IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 92-1021

FEDERAL DEPOSIT INSURANCE CORPORATION
as Manager for the FSLIC RESOLUTION FUND,

Plaintiff-Appellee,

versus

RICHARD H. CROWE, JR., ET AL.,

Defendants,

JOHN W. BROPHY and JACK R. GAUBERT,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Texas
(ca3 86 3166 T)

(July 8, 1993)

Before REYNALDO G. GARZA, GARWOOD, Circuit Judges, and WERLEIN,[*]

WERLEIN, District Judge:[1]

Appellee Federal Deposit Insurance Corporation ("FDIC"), successor to the assets of Independent American Savings Association

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[*] District Judge of the Southern District of Texas, sitting by designation.

[1] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

("Independent American" or "the Association"), brought this action to recover sums advanced to certain of Independent American's shareholders for the purchase of Independent American's common stock. The selling shareholders included the two Appellants, Jack G. Gaubert ("Gaubert"), a director of the Association, and John W. Brophy ("Brophy"), a consultant to the Association. The stock sales occurred in connection with the Association's creation of an employee stock ownership plan ("ESOP" or "the Plan"). Independent American's shareholders were given an opportunity to sell shares to the newly-created ESOP, and Gaubert and Brophy were among those who did so. The Honorable Robert B. Maloney, United States District Judge, awarded summary judgment to the FDIC on grounds (i) that Independent American--not the ESOP--actually was the purchaser of the shares, in violation of Article 852a, § 2.03 of the Texas Savings and Loan Act ("TSLA"), which prohibits a savings and loan association from purchasing its own shares of common stock, and (ii) that Gaubert and Brophy breached contracts with Independent American to return to the Association all proceeds received for their common stock if the ESOP Trustee did not accept their shares. Gaubert and Brophy have both appealed. Because we find that a genuine issue of material fact was raised on whether Independent American purchased its own shares in violation of the Texas statute, and because we conclude that the district court misapplied the clause upon which the breach of contract claim is founded, the summary judgment is reversed and the case is remanded.

I. THE STANDARD OF REVIEW

This court reviews the district court's grant of a summary judgment motion *de novo*. Campbell v. Sonal Offshore Drilling, Inc., 979 F.2d 1115, 1118-1119 (5th Cir. 1992); Topalian v. Ehrman, 954 F.2d 1125, 1131 (5th Cir.), cert. denied, 113 S. Ct. 82 (1992). Summary judgment is appropriate if the record discloses "that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A party seeking summary judgment bears the initial burden of identifying those portions of the pleadings and discovery on file, together with any affidavits, which it believes demonstrate the absence of a genuine issue of material fact. *See* Celotex Corp. v. Catrett, 106 S. Ct. 2505, 2511 (1986); Matsushita Elec. Ind. Col. v. Zenith Radio Corp., 106 S. Ct. 1348, 1355-57 (1986). Once the movant carries its burden, the burden shifts to the non-movant to show that summary judgment should not be granted. Celotex, 106 S. Ct. at 2553-54. While we must "review the facts drawing all inferences most favorable to the party opposing the motion," Reid v. State Farm Mut. Auto Ins. Co., 784 F.2d 577, 578 (5th Cir. 1986), that party may not rest upon mere allegations or denials in its pleadings, but must set forth specific facts showing the existence of a genuine issue for trial. Anderson, 106 S. Ct. at 2514. It is well established that "this Court is not permitted to assess the probative value of any of the evidence. To the contrary, this Court must only decide whether a genuine issue of

material fact exists 'so as to insure that factual issues will not be determined without the benefit of the truth seeking procedures of a trial.'" Breen v. Centex Corp., 695 F.2d 907, 910 (5th Cir. 1983).

II. DISCUSSION

A somewhat detailed analysis of the summary judgment evidence is necessary. In October 1985, the Board of Directors of Independent American, including Gaubert, voted unanimously to adopt an ESOP. This followed efforts begun several months earlier when Independent American retained outside legal counsel to secure advice on the possibility of creating an ESOP purportedly for the benefit of its employees.

To prepare for its implementation, the Board of Directors of Independent American named First Benefit Trust Company ("Trust Company" or "Trustee") to act as Trustee of the ESOP and of a related trust. In order to establish a price for purchase of the Independent American shares by the ESOP, the Board also retained an appraiser. Based upon information provided to him by the Association's directors, the appraiser estimated that the Association had a net worth of $54 million, equivalent to $29 per share.

The contemplated transaction required the Trust Company, in its capacity as Trustee of the ESOP, to borrow from Independent American the funds necessary to purchase from Independent American shareholders up to 9.9% of the common stock of the Association.

Accordingly, on October 10, 1985, the Trust Company, in its trustee capacity, and Independent American entered into a loan agreement for $5.4 million to be funded in one advance. The Trust Company, as trustee, contemporaneously executed and delivered to the Association a promissory note payable to Independent American for $5.4 million. The loan agreement recited that the Trustee was concurrently purchasing 184,238 shares (totaling 9.9%) of the common stock of Independent American. No cash funds were advanced to the Trustee at that time.

The Association's outside counsel advised the Federal Home Loan Bank of Dallas in a letter that Independent American intended to adopt an ESOP, and described generally the amount of stock proposed to be acquired by the ESOP, the fact that an independent appraisal had been obtained and would be relied upon by the Trustee, and that a loan was proposed to be made to the ESOP by the Association which, in the opinion of counsel, conformed to law and the directives of regulatory authorities. The letter concluded by soliciting from the Federal Home Loan Bank Board ("FHLBB") its position with respect to the proposed transaction in advance of the ESOP's formation even though no approval of the FHLBB was required.

The summary judgment evidence further reflects that Independent American's outside counsel in early October, 1985, received an oral opinion from the supervisory agent of the Federal Home Loan Bank of Dallas that he saw no problem with the ESOP formation and outside counsel concluded that inasmuch as no formal

approval process was mandated by FHLBB regulations, no formal communication was anticipated from the FHLBB on the question.

Independent American also received a lengthy letter from outside counsel expressing its qualified opinion that the October 10, 1985, loan being made by First American to the Trustee was not expressly prohibited by the FHLBB's restrictions on loans to affiliated persons and was not expressly prohibited by certain other federal and state regulations. A separate law firm representing First Benefit Trust Company of Texas, expressed its qualified opinion that the loan agreement between the Association and the Trustee, the note, and the other loan documents had each been properly executed and delivered by the Borrower, and that each of the documents was a valid and binding obligation and agreement of the Borrower, enforceable in accordance with its terms.

The summary judgment evidence reflects that Independent American requested its outside counsel to provide the appropriate language for a letter to its shareholders advising the organization of the ESOP and relating the offer of the ESOP Trustee to purchase up to 9.9% of the shares of the Association's common stock. The offer letters were then written on Independent American's letterhead, over the signature of Tommy G. Lane, Chief Executive Officer of the Association, who in the first paragraph of the letter stated that the Board of Directors of Independent American had recently created the Independent American ESOP for the benefit of the employees of the Association and its subsidiaries. The next four paragraphs of the letter read as follows:

> To comply with the terms of the plan which created the ESOP (which terms allow the ESOP to purchase and hold shares of the Association's common stock for the benefit of the Association's employees), *the Trustee of the ESOP, First Benefit Trust Company of Texas, hereby offers to purchase up to 9.9% of the shares of the Association's common stock owned by you.*
>
> The *Trustee* reserves the right to terminate or withdraw this offer at any time prior to payment being delivered for any shares which are tendered. Unless earlier terminated pursuant to the preceding sentence, this offer will remain open until 5:00 p.m., Dallas, Texas time, on October 31, 1985.
>
> If you wish to tender shares of common stock for purchase, *please complete and return to the attention of the Trustee,* at the address set forth in the transmittal form, the attached transmittal form together with the certificates representing any shares to be tendered. More complete instructions on how to tender shares are set forth in the transmittal form.
>
> Enclosed herewith please find (1) a copy of an unaudited financial statement of the Association dated June 30, 1985, and (2) a copy of an independent appraisal of the Association's common stock dated August 5, 1985.

(Emphasis added.) A place was provided on the letter for the shareholder to sign his name acknowledging receipt of the letter and of the enclosed transmittal form.

The separate transmittal form furnished to shareholders for their use recited in its title that it was to accompany certificates representing shares of common stock of Independent American to be exchanged "pursuant to the offer of Independent American Employee Stock Ownership Plan (the 'ESOP')." The

addressee to whom the transmittal form was directed was the following:

> *Trustee, Employee Stock Ownership Trust*
> *for Employees of Independent*
> *American Saving Association*
> c/o Independent American Savings Association
> 300 E. John W. Carpenter Freeway
> Irving, Texas 75062

(Emphasis added.)

The transmittal form provided a place for the shareholder to fill in the number of shares being tendered to the ESOP and then, in its second paragraph, read as follows:

> The undersigned hereby *assigns and transfers the Shares to the Trustee* and *constitutes and appoints the Trustee* the true and lawful attorney-in-fact of the undersigned with respect to such Shares, with full power of substitution, (1) to deliver such certificates together with all accompanying evidences of transfer and authenticity to Independent American for transfer and (2) to cause the transfer of the Shares to the Trustee.

(Emphasis added.) The transmittal form also included the following paragraphs:

> The undersigned understands and agrees that in the event the Shares are not accepted by the Trustee for any reason, the certificates representing the Shares will be returned to him as soon as practicable.[2]

[2] It is this paragraph of the transmittal form that the district court held was breached by Gaubert's and Brophy's "refusal to return the funds upon the Association's tender of the shares" back to Gaubert and Brophy.

> The undersigned understands and agrees that the appointment of the *Trustee* as his attorney-in-fact with respect to the Shares is coupled with an interest and is irrevocable.
>
> The undersigned agrees that upon request he will execute and deliver any additional documents deemed by the *Trustee* to be necessary or desirable to complete *the assignment and transfer of the Shares to the Trustee.*

(Emphasis added.)

The evidence reflects that Appellants Gaubert and Brophy accepted the ESOP's offer and, pursuant to the printed directions, signed the transmittal forms that recited, as seen above, the appointment of the ESOP Trustee as their attorney-in-fact to deliver the certificates to Independent American so that it could in turn transfer the shares to the Trustee. The shares were delivered to the Trustee at the address of the Association.

Independent American, which held the $5.4 million note signed by the Trustee pursuant to the Loan Agreement, issued checks to the tendering shareholders in payment for their shares. In all, the Association advanced $5,261,702 for 181,438 shares of common stock in Independent American that were tendered by 48 shareholders in response to the offer. Subsequently, Independent American made a cash advance of $5,261,702 to the Trustee and, a few days later, the Trustee wire transferred that same sum back to Independent American in exchange for the one stock certificate issued in the ESOP's name for the full 181,438 shares of common stock that had been purchased.

After new management was installed at Independent American the next year,[3] questions arose concerning the accuracy of the earlier $29 per share appraisal of the Association's common stock. It was subsequently estimated that the value of the Association's stock before creation of the ESOP was at least $6 million in the *negative*, not the positive $54 million for which it had been appraised. The Trust Company as Trustee of the ESOP thereupon refused to make payments on the loan, notified Independent American of its belief that the ESOP transaction violated art. 852, sec. 2.03 of the TSLA, and asked that the entire transaction be rescinded. Independent American agreed, and Independent American and Trust Company executed a Rescission Agreement dated September 30, 1986.

Independent American officials thereafter sent a letter to all selling shareholders informing them that the stock purchase had been rescinded and demanding that the shareholders return all funds

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[3] Independent American's new management has previously been a subject of litigation involving Gaubert. Gaubert v. United States, 885 F.2d 1284 (5th Cir. 1989), reh'g denied, en banc, Gaubert v. United States, 894 F.2d 406 (5th Cir. 1990), and rev'd, United States v. Gaubert, 113 L.Ed.2d 335 (1991). Gaubert sued the United States under the Federal Tort Claims Act ("FTCA"), alleging that officials from the Federal Home Loan Bank Board in April, 1986, acted negligently in (1) selecting officers and directors for Independent American; and (2) conducting the daily affairs of the Association. Gaubert sought damages in the amount of $75 million for the lost value of his shares and $25 million for property he had forfeited pursuant to a guaranty agreement. Judge Robert B. Maloney dismissed Gaubert's suit for lack of subject matter jurisdiction. At the end of the day, and after a trip to the United States Supreme Court, the district court was fully affirmed and Gaubert's case was dismissed in its entirety. Gaubert v. United States, 932 F.2d 376 (5th Cir. 1991).

previously paid for their stock. Brophy, Gaubert and others refused to return their proceeds, which resulted in the instant suit, originally filed by Independent American, to recover the funds.

Viewed in the light most favorable to the parties opposing the motion for summary judgment, the summary judgment evidence at least raises a genuine issue of material fact on whether Independent American purchased for its own account its own shares in violation of the Texas statute. Much of the documentary evidence suggests that Independent American acted only as a transfer agent and agent for the Trustee in receiving the shares, in advancing payment for the shares in behalf of the Trustee from out of funds borrowed by the Trustee and for which the Association held the $5.4 million note, and then in delivering to the Trustee in one stock certificate the entirety of the shares that had been tendered to and purchased by the Trustee.

We are not able to agree, as found by the district court, that the facts are undisputed that Gaubert and Brophy transferred their shares to the Association and that the Association paid to them the purchase price for their stock with checks drawn on the account of the Association. While it is established by summary judgment evidence that Gaubert and Brophy *delivered* their shares to the Association's address, as directed, and received their payments on checks from the Association, to conclude from this evidence as a matter of law that the Association was purchasing its own shares directly or indirectly for its own account would require us wholly

to disregard most of the documentary evidence. The documents reflect that the offer to purchase common stock was made in behalf of the Trustee of the ESOP, that selling shareholders tendered their shares to the Trustee of the ESOP, albeit at the business address of the Association, and that payments made by the Association for the tendered shares may well have been advances against the $5.4 million loan made by Independent American to the Trustee to finance the Trustee's purchases of stock for the ESOP. Resolving all reasonable doubts and drawing all reasonable inferences from the summary judgment in favor of Brophy and Gaubert, we find that a fact issue exists on whether there was a bona fide purchase of Brophy's and Gaubert's Independent American shares by the Trustee of the ESOP or, on the other hand, whether their shares were actually purchased by Independent American in a transaction prohibited by § 2.03 of the TSLA.

The second basis relied upon for entry of the summary judgment was that Gaubert and Brophy breached a contract requiring them to return the purchase price of their shares if the Trustee did not accept the tendered shares. The contractual obligation found to have been breached was in the transmittal form:

> The undersigned understands and agrees that in the event the shares are not accepted by the Trustee for any reason, the certificates representing the shares will be returned to him as soon as practicable.

The district court found that the shares were transferred to the Trustee in January, 1986; that in May, 1986, the Trustee

declared that it would not make payments on the loan from Independent American until audited financial reports confirmed the value of the purchased stock; and that on September 30, 1986, the Trustee and Independent American agreed to rescind "the sale by the Association" and the purchase by the Trustee of the shares. The district court found that this rescission constituted the Trustee's rejection of the stock, which in turn required Brophy and Gaubert to return to the Association all proceeds received by them in the transaction. Their failure to do so was held to constitute a breach of contract.[4]

We conclude that summary judgment was improperly granted on this breach of contract claim, first, because it cannot be held as a matter of law that the shareholders and Independent American were in privity of contract for the sale/purchase of Independent American common stock. The summary judgment evidence on this subject has already been discussed; there remains a genuine issue of material fact as to whether Independent American actually purchased stock from Appellants and, concomitantly, whether Independent American was a party to the stock transmittal form from Gaubert and Brophy upon which the FDIC now sues.

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[4] Independent American did not allege breach of contract in its original complaint, although it alleged numerous grounds for recovery, including violation of FSLIC regulations, violation of federal securities laws, breach of fiduciary duty, common law fraud, violation of § 2.03 of the Texas Savings and Loan Act, violation of the Texas Business Corporation Act, and violation of the RICO Act. The FDIC, after it succeeded to Independent American as Plaintiff, added this breach of contract theory along with two or three additional grounds for recovery.

Second, to hold that this summary judgment evidence establishes a breach of contract as a matter of law reads too much into the language lifted from the transmittal form. Interpreting the language of a contract, if there is no ambiguity, is a question of law for the Court. Koch Industries, Inc. v. Sun Co., 918 F.2d 1203, 1208 (5th Cir. 1990); Matter of Topco, Inc., 894 F.2d 727, 738 (5th Cir. 1990), reh'g denied, en banc, 902 F.2d 955 (5th Cir. 1990); Browning v. Navarro, 743 F.2d 1069 (5th Cir. 1984), reh'g denied, en banc, 747 F.2d 1465 (5th Cir. 1984). In Koch Industries this Court stated:

> In construing the agreement, certain canons of construction are to be borne in mind. The court's role is to effectuate the intent of the parties. In so doing, we must assume that the language the parties used explains their intent. Extrinsic evidence of the facts and circumstances surrounding the making of the agreement may be used to interpret the contract in light of the parties' true intentions. Benson v. Jones, 578 S.W.2d 480, 484 (Tex. Civ. App. 1979, writ ref'd n.r.e.). "Language should be given its plain grammatical meaning unless it definitely appears that the intention of the parties would thereby be defeated." Reilly v. Rangers Management, Inc., 727 S.W.2d 527, 529 (Tex. 1987). Finally, "courts should examine and consider *the entire writing* in an effort to harmonize and give effect to *all the provisions* of the contract so that none will be rendered meaningless." Coker v. Coker, 650 S.W.2d 391, 393 (Tex. 1983).

Koch Industries at 1208. (Emphasis in original.)

In applying these well-recognized rules, the transmittal form must be construed in the context of the stock purchase offer to which it was related, namely, an offer dated in mid-October, 1985,

which by its express terms was to "remain open until 5:00 o'clock p.m., Dallas, Texas time, on October 31, 1985." Moreover, ordinary meaning must be given to the words requiring that the certificates be returned "as soon as practicable" if the shares were "not accepted by the Trustee for any reason." If the Trustee should for any reason not accept the shares, then the Trustee was clearly obliged by this language to return the shares *as soon as practicable*, and impliedly had no obligation to pay for them. There may be a number of reasons for an offeror not to accept particular certificates of stock received in response to a tender offer. Whatever the reason, however, the quoted language makes plain that the Trustee must not have *accepted* the shares and that at least some timeliness in returning the shares is required. Koch, 918 F.2d 1203, 1209 n.3, *citing* M.J. Sheridan & Son Co. v. Seminole Pipeline Co., 731 S.W.2d 620, 622 (Tex. Ct. App. 1987); Heritage Resources, Inc. v. Anschutz Corp., 689 S.W.2d 952, 955 (Tex. Ct. App. 1985).

Gaubert and Brophy were not parties to the September 30, 1986 rescission agreement. We conclude that the rescission agreement between Independent American and the Trustee is insufficient to constitute, as a matter of law, a refusal by the Trustee "to accept" the tendered shares as that term was used in the transmittal form. The summary judgment evidence reflects that the Trustee's supposed refusal "to accept" the shares, occurred on September 30, 1986, some nine months after the Trustee had become the record owner and holder of a certificate for 181,438 shares in

Independent American, including all of the shares surrendered and sold by Gaubert and Brophy nearly a year before. In view of this summary judgment evidence, we find that Gaubert and Brophy cannot be held liable, as a matter of law, for breach of the clause quoted from the transmittal form by reason of their failure to repay the purchase price of their stock after September 30, 1986, when Independent American and the Trustee bilaterally rescinded their own agreement. This is not to say that the FDIC may not show itself entitled to recover on one or more of a number of claims it has pled and may prove at trial. Our holding is simply that the FDIC has not established a right to recover as a matter of law on its breach of contract claim based on this clause in the stock transmittal form. Accordingly, because the summary judgment cannot be sustained on either of the grounds upon which it was granted, the cause is

REVERSED and REMANDED.