IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

EOD
08/22/2005

IN RE:	§	
	§	
ART WILLIAMSBURG, INC.,	§	Case No. 03-43909-BTR
	§	(Chapter 11)
Debtor.	§	
	§	
AMERICAN REALTY TRUST, INC., ART WILLIAMSBURG, INC., BASIC CAPITAL MANAGEMENT, INC., EQK HOLDINGS, INC., TRANSCONTINENTAL REALY INVESTORS, INC., and AMERICAN REALTY INVESTORS, INC.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	Adv. No. 03-4256
	§	
SUNSET MANAGEMENT, L.L.C., and COMMONWEALTH TITLE OF DALLAS, INC.,	§	
	§	
Defendants,	§	
	§	
- and -	§	
	§	
AMERICAN REALTY ADVISOR, INC., TRIAD REALTY SERVICES, LTD., REGIS REALTY, INC. and SYNTEK WEST, INC.,	§	
	§	
Intervenors.	§	

MEMORANDUM OF DECISION GRANTING IN PART AND DENYING IN PART COMMONWEALTH'S MOTION FOR SUMMARY JUDGMENT[1]

[1] This Memorandum of Decision is not designated for publication and shall not be considered as precedent, except under the respective doctrines of claim preclusion, issue preclusion, the law of the case, or as to other evidentiary doctrines applicable to the specific parties in this proceeding.

This adversary proceeding involves a $30 million loan made by Sunset Management, L.L.C. ("Sunset") and secured by, among other things, a pledge of stock in Transcontinental Realty, Inc. ("TCI"). Commonwealth Title of Dallas, Inc. d/b/a Commonwealth Land Title Insurance Company ("Commonwealth") was the pledge holder under the original loan documents and seeks summary judgment on its cross-claim for interpleader. Sunset opposes summary judgment.

I. STANDARDS FOR SUMMARY JUDGMENT

Motions for summary judgment are authorized by Rule 56 of the Federal Rules of Civil Procedure ("Federal Rule 56"), as adopted and applied to this proceeding by Rule 7056 of the Federal Rules of Bankruptcy Procedure. The entry of a summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (quoting FED. R. CIV. P. 56(c)). If a summary judgment motion is properly supported, a party opposing the motion may not merely rest upon the contents of its pleadings, but must demonstrate the existence of specific facts constituting a genuine issue of material fact for which a trial is necessary. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986) (citing FED. R. CIV. P. 56(e)). To determine whether summary judgment is appropriate, the record is

reviewed in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 587 (1986).

Local District Court Rule CV-56 (made applicable to this proceeding by Rule 7056 of the Local Rules of Bankruptcy Procedure) provides that the party moving for summary judgment must include in its motion a "Statement of Material Facts" in a specified format. A party opposing a motion for summary judgment must file a "Statement of Genuine Issues" in response to the movant's statement of material facts, with specific references to proper summary judgment evidence indicating that a genuine issue of material fact exists. In resolving a summary judgment motion, any material facts claimed by the moving party and supported by admissible evidence are admitted by the non-movant, unless the non-movant timely controverts such material facts with proper summary judgment evidence of its own. The Court will not engage in a comprehensive search for the existence of an undesignated genuine issue of material fact.

In this case, Commonwealth's *Motion for Summary Judgment and Brief in Support* (the "Commonwealth Motion"), the opposition by Sunset, and the admissible evidence submitted by the parties establish the following body of relevant uncontested facts:

II. UNCONTESTED FACTS

A. The Loan Agreement and Related Loan Documents

This adversary proceeding arises out of a $30 million loan from Sunset to ART Williamsburg, Inc. a/k/a "The Williamsburg Hospitality House" ("AWI" or

the "Debtor"), EQK Holdings, Inc. ("EQK"), Basic Capital Management, Inc. ("BCM"), and American Realty Trust, Inc. ("ART") (collectively, the "Borrowers"). Sunset and the Borrowers executed a Secured Promissory Note (the "Note") and a Loan Agreement each dated September 17, 2001. The loan was comprised of (1) an auxiliary loan in the amount of $10,500,000 bearing interest at the rate of 20% per annum; and (2) a base loan consisting of all principal, interest and other sums due under the Note (other than the auxiliary loan) bearing interest at the rate of 24% interest per annum.

As security for the Borrowers' obligations under the Note, the Debtor executed a Subordinate Deed of Trust and Security Agreement dated September 17, 2001, whereby the Debtor encumbered certain real property located in Virginia for the benefit of Sunset. The maximum indebtedness secured by the Deed of Trust and Security Agreement was $10,000,000. Additionally, American Realty Investors, Inc. ("ARI"), Regis Realty, Inc. ("Regis"), Syntek West, Inc. ("Syntek") and Triad Realty Services, Ltd. ("Triad") each signed the Note as obligors and executed a Guaranty dated September 17, 2001.

As further security for the Borrowers' obligations under the Note, EQK, ART and BCM each executed a Stock Pledge and Security Agreement dated September 17, 2001 (collectively, the "Pledge Agreements"), pledging a portion of their respective interests in the stock of TCI to Sunset. Sunset originally chose an attorney with a solo practice in Las Vegas, Nevada, to serve as the pledge holder, but the attorney declined the position. Although representatives of Sunset stated

in depositions that they had reservations about Commonwealth, each of the executed Pledge Agreements designated Commonwealth as the pledge holder. Pursuant to Section 2 of each of the Pledge Agreements, Commonwealth held the pledged securities "as agent solely of [Sunset] and solely for the benefit of [Sunset]. . . ."

B. Sunset's Requests to Transfer the TCI Stock to Craig Burr

After executing the loan documents, Sunset searched for an attorney to replace Commonwealth as the pledge holder under the Pledge Agreements. Craig Burr, Esq. was the first attorney to agree. Mr. Burr is a solo practitioner in Las Vegas, Nevada, who has worked with Sunset from time to time.

On May 23, 2002, Sunset directed Commonwealth to transfer the TCI stock to Mr. Burr by May 31, 2002 pursuant to section 12(h) of the Pledge Agreements. This provision allows Sunset, in its "sole discretion, with or without cause," to appoint a substitute pledge holder.

Prior to transferring the stock certificates and stock powers, Commonwealth contacted the Borrowers and inquired as to the existence of any dispute between Sunset and the Borrowers. Commonwealth asserts that its inquiry was reasonable and proper under section 9 of the Pledge Agreements. This provision states in pertinent part as follows:

> Limitations on Duties and Responsibilities. Pledge Holder's sole duty with respect to the custody, safekeeping and physical preservation of the Pledge Securities in his possession, under the UCC or otherwise, shall be to deal with the Pledged Securities in the same manner as Pledge Holder deals with similar securities and

> property for his own account and as would be dealt by a prudent person in the reasonable administration of his affairs, and no additional duties shall be inferred or implied hereby…. *In the event of any dispute among the parties hereto with respect to the Pledge Holder or his duties, (i) Pledge Holder may act or refrain from acting in respect of any matter referred to herein in full reliance upon and by and with the advice of legal counsel selected by him and shall be fully protected in so acting or in refraining from acting on the advice of such counsel, or (ii) Pledge Holder may refrain from acting until required to do so by an order of a court of competent jurisdiction.*

(Emphasis added.)

The Borrowers objected to the substitution of Mr. Burr as the pledge holder under the Pledge Agreements, and discussions ensued between Commonwealth, Sunset, and the Borrowers. The parties agree that the result of those discussions was that Sunset instructed Commonwealth not to transfer the stock to Mr. Burr at that time. In a letter to the Borrowers and Commonwealth dated May 30, 2002, Sunset stated that it had agreed to extend the May 31st deadline to transfer the pledged securities and stock powers to Mr. Burr on a day-to-day basis "subject to the condition and understanding that Commonwealth will comply with the directions in the May 23, 2002 letter … immediately upon notice and request by Sunset Management, LLC at any time in the future."

On July 9, 2002, Sunset sent a letter to ART, BCM, EQK and Commonwealth, stating that Sunset had decided to appoint Mr. Burr as substitute pledge holder to act in the place of Commonwealth. Sunset requested that Commonwealth immediately send the stock certificates and stock powers executed by ART, BCM and EQK to Mr. Burr via Federal Express. In the letter, Sunset

referred to its prior agreement to postpone the effective date of the substitution of Mr. Burr as pledge holder on a day-to-day basis.

The Borrowers and pledgors continued to oppose the substitution of Mr. Burr as pledge holder. Commonwealth contends through deposition testimony that it spoke with Sunset shortly after the July 9th correspondence and that it was instructed by Sunset not to transfer the TCI stock to Mr. Burr. Sunset denies that it rescinded its request to immediately transfer the TCI stock as stated in the July 9th correspondence.

C. Sunset's September 11th Notice of Default

On September 11, 2002, Sunset sent a notice of default to the Borrowers and Commonwealth asserting several violations of the Loan Agreement and related documents by the Borrowers and Commonwealth. Sunset asserted, among other things, that the Borrowers and/or Commonwealth had failed to transfer the stock certificates representing the pledged securities and the related stock powers to Mr. Burr as directed in Sunset's prior correspondence. Sunset's September 11th correspondence requested, among other things, the immediate delivery to Mr. Burr of all stock certificates and stock powers associated with the pledged TCI shares.

Commonwealth contends through deposition testimony that it was subsequently instructed by Sunset to "stand down." Sunset disputes this contention. Sunset offers deposition testimony that the only time it instructed Commonwealth not to transfer the TCI stock to Mr. Burr was memorialized in its letter dated May 30, 2002.

D. The Borrowers' Lawsuit Against Sunset and Commonwealth

On October 2, 2002, the Borrowers filed suit against Sunset and Commonwealth in the 162nd Judicial District of Dallas County, Texas. In their complaint, the Borrowers requested, among other things, a declaratory judgment that an oral modification of the loan agreement made by Sunset relieved Commonwealth of any obligation to transfer the TCI stock certificates and stock powers to any nominee of Sunset.

Counsel for Commonwealth, John Updegraff, Esq., took possession of the TCI stock certificates and stock powers on Friday, January 17, 2003. On the same day, Sunset sent a letter to Mr. Updegraff instructing him to transfer the stock and stock powers to Mr. Burr. However, on or about January 21, 2003, the Borrowers obtained a temporary order in the Texas lawsuit restraining the transfer of the TCI stock certificates and stock powers.

In the Texas lawsuit, Sunset filed cross claims against Commonwealth for breach of contract, breach of fiduciary duty, and declaratory judgment. Additionally, Commonwealth filed a cross claim and counterclaim for interpleader prior to the expiration of the temporary restraining order. Sunset opposed Commonwealth's request for interpleader, arguing that Commonwealth is not entitled to interpleader because it is not a disinterested stakeholder.

E. AWI's Bankruptcy Petition

AWI filed a petition for relief under Chapter 11 of Title 11 of the United States Code on August 28, 2003. With regard to the pending Texas state court

action, the Debtor filed a Notice of Removal on September 10, 2003, in the United States Bankruptcy Court for the Northern District of Texas. On the same date, the Debtor requested that the removed state court action be transferred to this Court, where its bankruptcy case was pending. An agreed order transferring the action to this Court was entered on September 26, 2003.

In this adversary case, the parties have filed competing motions for summary judgment. In addition, the parties have demanded a jury trial, objected to the jury trial being held before this Court, and moved to withdraw the reference of their case to this Court. On April 16, 2004, the U.S. District Court entered an order denying the withdrawal of the reference without prejudice, stating that "judicial economy will be better served by the maintenance of the adversary proceeding in [this] court through the completion of discovery and disposition of any pre-trial motions."

III. DISCUSSION

A. Commonwealth's Request for Summary Judgment

In its request for summary judgment, Commonwealth asserts that it is a disinterested stakeholder and that it is entitled to interpleader based on Rule 22 of the Federal Rules of Civil Procedure ("Federal Rule 22"), Rule 43 of the Texas Rules of Civil Procedure ("Texas Rule 43") and the terms of the Pledge Agreements. Commonwealth argues that it had a contractual right to refrain from following Sunset's instructions for the appointment of a new pledge holder. Commonwealth also denies that it breached any duty to Sunset.

Commonwealth requests that the Court enter judgment that Sunset take nothing by reason of its breach of contract, breach of fiduciary duty and declaratory judgment claims against Commonwealth. Commonwealth also requests that the Court grant its claim for interpleader, dismiss it from this case, and award Commonwealth its attorneys' fees and costs. In support of its motion, Commonwealth submitted excerpts from the deposition of Mr. Sandy Marr, an authorized agent for Sunset, and various other exhibits.[2]

Sunset opposes the Commonwealth Motion, arguing that Commonwealth has no contractual right to interplead, that it breached its obligations under the Pledge Agreements, and that it bears some responsibility for the dispute between Sunset and the Borrowers. In support of its opposition, Sunset submitted several exhibits.[3] In support of its reply to Sunset's opposition, Commonwealth submitted excerpts from the deposition of James Lazar.

---

[2] These exhibits are: (1) excerpts from the deposition of Mr. Marr taken on May 15, 2003; (2) the Loan Agreement dated September 17, 2001; (3) ART's Stock Pledge and Security Agreement dated September 17, 2001; (4) BCM's Stock Pledge and Security Agreement dated September 17, 2001; (5) EQK's Stock Pledge and Security Agreement dated September 17, 2001; (6) a letter from Mr. Marr to ART, AWI, BCM, and EQK dated December 18, 2001; (7) a letter from Mr. Marr to ART, BCM, EQK, and Commonwealth dated May 23, 2002; (8) a letter from Mr. Marr to ART, BCM, EQK and Commonwealth dated July 9, 2002; (9) a letter from Mr. Marr to ART, ARW, BCM, EQK and Commonwealth dated September 11, 2002; (11) *Order of Issues of Show Cause and Temporary Restraining Order* entered by the 162nd Judicial District for Dallas County, Texas, in Cause No. 02-09433-I; (12) *Defendant's Answer and Counterclaim and Cross-Claim for Interpleader* filed in Cause No. 02-09433-I in the 162nd Judicial District for Dallas County, Texas; (13) *Sunset Management LLC's Objections and Responses to Commonwealth's First Request for Admissions and First Interrogatories* filed in Cause No. 02-09433-I in the 162nd Judicial District for Dallas County, Texas; (14) excerpts from the deposition of Ronald E. Kinbrough taken on January 22, 2004; (15) the Affidavit of John K. Baldwin; (16) a transcript of the deposition of James Lazar taken on March 24, 2004; (17) excerpts from the deposition of John Baldwin taken on January 23, 2004; (18) excerpts from the deposition of John Updegraff taken on March 24, 2004; (19) a letter from Mr. Marr to ART, BCM, EQK, and Commonwealth dated May 30, 2002; and (20) and a letter from Benjamin D. Johnson, Esq., to John Updegraff dated January 17, 2003.

[3] These exhibits are: (1) excerpts from the deposition of Robert Kimbrough; (2) an affidavit by John Baldwin; (3) the deposition of James Lazar; (4) excerpts from the deposition of James Baldwin; (5) a

B. The Right to Interpleader in Federal Courts (Generally)

Interpleader is not, as portions of Sunset's arguments suggest, merely a contractual remedy. Interpleader is a procedural device which enables a person holding property belonging to another to join in a single action two or more persons who are asserting claims against that property in order to avoid multiple lawsuits. *See* 7 Charles A. Wright, Arthur R. Miller & Mary K. Kane, FEDERAL PRACTICE & PROCEDURE: CIVIL 3d §1702. There are two types of interpleader in federal courts: statutory interpleader under 28 U.S.C. §1335 and equitable interpleader governed by Federal Rule 22.

The person or entity seeking interpleader is referred to as the "stakeholder." Historically, interpleader was available only to stakeholders who had no interest in the outcome of the controversy and who had no independent liability to any of the other parties in the interpleader action. Prior to the promulgation of the present rules of civil procedure governing the joinder of parties and claims, if a plaintiff with an independent liability to a defendant was permitted to maintain an interpleader action, there would be no opportunity for the defendant to recover an affirmative judgment against the plaintiff. *See Builders & Developers Corp. v. Manassas Iron & Steel Co.*, 208 F.Supp. 485, 490 (D.C. Md. 1962). The defendant's rights would be limited to the interpleaded fund, and valuable claims against the plaintiff might be lost. *Id.*

January 17, 2003 letter from counsel for Sunset to counsel for Commonwealth; (5) a May 30, 2002 letter from Sunset to Commonwealth and the Borrowers and pledgors; and (3) excerpts from the deposition of John Updegraff, Esq.

The requirement that the stakeholder must be disinterested in order to be entitled to interpleader was eliminated by the enactment of 28 U.S.C. §1335 in 1948. The federal interpleader statute allows interpleader by stakeholders who claim an interest in the fund or property in dispute (*i.e.*, actions in the nature of interpleader) as well as by disinterested stakeholders (*i.e.*, true or strict interpleader actions). Federal Rule 22(1) also allows interested parties to bring and maintain an interpleader action. *See Fulton v. Kaiser Steel Corp.*, 397 F.2d 580, 582 (5th Cir. 1968). Likewise, Texas, which has adopted Federal Rule 22 with minor textual changes, does not require that the stakeholder be wholly disinterested in the suit. *See* TEX. R. CIV. P. 43; *Bank One, Texas, N.A., v. Taylor*, 970 F.2d 16, 23 (5th Cir. 1992). [4]

With regard to the no-independent-liability requirement, the modern trend among the circuits is to reject this historic equitable limitation on interpleader.[5] Some modern courts, however, continue to consider the stakeholder's interest in the dispute in determining whether to allow interpleader.[6] Although the Fifth

[4] Like Federal Rule 22, Texas Rule 43 was "intended to dispense with many of the restraints on interpleader that had developed in equity and liberalize the practice so that an interested and hostile party could file an action in interpleader and avoid a multiplicity of suits." 47 TEX. JUR. *Interpleader* §2.

[5] *See, e.g., Knoll v. Socony Mobil Oil Co.*, 369 F.2d 425, 428-429, (10th Cir. 1966); *Stuyvesant Ins. Co. v. Dean Constr. Co.*, 254 F.Supp. 102, 109 (D.C. N.Y. 1976), *aff'd per curiam*, 382 F.2d 991 (2nd Cir. 1967); *Hebel v. Ebersole*, 543 F.2d 14 (7th Cir. 1976); *Dakota Livestock Co. v. Keim*, 552 F.2d 1302, 1306 (8th Cir. 1977); *Libby, McNeill, and Libby v. City Nat'l Bank*, 592 F.2d 504, 507-508 (9th Cir. 1978).

[6] *See, e.g., Farmers Irrigating Ditch & Resevoir Co. v. Kane*, 845 F2d 229, 232 (10th Cir. 1988) ("[A] party seeking interpleader must be free from any blame in causing the controversy…."); *Mendez v. Teachers Ins. and Annuity Ass'n and College Retirement Equities Fund*, 982 F.2d 783 (2nd Cir. 1992) (requiring a disinterested stakeholder for interpleader).

Circuit has not expressly addressed the no-independent-liability requirement in any recent interpleader case, the Fifth Circuit appears to follow the modern trend:

> A suit for or in the nature of interpleader can be brought either under Title 29, U.S.C. Section 1335 or Rule 22 of the Federal Rules of Civil Procedure. There must be two or more adverse claimants for statutory interpleader purposes. Rule interpleader requires the presence of claims that expose the plaintiff to double or multiple liability. In either case, the gist of the relief sought is the avoidance of the burden of unnecessary litigation or the risk of loss by the establishment of multiple liability when only a single obligation is owing.

Fulton, 397 F.2d at 582-583 (citation omitted); *see also Phillips Petroleum Co. v. Hazlewood*, 534 F.2d 61, 62 (5th Cir. 1976) (rejecting the argument that a stakeholder is not an "opposing party" against whom a counterclaim can be brought). Further, a leading treatise on federal practice and procedure takes the position that the no-independent-liability restriction is unnecessary to modern interpleader and should be rejected:

> Contemporary procedure, with its flexible and liberal provisions for joinder of parties and claims, for separate trial of separate issues, for assuring that the right to a jury trial on a particular issue is not impaired, and for shaping the relief to the necessities of the case is well adapted to disposing of interpleader cases even when independent liability is asserted. Thus, there is no reason today, under either the statute or the rule, for continuing to honor a limitation on the remedy that has no claim to validity other than that it is old.

See 7 Charles A. Wright, Arthur R. Miller & Mary K. Kane, FEDERAL PRACTICE & PROCEDURE: CIVIL 3d § 1716 (citations omitted).

Courts within the Fifth Circuit have implicitly rejected the no-independent-liability rule by permitting litigants to bring counterclaims against an interpleading stakeholder. In *Metropolitan Life Ins. Co. v. Palmer*, 238 F.Supp.2d 831 (E.D. Tex. 2002), for example, the court allowed an insurance company to interplead and awarded the insurance company its attorneys' fees relating to the interpleader action. However, the mere allowance of interpleader did not automatically discharge the insurance company from independent liability under the disputed policy. After granting the insurance company's motion for summary judgment on its request for interpleader, the court went on to address, and reject, counterclaims for negligence and breach of contract brought against the insurance company by an alleged beneficiary under the contract. *Accord First Colony Life Ins. Co. v. Bailey-Mason*, 2001 WL 705786 (N.D. Tex. 2001) (after sustaining summary judgment on stakeholder's request for statutory interpleader, the court considered counterclaims against the stakeholder).

C. Commonwealth's Request for Interpleader and Summary Judgment

1. Whether Commonwealth Has Established the Requirements for Interpleader

In its claim and counterclaim for interpleader filed in the Texas lawsuit, Commonwealth relied the Texas Rules of Civil Procedure in seeking to interplead the TCI stock. Although Commonwealth has not amended its complaint to request interpleader under the Federal Rule 22, the Federal Rules of Civil Procedure govern the procedure to be followed in a civil action after its removal from a state court. *See* FED. R. CIV. P. 81(c).

An interpleader action typically involves two stages. *Rhoades v. Casey*, 196 F.3d 592, 600 (5th Cir. 1999). In the first stage, the court decides whether the requirements for rule or statutory interpleader action have been met by determining (1) if there is a single fund at issue, and (2) whether there are adverse claimants to that fund. *See id.* In the second stage, "the district court will then make a determination of the respective rights of the claimants." *Id.*

The burden is on the party seeking interpleader to demonstrate that the requirements for rule or statutory interpleader are satisfied. *See, e.g., Interfirst Bank Dallas, N.A. v. Purolator Courier Corp.*, 608 F.Supp. 351 (N.D. Tex. 1985). If the interpleading party is a disinterested stakeholder, a court may award reasonable costs and attorney's fees in an action for interpleader action, whether brought under Federal Rule 22 or the interpleader statute. *See Rhoades v. Casey*, 196 F.3d 592 (5th Cir. 1999); *Corrigan Dispatch Co. v. Casa Guzman, S.A.*, 696 F.2d 359, 364 (5th Cir. 1983).[7] However, the award of costs and attorneys' fees is not automatic. Rather, a decision to make such an award falls within the discretion of the trial judge. *See Gulf Oil Corp. v. Olivier*, 412 F.2d 938, 946 (5th Cir. 1969).

In this case, Sunset and the Borrowers dispute whether or not the original loan agreement has been modified. They also dispute whether or not the TCI stock is part of Sunset's security under the modified loan agreement, and the Borrowers oppose Sunset's attempts to replace Commonwealth with Mr. Burr as

[7] Similarly, a court may discharge a disinterested stakeholder who has met the requirements of §1335 from any future liability with regard to the interpleaded stake, leaving the claimants to litigate among themselves. *See* 28 U.S.C. §2361.

the pledge holder for the TCI stock. It appears to the Court, based on these undisputed facts, that there is a single stake at issue – namely, the TCI stock certificates and stock powers – and that there are adverse claims to the stake.

The Court need not reach Sunset's claims against Commonwealth or determine whether Commonwealth is a "disinterested stakeholder" entitled to its attorneys' fees or other relief before deciding whether to permit Commonwealth to interplead the TCI stock. As discussed *supra*, courts and commentators generally agree that disinterestedness is not a requirement for modern interpleader. Indeed, it would undermine the purpose of interpleader if a party could prevent interpleader simply by, for example, arguing that the stakeholder breached its contract by failing to transfer the funds or property to it.

Finally, the Court addresses Commonwealth's tender of the TCI stock to this Court. Unlike statutory interpleader under 28 U.S.C. §1335, which requires a stakeholder to deposit the disputed asset or a bond with the court, deposit of the asset is not a jurisdictional prerequisite for rule interpleader. *See, e.g., Holland Am. Ins. Co. v. Succession of Roy***,** 777 F.2d 992, 997 (5th Cir. 1985). In rule interpleader actions, it is within the court's discretion to determine if the plaintiff will be required to bring the asset into the court's registry. *See, e.g., Percival Const. Co. v. Miller & Miller Auctioneers, Inc.,* 532 F.2d 166, 171 (10th Cir. 1976). Here, in the exercise of that discretion, a deposit of the TCI stock into the registry of this Court will not be required. Commonwealth will be directed to hold the TCI stock certificates and stock powers subject to the further order of this

Court or the U.S. District Court. *See, e.g., U.S. v. Coumantaros*, 146 F.Supp. 51 (D.C. N.Y.1956) (directing plaintiff in interpleader action under Federal Rule 22 to hold bills of lading pending further order of court).

2. Whether Commonwealth Is Entitled Summary Judgment on Sunset's Claims

With regard to Commonwealth's request for summary judgment on Sunset's claims against it, the party moving for summary judgment bears the initial responsibility of informing the court of the basis for its motion and identifying those portions of the "pleadings, depositions, answers to interrogatories, and affidavits, if any," which it believes demonstrates the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. The manner in which this showing can be made depends upon which party will bear the burden of persuasion at trial. If, as in this case, the burden of persuasion is on the non-moving party, the party moving for summary judgment may satisfy the burden of production under Federal Rule 56 by either submitting affirmative evidence that negates an essential element of the non-moving party's claim, or by demonstrating that the non-moving party's evidence is insufficient to establish an essential element of the non-moving party's claim. *See id; see also Lavespere v. Niagra Mach. & Tool Works, Inc*., 910 F.2d 167, 178 (5th Cir. 1990).

In this case, the Court has reviewed the arguments and the admissible evidence submitted by the parties regarding Commonwealth's request for summary judgment. Upon due consideration of the pleadings, the proper summary judgment evidence submitted by Commonwealth and Sunset, and the relevant

legal authorities, the Court finds that Commonwealth has failed to sustain its burden to demonstrate that there is no genuine issue as to any material fact or that it is entitled to judgment as a matter of law on Sunset's claims. Genuine issues of material fact exist regarding Commonwealth's role in the dispute between the Borrowers and Sunset as well as, among other things, Sunset's instructions to Commonwealth under the Pledge Agreements.

IV. CONCLUSION

In summary, the Court concludes that Commonwealth has established the requirements for interpleader and that interpleader should be granted, without prejudice to a subsequent decision regarding Sunset's claims against Commonwealth or Commonwealth's requests for discharge, dismissal and fees. Genuine issues of material fact exist with regard to Commonwealth's request for costs and attorneys' fees as well as its request for summary judgment on Sunset's claims against it and for dismissal or discharge from this proceeding. The Court will enter an order consistent with this Memorandum of Decision.

Signed on 8/22/2005

Brenda T. Rhoades MD

HONORABLE BRENDA T. RHOADES,
UNITED STATES BANKRUPTCY JUDGE