NOT DESIGNATED FOR PUBLICATION

SYLVIA O'BRIEN BERGER, WALTER J. BERGER, JR. AND KRISTINE M. BERGER	*	**NO. 2003-CA-1055**
	*	**COURT OF APPEAL**
VERSUS	*	**FOURTH CIRCUIT**
ROYCE INSTRUMENT CORPORATION, JAMES R. DARTEZ, J . THOMAS SOUTH, AND POLYCAST CORPORATION	*	**STATE OF LOUISIANA**
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2000-10914, DIVISION "C-6"
Honorable Roland L. Belsome, Judge
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Judge Charles R. Jones, Judge James F. McKay, III, and Judge Dennis R. Bagneris, Sr.)

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REVERSED

The plaintiffs, Sylvia Berger, Walter Berger, III, and Kristine Berger (collectively, "Plaintiffs") appeal a trial court judgment, which granted a summary judgment to the defendant, James Dartez. For the following reasons, we reverse.

FACTS

Prior to June 23, 2000, Plaintiffs were minority shareholders of defendant Royce Instrument Corporation ("Royce"). On June 23, 2000, Plaintiffs and Royce executed a Stock Redemption Agreement whereby Royce purchased all of Plaintiffs' shares in the company.

The Stock Redemption Agreement executed by the parties provides at Section 5(a) that, in connection with the sale, the Plaintiffs release Royce and its officers, directors, employees, and agents (except for majority stockholder James R. Dartez) from all claims arising prior to June 23, 2000, the date the agreement was executed. The Stock Redemption Agreement also provided an Escrow Agreement whereby James Dartez would be

released if Plaintiffs did not initiate legal action against him "prior to" July 13, 2000. Specifically, the Escrow Agreement states as follows:

> 6. **ESCROW AGREEMENT**.
> CORPORATION and RETIRING SHAREHOLDERS agree that they shall, contemporaneous with the execution of this Agreement, execute an escrow agreement (the "Escrow Agreement") in connection with the transactions contemplated hereunder whereby the CORPORATION shall place cash in the amount of $10,000.00 (the "Escrowed Funds") into a designated escrow account. Said Escrow Agreement shall further provide that: (i) **in the event that no legal action is commenced** by any RETIRING SHAREHOLDER against the either CORPORATION or James Dartez **prior to July 13, 2000** based solely on the bad faith or fraud in the performance of by James Dartez of his duties as an officer and/or director of the CORPORATION, **then the Escrowed Funds shall then be immediately payable in full to the RETIRING SHAREHOLDERS**, and (ii) **in the event that any legal action whatsoever is commenced** by any RETIRING SHAREHOLDER against the either CORPORATION or James Dartez **prior to July 13, 2000, then the Escrowed Funds shall then be immediately payable in full to the shareholders of the CORPORATION** at the time of execution of the Escrow Agreement, in proportion to their interests in the CORPORATION at the time of execution of the Escrow Agreement. (Emphasis added)

On July 13, 2000, Plaintiffs filed a shareholders' derivative suit against defendants Royce, James Dartez, J. Thomas South, and Polycast Corporation. The derivative suit alleged various breaches of fiduciary duties by Royce officers, Dartez and South. The defendants answered Plaintiffs' petition and, in addition, Royce, Dartez and South filed a Reconventional Demand against the Plaintiffs seeking the $10,000.00 in funds escrowed

pursuant to the Stock Redemption Agreement and the Escrow Agreement.

On November 22, 2000, defendants filed a Motion for Summary Judgment, which alleged that Plaintiffs' claims were not timely. The defendants' Motion was granted by the District Court and affirmed by this Court on February 13, 2002. Specifically, this Court found that Plaintiffs' lawsuit, which was filed "on" and not "prior to" July 13, 2000 was not timely. Thereafter, the Louisiana Supreme Court denied Plaintiffs' writ request and upheld this Court's ruling on that issue.

On August 30, 2002, James Dartez filed a Motion for Summary Judgment on Reconventional Demand, which sought a judgment declaring that he was entitled to the $10,000.00 in escrowed funds pursuant to the Escrow Agreement executed by the parties. On November 18, 2002, the trial court granted Dartez's Motion for Summary Judgment and ordered that the $10,000.00 held in escrow be released and distributed to the defendants. In its reasons for judgment, the trial court stated, in pertinent part:

> In upholding this Court's ruling on Defendants' Motion for Summary Judgment dismissing Plaintiffs' shareholders derivative lawsuit, the Fourth Circuit Court of Appeal extensively discussed its reasons in support of summary judgment. In analyzing Section 5 of the Stock Redemption Agreement, the Fourth Circuit stated, "The last two sentences in Section 5(a) are not interchangeable and address different, although corollary, aspects of the parties' agreement. The use of the word "until" in the second to last sentence is appropriate in the context of that sentence." However, the Court found that last sentence clearly set out the delay within which the plaintiffs

could file suit.

> Likewise, the words "prior to" as used in Section 6(i) are appropriate in the context of that sentence and were obviously intended to be read in context with the entire agreement. Sub-section 6(i) is not completely interchangeable with sub-section 6(ii). The agreement is clear that only if the plaintiffs were to file suit prior to July 13, 2000, would they be entitled to the escrowed funds. However, filing suit after July 13, 2000 does nothing to benefit plaintiffs' position and awarding them the escrowed funds would unjustly enrich them for merely filing a lawsuit "on" July 13, 2000.
>
> There are clearly no genuine issues of material fact. The parties agreed that the escrowed funds were intended to be distributed according to the terms of the contract, which when read in its entirety, entitles the defendants to the $10,000.00 in escrow.

Plaintiffs now appeal this final judgment.

STANDARD OF REVIEW

On appeal, summary judgments are reviewed *de novo* under the same criteria that govern the district court's consideration of whether summary judgment is appropriate. *Independent Fire Ins. Co. v. Sunbeam Corp.*, 99-2181, p.7 (La. 2/29/00), 755 So.2d 226, 230. The motion for summary judgment is a procedural device used to avoid a full-scale trial when there is no genuine factual dispute. See La. C.C.P. art. 966(B). The motion should be granted only 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 material fact and that the mover is entitled to judgment as

a matter of law. La. C.C.P. art. 966(B).

The summary judgment procedure is designed to secure the just, speedy and inexpensive determination of every action, and is now favored. La. C.C.P. art. 966(A)(2). The initial burden continues to remain with the mover to show that no genuine issue of material fact exists. If the moving party points out that there is an absence of factual support for one or more elements essential to the adverse

party's claim, action or defense, then the nonmoving party must produce factual support sufficient to satisfy his evidentiary burden at trial. La. C.C.P. art. 966(C)(2). If the nonmoving party fails to do so, there is no genuine issue of material fact and summary judgment should be granted. La. C.C.P. arts. 966. In determining whether an issue is "genuine," courts cannot consider the merits, make credibility determinations, evaluate testimony or weigh evidence. *Smith v. Our Lady of the Lake Hospital, Inc.*, 93-2512, p. 27 (La.7/5/94), 639 So.2d 730, 751.

DISCUSSION

Plaintiffs' sole issue on appeal is whether, as a matter of law, defendant James Dartez is entitled to the $10,000.00 in escrowed funds. Specifically, Plaintiffs argue that Dartez is not entitled to the $10,000.00 because the Stock Redemption Agreement governing the funds clearly states

that Dartez would only be entitled to the escrowed funds if Plaintiffs were to file a lawsuit against him prior to July 13, 2000 and Plaintiffs did not file a lawsuit against him "prior to" July 13, 2000, but rather filed the lawsuit "on" July 13, 2000, which lawsuit was subsequently and summarily dismissed as being untimely. We find merit to Plaintiffs' argument.

When a contract can be interpreted from the four corners of the instrument, the question of contractual interpretation is answered as a matter of law, and summary judgment is appropriate. *Brown v. Drillers, Inc.*, 93-1019, p. 9 (La.1/14/94), 630 So.2d 741, 749-750. Contracts have the effect of law for the parties. La. C.C. art.1983. When the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent. La. C.C. art. 2046. In such cases, the meaning and intent of the parties to the written contract must be sought within the four corners of the instrument and cannot be explained or contradicted by parol evidence. La. C.C. art. 1848.

> As stated previously, the Escrow Agreement, signed by the parties on June 23, 2000, specifically states: 6. **ESCROW AGREEMENT**. CORPORATION and RETIRING SHAREHOLDERS agree that they shall, contemporaneous with the execution of this Agreement, execute an escrow agreement (the "Escrow Agreement") in connection with the transactions contemplated hereunder whereby the CORPORATION shall place cash in the amount of $10,000.00 (the "Escrowed Funds") into a designated escrow account. Said Escrow Agreement shall further provide that: (i) **in the event that no legal action is commenced** by any

> RETIRING SHAREHOLDER against the either CORPORATION or James Dartez **prior to July 13, 2000** based solely on the bad faith or fraud in the performance of by James Dartez of his duties as an officer and/or director of the CORPORATION, **then the Escrowed Funds shall then be immediately payable in full to the RETIRING SHAREHOLDERS**, and (ii) **in the event that any legal action whatsoever is commenced** by any RETIRING SHAREHOLDER against the either CORPORATION or James Dartez **prior to July 13, 2000, then the Escrowed Funds shall then be immediately payable in full to the shareholders of the CORPORATION** at the time of execution of the Escrow Agreement, in proportion to their interests in the CORPORATION at the time of execution of the Escrow Agreement. (Emphasis added)

After a close reading of the Escrow Agreement, we find that the agreement is clear that only if the Plaintiffs were to file suit "prior to" July 13, 2000, would the defendants be entitled to the escrowed funds. If the Plaintiffs do not file suit **prior** to July 13, 2000, then the $10,000.00 would be returned to them. On February 13, 2002, this Court addressed the issue of whether the Plaintiffs' lawsuit, filed on July 13, 2000, was timely when the Agreement states that the Plaintiffs' lawsuit must be filed **prior** to July 13, 2000, and this Court found that Plaintiffs' claims were not timely. Consequently, because Plaintiffs failed to file suit **prior** to July 13, 2000, then, according to the explicit language of the Agreement, the $10,000 held in escrow must be returned to them.

For these reasons, we reverse the judgment of the trial court, which

granted James Diaz's Motion for Summary Judgment and ordered that the $10,000.00 held in escrow be released to him. Accordingly, we find in favor of Plaintiffs and against defendants and order that the $10,000.00 held in the escrow account be returned to Plaintiffs.

REVERSED