Affirmed and Opinion filed March 14, 2002.

In The

Fourteenth Court of Appeals

NO. 14-01-00222-CV

A.I. CREDIT CORPORATION, Appellant

V.

HI-TECH COMMUNICATIONS, INC., Appellee

On Appeal from the 212th District Court
Galveston County, Texas
Trial Court Cause No. 98CV0950

O P I N I O N

In this loan collection dispute, A.I. Credit Corporation ("A.I. Credit") appeals a take-nothing summary judgment entered in favor of Hi-Tech Communications, Inc. ("Hi-Tech") on the grounds that the trial court erred in: (1) denying A.I. Credit's motion for summary judgment and motion for reconsideration; (2) granting Hi-Tech's motion for summary judgment; and (3) sustaining Hi-Tech's objections to an affidavit submitted in support of A.I. Credit's motion for summary judgment. We affirm.

Background

A.I. Credit is an insurance premium finance company. Hi-Tech engaged a broker, Business Insurance Corporation ("BIC"),[1] to secure, on Hi-Tech's behalf, various types of insurance coverage and financing for the corresponding insurance premiums. BIC submitted to A.I. Credit a premium finance agreement (the "PFA"), seeking a loan to finance Hi-Tech's insurance premiums for a year. A.I. Credit accepted the PFA and wire transferred the loan proceeds to BIC. Hi-Tech made a cash down-payment directly to the insurers, and they issued the insurance policies.

Pursuant to a separate agreement between A.I. Credit and BIC, (the "A.I. Credit-BIC contract"), BIC was obligated to disburse the loan proceeds to the respective insurers but failed to do so. When Hi-Tech allegedly failed to make any of the loan repayments under the PFA, A.I. Credit instructed Hi-Tech's insurers to cancel Hi-Tech's policies and to refund any unearned premiums to A.I. Credit. A.I. Credit thereafter sued Hi-Tech to recover the loan balance and then moved for summary judgment on the ground that it had fulfilled its obligation under the PFA when it disbursed the loan proceeds to BIC. Hi-Tech filed a cross-motion for summary judgment on the ground that it was excused from repaying the loan because A.I. Credit materially breached the PFA by failing to pay the insurers. The trial court granted Hi-Tech's motion.

On appeal, A.I. Credit's first two points of error challenge the denial of its motion for summary judgment and the granting of Hi-Tech's motion on the ground that A.I. Credit satisfied its obligations under the PFA. In the alternative, A.I. Credit contends that genuine issues of material fact concerning the existence, duration, and nature of BIC's agency relationships with A.I. Credit, Hi-Tech, and Hi-Tech's insurers precluded summary judgment in Hi-Tech's favor.

Standard of Review

A summary judgment may be granted if the motion and summary judgment evidence show that, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law on those issues expressly set out

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[1] BIC is not a party to this appeal, and it is undisputed that BIC is bankrupt and judgment-proof.

in the motion or response. TEX. R. CIV. P. 166a(c). When both sides move for summary judgment and the trial court grants one motion but denies the other, the reviewing court should review both sides' summary judgment evidence, determine all questions presented, and render the judgment that the trial court should have rendered. *Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 566 (Tex. 2001).

Discharge of Hi-Tech's Repayment Obligation

The core issue in this case is whether A.I. Credit's disbursement of the loan proceeds to BIC satisfied A.I. Credit's obligation under the PFA to make payment to Hi-Tech's insurers. If not, Hi-Tech's obligation to repay the loan under the PFA was discharged by A.I. Credit's material breach of the PFA. *See Hernandez v. Gulf Group Lloyds*, 875 S.W.2d 691, 692 (Tex. 1994) (recognizing that when one party to a contract materially breaches the contract, the other party is excused from any obligation to perform).

The operative provision of the PFA provides that: "In consideration of the premium payments being financed by *[A.I. Credit] to the insurance company(ies) on [Hi-Tech's] behalf*, [Hi-Tech] promise[s] to pay to [A.I. Credit's] order the TOTAL OF PAYMENTS . . . ." (emphasis added). Because the PFA makes distinct references to the "insurance company(ies)" on the one hand and the "agent or broker" (BIC) on the other, and the two terms are not used synonymously or interchangeably, we interpret the PFA to obligate A.I. Credit to accomplish payment of the loan proceeds to the insurance companies listed therein, rather than merely to an agent / broker or other intermediary. Therefore, although A.I. Credit was not restricted by the PFA as to the manner of accomplishing this payment, it bore the ultimate responsibility for achieving that result and thus the means that it selected to do so.

It is undisputed in this case that the loan proceeds were never remitted to the insurance companies. There is also no evidence that BIC had actual or apparent authority of any of Hi-Tech's insurance companies to receive premium payments or loan proceeds on their behalf. Rather, the evidence indicates that BIC's participation in the disbursement of loan proceeds was solely by virtue of the A.I. Credit-BIC contract, *i.e.*, solely at A.I. Credit's behest.

To support its contention that paying the loan proceeds to BIC nevertheless satisfied its obligation to pay the insurance providers, A.I. Credit relies in part on the following language of article 21.02 of the Texas Insurance Code:

> Any person who solicits insurance on behalf of any insurance company . . . or who takes or transmits other than for himself any application for insurance or any policy of insurance to or from such company . . . or who shall receive or deliver a policy of insurance of any such company . . . or who shall . . . receive, or collect, or transmit any premium of insurance . . . shall be held to be the agent of the company for which the act is done . . . as far as relates to all the liabilities, duties, requirements and penalties set forth in this chapter.

TEX. INS. CODE ANN. art. 21.02 (Vernon Supp. 2002). A.I. Credit thus argues that BIC's involvement in obtaining Hi-Tech's policies and receiving the premium financing proceeds rendered it the agent of the insurance companies (except the worker's compensation provider, discussed below) under article 21.02. Therefore, A.I. Credit contends that its payment of the loan proceeds to BIC, as agent of the insurers, was the legal equivalent of payment to the insurers themselves for purposes of the PFA.

However, article 21.02 creates an implied agency relationship only with regard to the liabilities, duties, requirements, and penalties set forth in chapter 21 of the insurance code. A.I. Credit has not established that its obligation to pay the loan proceeds to Hi-Tech's insurance companies is a matter governed by chapter 21 of the insurance code. Thus, A.I. Credit has not demonstrated that BIC's status as an agent of the insurance companies for purposes of that chapter (which we do not decide) bears on the contractual relationship between the parties to this case, neither of which is an insurance company.

A.I. Credit also contends that its payment to BIC fulfilled its obligations to pay the insurance companies under the PFA in that BIC was acting as Hi-Tech's agent with respect to the worker's compensation policy. However, because the PFA did not obligate A.I. Credit to pay the loan proceeds to Hi-Tech, it does not follow that BIC's status as Hi-Tech's agent is relevant to whether A.I. Credit's payment to BIC was, in effect, a payment to the insurance companies.[2]

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[2] Nor is the issue whether BIC was acting as A.I. Credit's agent relevant to our disposition.

Similarly, A.I. Credit contends that its payment to BIC satisfied its obligation to pay the insurance companies because it was consistent with industry standards for disbursement of premium financing proceeds. In addition to providing no evidence of industry standards, other than its interpretation of what it contends is the "statutory scheme," A.I. Credit cites no authority in which any such industry standard has been held to satisfy a similar contractual obligation.[3] A.I. Credit's third point of error argues that the trial court abused its discretion by sustaining Hi-Tech's objections to the affidavit of Joan Stratton, which A.I. Credit submitted in support of its motion for summary judgment. Because the evidence contained in this affidavit does not bear upon the grounds we rely on to affirm the summary judgment, it is not material to our disposition of the appeal, and we need not address this point of error further.

Because A.I. Credit's points of error do not demonstrate that Hi-Tech's motion for summary judgment and evidence were insufficient to show that A.I. Credit's failure to perform its obligation under the PFA discharged Hi-Tech's obligation to repay the loan, they are overruled, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed March 14, 2002.
Panel consists of Justices Hudson, Fowler, and Edelman.
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[3] Nor is it apparent how, in theory, a practice which fails to satisfy a contractual obligation could nevertheless be deemed to satisfy the obligation merely because the practice is widely followed by one of the parties for their own convenience.