



## **TLTA Judiciary Committee: Have you ever wondered whether an escrow relationship can be formed without a written agreement?**

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Have you ever wondered whether an escrow relationship can be formed without a written agreement? The Third Court of Appeals in Austin was tasked with addressing such an issue when it upheld a trial court's ruling on summary judgment that a lender's attorney was not an escrow agent and did not owe the lender's borrower a fiduciary duty in *JTREO, Inc. v. Hightower & Assocs.*, 2020 Tex. App. LEXIS 4523, 2020 WL 3468148.

Like all great stories, this saga begins when a man met a woman and bought real property together. Mr. Jones and his wife held title to a pricey \$1.25 million condo and entered a contract to sell the condo to an LLC. The sale called for \$157,700 to be paid in cash and a \$1,250,000 promissory note from the LLC back to the sellers. After the sale, Mr. Jones sold the promissory note to JTREO, Inc., for \$874,627.70 (What a deal!?). JTREO financed the purchase of the note with a loan from Libertad Bank, who retained Hightower & Associates to represent them in the deal.

After closing on the note sale, Hightower wired \$874,627.70 to Mr. Jones' individual bank account. So, what's the problem? Well, Mr. Jones allegedly used a forged power of attorney to act on his estranged wife's behalf so when his wife realized that the funds were transferred to Mr. Jones, individually and without her knowledge, litigation ensued.

Although various causes of action were asserted by the numerous parties to the lawsuit, JTREO contended that Hightower, even though they were the counsel for the lender, Libertad Bank, in the transaction, served as the escrow agent for the sale of the promissory note, and thus owed JTREO a fiduciary duty in the transaction. Of note, JTREO alleged that Hightower was their escrow agent for the transaction, not through a written instrument, but through Hightower's actions related to their disbursement of funds for the deal. JTREO relied upon *Home Loan Corp*

*v. Texas American Title Co.* 191 S.W.3d 728, 731-34 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) which held that a title company owed a duty to a buyer, despite the lack of writing establishing the title company as an escrow agent, because the title company took the buyer's money to accomplish a purposed directed by the buyer and was paid a fee for those services.

In upholding the trial court's summary judgment in favor of Hightower on the issue, the Appellate Court distinguished JTREO's situation from *Home Loan Corp* by focusing on several grounds raised by Hightower:

1. JTREO did not pay Hightower an escrow fee for their services;
2. The evidence conclusively established that Hightower served solely as Libertad's attorney; and,
3. Generally, in an escrow arrangement, the funds pass out of the control of a party to the transaction to a neutral third party and in this case, Hightower could not have held the funds in "escrow" for its own principal (or anyone else), because as long as the funds are in the possession and control of the principal's attorney, they remain subject to the control of the principal.

Thus, the Court held that Hightower did not owe a fiduciary duty to JTREO as a matter of law.<sup>1</sup>

JTREO did file a petition for review with the Texas Supreme Court, arguing that, among other things, the Appellate Court's opinion contradicts prior precedent that found duties of an escrow agent can be imposed on the holder of funds without a written agreement as was the case in *City of Fort Worth v. Phippen*, 439 S.W.2d 660 (Tex. 1969). Unfortunately for JTREO, on January 22, 2021, the Texas Supreme Court denied their petition.

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<sup>1</sup> The Court also refused to find that JTREO and Hightower had an implied contract for the facilitation of the note sale because there was no fact issue as to whether a meeting of the minds occurred whereby Hightower agreed to provide such escrow services.