

IN THE UNITED STATES COURT OF APPEALS  
for the Fifth Circuit

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No. 94-50306  
(Summary Calendar)

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BILL REA INSURANCE ASSOCIATES,  
INC. ,

Plaintiff-Appellant,

versus

NATIONAL FINANCIAL SERVICES,  
CORP. , ET AL

Defendants,

GREENWAY CAPITAL CORPORATION,

Defendant-Appellee.

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Appeal from United States District Court  
for the Western District of Texas  
(M-93-CV-114)

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(March 13, 1995)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:\*

At issue is whether Greenway Capital Corporation is liable to plaintiffs, Billy F. Rea and Bill Rea Insurance Associates, Inc. (hereinafter collectively referred to as "Rea"), for the solicitation and sale of stock by Don Caban because Caban was not licensed under Texas' Blue Sky Law, VERNON'S TEX.REV.ST. ARTS.

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\* Local Rule 47.5 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

581-1 *et seq.*, at the time he referred Rea's stock purchase to Greenway. The district court found that there was no agency relationship between Greenway and Caban, and entered judgment in favor of Greenway and against Rea. We affirm.

*FACTS*

Don Caban first contacted Billy Rea on or about April 1, 1993 and, during the next four to six weeks, Rea purchased or sold shares of stock in several companies as recommended by Caban. Among these transactions were several purchases of Visual Cybernetics Corporation stock. Caban placed the first few orders through Allied Capital Corporation, which used Broadcort Capital Corporation as its clearing firm. Caban placed the final order through Greenway Capital Corporation, which used National Financial Services Corporation as its clearing firm.<sup>1</sup> These transactions are detailed as follows:

On April 16, 1993, Rea authorized Caban to purchase 10,000 shares of Visual Cybernetics for his personal account. Rea then authorized Caban to purchase another 25,000 shares on May 5, 1993 for his corporate account. Each of these purchases was made through Allied Capital Corporation. The last order for Rea's account was for another 25,000 shares of Visual Cybernetics at a price of \$7.125 per share (\$178,133). Caban referred this order to Greenway and, on May 20, 1993, Greenway placed the order in the

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<sup>1</sup> Allied was unable to place this order because it had lost its clearing firm (Broadcort) and because it had been restricted from doing so by the Federal Securities Exchange Commission.

name of Rea Associates "as an accommodation" for Allied.<sup>2</sup> Allied provided to Mr. Fiorini, Greenway's Vice-President of Sales, the necessary information to establish an account on Rea's behalf, and Fiorini placed the purchase order through Greenway's clearing firm, National Financial.

Rea deposited a check as payment for the May 5 purchase, but the check bounced. On May 27, 1993, Rea wired \$161,255 to National Financial. The wire information included Rea's Greenway account number, and these funds were applied to the May 20 Greenway transaction. Rea was sued for payment of the May 5, 1993 purchase.

Bill Rea Insurance Associates, Inc. filed the instant suit against Greenway and National Financial Services Corporation, asserting, *inter alia*, that Greenway used an unregistered broker (Caban) to solicit and sell misrepresented stock to them.<sup>3</sup> Evidence adduced during a bench trial revealed that Caban was not Greenway's employee. The district court dismissed without prejudice the claims against National Financial for lack of personal jurisdiction, and entered judgment in favor of Greenway and against the plaintiffs, Billy Rea and Bill Rea Insurance Associates, Inc.

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<sup>2</sup> The district court found that Plaintiffs authorized this purchase. Rea contends that he did not authorize this transaction. Nevertheless, the question of Rea's authorization has no bearing on the narrow issue presented herein, *i.e.*, whether Caban acted as Greenway's agent such that Greenway is liable for Caban's noncompliance with Texas' Blue Sky Law.

<sup>3</sup> The Second Amended Complaint added Billy F. Rea as a plaintiff. Rea also filed complaints against Caban and against Allied, for a total of three lawsuits. However, Plaintiffs' brief for the instant appeal indicates that Caban has not been located and that Allied has disbanded.

Rea appeals, seeking to have returned to them the \$161,255 that was wired to National Financial. Rea contends that (1) the funds were wired to National Financial under the mistaken belief that National Financial was associated with Allied; and (2) the funds were intended to be used to pay for the May 5, 1993 Allied purchase and not for the subsequent Greenway purchase. Of the several issues presented at trial, the only issue presented in this appeal is the district court's determination that Caban was not an agent for Greenway for the purposes of conferring liability upon Greenway due to Caban's noncompliance with the Texas Blue Sky Law.

#### DISCUSSION

The Texas Blue Sky Law requires that a seller be registered to sell in Texas. VERNON'S REV.ST.ANN. ART. 581-12. A person who "offers or sells a security" in violation of article 581-12 is liable to the buyer for rescission of the transaction, or to damages if the buyer no longer owns the security. VERNON'S REV.ST.ANN. ART. 581-33A(1). Thus, the district court judgment is proper, unless the evidence shows that *Greenway* offered or sold the stock to Rea.

Rea contends both that Caban did not sell him the stock purchased on May 20, 1993 (i.e., Rea maintains that he did not authorize the purchase), and that Caban was Greenway's agent when he referred the Visual Cybernetics transaction to Greenway. Greenway, on the other hand, contends both that, in a May 27, 1993 conversation, Rea confirmed that Caban had sold the stock to him

and that Caban was not its agent. There is no dispute about these two facts: (1) Caban was not registered pursuant Texas Blue Sky Law, and (2) Caban was not employed by Greenway or by Allied. Rea's brief states that,

To circumvent its trading restriction, Allied Capital asked Greenway if it would place the Visual Cybernetics order as well as other orders that it was unable to place. Greenway agreed and accepted these transactions with full knowledge that Allied Capital had been restricted by its clearing broker. This arrangement continued for several weeks, until Allied Capital disbanded sometime in June 1994.

The term "agent" is defined in pertinent part as follows in VERNON'S REV.ST.ANN. ART. 581-4D:

The term "salesman" or "agent" shall include every person or company employed or appointed or authorized by a dealer to sell, offer for sale or delivery, or solicit subscriptions to or orders for, or deal in any other manner, in securities within this state, whether by direct act or through subagents; . . . .

Thus, if Caban was "employed or appointed or authorized" by Greenway, or if Caban was a subagent of Allied and Allied was "employed or appointed or authorized" by Greenway, to solicit or sell these securities, then Caban was Greenway's agent for the purposes of the Texas Blue Sky Law.

Standard of Review

Under Texas law, agency is a mixed question of law and fact. American International Trading Corp. v. Petroleos Mexicanos, 835 F.2d 536, 539 (5th Cir. 1987). Once the factfinder determines the factual relationship of the parties, the court then determines whether an agency relation exists as a matter of law based upon the

ascertained facts. Id. "In cases where facts were undisputed, we freely have reviewed such questions, but with disputed facts we often have applied the clearly erroneous rule." Id., citing Carpenters Amended & Restated Health v. Hollerman, 751 F.2d 763, 767 at n. 7 (5th Cir. 1985).

Greenway asserts that because Greenway accepted Caban's referral of the order, Caban was necessarily Greenway's agent and that Greenway should have required that Caban be properly registered. By contrast, Greenway contends that it had nothing to do with the sale; it's own properly registered personnel placed the order to accommodate Allied after obtaining sufficient information about Rea from Allied.

We find that the question of whether Greenway authorized either Caban or Allied to sell these shares is predominately a factual issue. Accordingly, shall review the district court's factual findings for clear error and then examine its conclusion of law based upon the ascertained facts.

#### Analysis

The district court heard testimony and other evidence that, on May 27, 1993, Rea confirmed the May 20, 1993 transaction and wired most of the purchase price (\$161,255 of the \$178,133 total) to Greenway's clearing firm, National Financial. The district court heard about transactions which Caban had placed through Allied, as well as about Greenway's consideration of whether to hire several Allied employees, including Caban. The court concluded that, at all times, Caban acted either as the agent

or employee of Allied or on his own behalf. On this record, we find no error in this factual determination. Thus, as a matter of law, liability cannot attach to Greenway due to any direct agency relationship between Greenway and Caban.

Rea points out that article 581-4 extends to subagents. The statute states that agents are those "authorized by a dealer to sell . . ., whether by direct act or through subagents"; the statute does not state that the subagent is deemed the *dealer's* agent. In other words, the statute provides that, if Greenway authorized Allied to deal in securities, then Allied was Greenway's agent whether Allied sold directly (e.g., through its employees) or through subagents (e.g., through Caban if he were acting in his own behalf). However, the statute does not state that under such circumstances Allied's subagent becomes the agent of Greenway. Thus, assuming arguendo that Greenway authorized Allied to sell or otherwise deal in the Visual Cybernetics stock, it would be Allied who was Greenway's agent: even if Caban was Allied's employee or subagent, article 581-4 does not make him an agent of Greenway.

For the foregoing reasons, we find no error of law in the district court judgment.

#### CONCLUSION

The sole issue herein is whether Caban acted as a seller on Greenway's behalf such that Greenway may be held liable for the fact that Caban solicited and negotiated these stock transactions in Texas even though he was not licensed to do so. The district court's factual finding was that, at the time Caban sold the Visual

Cybernetics stock to Plaintiffs, there was no employment relationship between Caban and Greenway --and no other such connection-- which would entitle Rea to obtain relief from Greenway for the fact that Caban was not registered under the Texas Blue Sky Law. This factual finding is not clearly erroneous. Moreover, we find no error in the associated legal conclusion that Caban was not Greenway's agent so as to violate article 581-12. Therefore, Rea is not entitled to relief on under article 581-33A(1) and the district court judgment is AFFIRMED.