/C SW4 TH N30FT E30FT SW42.77FT TO BEG SUBJ TO ESMTS ON
W & S

Closing Date 12/12/2014 Disbursement Date 12/12/2014 Proration Date 12/12/2014

	Debit	Credit
Sales/Price		
Contract sales price		\$2,550,000.00
Prorations		
County taxes 12/12/2014 to 1/1/2015		\$2,108.45
Other Adjustments		
Release of Mortgage (Doyle Mortgage) to County Clerk	\$17.00	
2014 Real Estate Taxes to County Treasurer	\$38,479.29	
Payoffs		
Payoff of first mortgage loan to 12-15-14 to Quail Creek Bank	\$1,911,290.69	
Payoff of second mortgage loan to 12/15/14 to SBA; Loan: 6525055006	\$327,487.72	
Commissions		
\$76,500.00 to Vawter real Estate	\$76,500.00	
Title Charges		
Settlement or closing fee to Stewart Abstract & Title of Oklahoma	\$150.00	
Abstract or title search to Stewart Abstract & Title of Oklahoma	\$500.00	
Title examination to Stewart Abstract & Title of Oklahoma	\$300.00	
Title Insurance to Stewart Abstract & Title of Oklahoma		
Owner's coverage \$2,550,000.00 \$4,427.50	\$4,427.50	
Final Title Report to Stewart Abstract & Title of Oklahoma	\$100.00	
Title Service Fee to Stewart Abstract & Title of Oklahoma	\$150.00	
Recording Fees/Transfer Charges		
State tax/stamps: Deed \$3,825.00	\$3,825.00	
Additional Charges		
Invoice # 47423 to Robertson & Williams	\$39,938.55	
Invoice 355 to Oklahoma Web Media	\$398.00	
Legal Fees to Jim Lee, Attorney at Law	\$21,178.05	
Fees to Discover Card	\$2,789.40	
Fees to Expedia	\$3,399.00	
Fees to Ecolab	\$3,504.65	
Fees to Champion Supply	\$3,628.11	
Fees to Progressive	\$2,143.00	
Fees to MS1	\$1,550.00	
Pest Control to Mother Nature Pest Control	\$160.00	
Fees to Locke Supply	\$100.34	
Fees to InnPoints Worldwide	\$585.84	
Fees to Freedom Electric	\$3,680.00	
Bankcard to Bank of the West	\$43,781.19	
Fees to Bank of America	\$3,823.74	
Statement to American Express	\$28,954.03	
Fees to City of Oklahoma City	\$5,592.01	
Invoice to ONG	\$5,889.09	
Services to O G & E	\$16,447.90	
Services to Cox Communications	\$3,600.94	

Seller's Closing Statement

Subtotal:	\$2,554,371.04	\$2,552,108.45
Balance due from Seller:		\$2,262.59
Totals:	\$2,554,371.04	\$2,554,371.04

Bricktown Capital LLC

EXHIBIT B