IN THE SUPREME COURT OF GUAM

TAKAGI & ASSOCIATES, INC.,
Plaintiff-Appellee,

v.

INTERNATIONAL INSURANCE UNDERWRITERS,
Defendant-Appellant.

Supreme Court Case No.: CVA04-026
Superior Court Case No.: CV2010-00

OPINION

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Appeal from the Superior Court of Guam
Argued and submitted on August 17, 2005
Hagåtña, Guam

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice; FRANCES M. TYDINGCO-GATEWOOD, Associate Justice; ROBERT J. TORRES, JR., Associate Justice.

CARBULLIDO, C.J.:

[1] Defendant-Appellant International Insurance Underwriters, Inc. ("IIU") appeals from the trial court's Findings of Fact and Conclusions of Law following a *de novo* appeal of a small claims trial to the bench. The trial court held that a broker was obligated under the terms of their contract to return a commission it earned to the insurer because the insurance premium had been returned by the insurer to the insured. We reverse.

I.

[2] International Insurance Underwriters,[1] a broker, was selling policies for an insurer, Plaintiff-Appellee Takagi & Associates, Inc. ("Takagi") and its underwriter, Dai-Tokyo Fire & Marine Insurance Co., Ltd. In 1995, IIU arranged for the sale of a Takagi worker's compensation policy to Pacific Drilling, Inc. ("PDI"). Takagi provided worker's compensation insurance for PDI for 1995, 1996 and 1997.

[3] PDI eventually became aware that Takagi had erroneously calculated its premiums for the years of coverage. PDI filed suit against Takagi for return of premiums paid for the worker's compensation policies it purchased through IIU. The basis of the lawsuit was that the premiums were erroneously calculated. PDI alleged that the premiums for the worker's compensation policy were calculated at the rate for workers in high risk jobs (such as heavy equipment operators) instead

[1] Despite the name, there is no evidence that IIU ever underwrote any policies; IIU acted only as a broker in the transactions that gave rise to this lawsuit.

of the jobs which they in fact occupied, which were low risk jobs (such as cook helpers and minimum wage laborers). PDI alleged that Takagi intentionally used wrong categories which resulted in higher premiums. PDI did not name IIU in the lawsuit.

[4] Six months later, PDI and Takagi entered into a Settlement Agreement and Release of All Claims. In this agreement, Takagi agreed to return all the excess premiums paid for the worker's compensation policies, totaling $38,779.00, plus $3,000.00 in attorney's fees. In the recitations of the settlement agreement, it states, "[p]ayment is not to be construed as an admission of liability by Releasees [Takagi] or anyone else." Appellee's Supplemental Excerpts of Record ("SER"), at 10 (Settlement Agreement and Release of All Claims).

[5] When the check for $38,779.00 was tendered to PDI, it stated that it was for "Return Premium" on three policies: WC-00298, WC-00410, and CGL-00353. Appellee's SER, at 12 (Copy of T & A settlement check no. 2068 payable to PDI for $38,779.00).

[6] After this settlement concluding the litigation with PDI, Takagi sued IIU in the Small Claims Division of the Superior Court to recover the 15% commission it had paid IIU on PDI's worker's compensation premiums, totaling $2,966.55. The Small Claims Referee entered judgment in favor of Takagi in the small claims case in the full amount of $2,966.55, plus $86.33 filing fees. The case was appealed to the Superior Court of Guam.

[7] The Superior Court entertained the dispute in a trial *de novo* as required by statute, 7 GCA § 4206, and Rule 92 of the Guam Rules of Civil Procedure for the Superior Court of Guam. The bench trial was held on October 18, 2002. At the conclusion of trial, the court took the matter under advisement. The court later entered a Findings of Fact and Conclusions of Law on September 9, 2004, entering judgment for plaintiff Takagi in the amount of $2,966.55 commission and $86.33 for

filing fees. The judgment was entered on the docket on October 15, 2004. That decision is now on appeal to this court.

[8] IIU appeals the Superior Court's findings, alleging error in the Superior Court's finding that the premium had to be returned under the contract. IIU concedes, "if the original premium was an *overcharge* as claimed by PDI, then IIU would be contractually liable to return its commission" and "when there is a cancellation in coverage, a premium must be refunded pro rata for that period of time when the insurance coverage is cancelled . . . and . . . [s]ince the Broker is only entitled to a commission on a [sic] 'fully paid' policies, and not more, the commission must be refunded as well." Appellant's Reply Brief, at 4, 5 (July 5, 2005).

II.

[9] We have jurisdiction over this appeal from a final judgment pursuant to 48 U.S.C. § 1424-1(a)(2) (Westlaw through P.L. 109-169 (2006)) and 7 GCA § 3107(b) and § 3108(b) (2005).

III.

[10] This matter proceeded as a bench trial in the Superior Court, followed by the issuance of Findings of Fact and Conclusions of Law. The standard of review for findings of fact is clearly erroneous, and is highly deferential. *In re Application of Leon Guerrero*, 2005 Guam 1 ¶ 15. The conclusions of law made by a court following a bench trial are reviewed *de novo*. *Guam United Warehouse Corp. v. DeWitt Transp. Servs.*, 2003 Guam 20 ¶ 13.

IV.

[11] The issue in this case is whether the trial court erred in finding that a broker was obligated under the contract to return a commission to the insurer earned on an insurance premium that the insurer returned to the insured.

[12] The agreement between the parties contains three provisions which are relevant to a discussion on the return of commissions:

> VIII. **T & A** shall pay the **BROKER** commissions due as provided in the attached commission schedule only on fully paid policies. . .
>
> IX. Should there be a return premium brought about by a cancellation, the return premium shall be forwarded through the **BROKER**.
>
> X. On over-payment of commission brought about by a return premium, **T & A** shall make the necessary adjustment by deducting corresponding amount of return commission from the monthly payment of commissions as indicated under Item VIII.

Appellee's SER, at 1-3 (Broker's Agreement). The trial court found that "[i]n this case, premiums were returned to PDI which resulted in an over-payment [on] commission to [IIU]." Appellant's Excerpts of Record ("ER"), Tab 5, at 5 (Findings of Fact and Conclusions of Law). In so holding, the trial court concluded as a matter of law that since the premiums had been returned, despite there not being a confession of liability, there was an overpayment. IIU argues that there could not have been an "overpayment" because there was no confession of liability. Appellant's Opening Brief, at 4 (May 24, 2005).

[13] Takagi argues that this court may uphold the trial court's findings on four grounds. (1) The language of the brokerage contract is not ambiguous. The agreement states that commissions are to be paid on fully paid policies. Since the premium was returned, there was no fully paid policy. (2) The broker's agreement, read as a whole, contemplates that if a premium is returned as overpaid, for whatever reason, then the commission is refunded, relying on *National Union Fire Insurance Co. v. Guam Housing & Urban Renewal Authority,* 2003 Guam 19 ¶ 21. (3) Uncontradicted extrinsic evidence at trial established that it is customary in the industry to return a commission on a returned premium. Pamela A. Cruz of Takagi testified, and the trial judge made a conclusion of law, that

"return of commissions after the return of premiums is a common insurance-wide practice." Appellant's ER, Tab 5, at 6 (Findings of Fact and Conclusions of Law). Takagi argues that industry practice has been used by this court (in *Taniguchi-Ruth + Associates v. MDI Guam Corp.*, 2005 Guam 7) as an evidentiary tool to ascertain the intent of the parties in a contract. (4) Finally, the course of dealings between the parties establishes that with respect to two of the three returned worker's compensation policies, Takagi offset the returned commission against other commissions due IIU. It was only this third worker's compensation commission that could not be offset because there was an inadequate balance to offset it. Because IIU acquiesced to the offset for returned commissions with respect to the other two PDI policies, course of dealings between the parties establishes that the commission on the third policy would also be returned.

[14] IIU argues against all of the above four grounds for upholding the trial court, primarily because none of the arguments answers the crucial question: Must the commission be returned any time a premium is returned, or only when the premiums are shown to be unearned because the policies were not fully paid or because there was an overpayment of commission brought about by return premium? IIU argues that its commission was earned and the policy was fully paid: "IIU maintains that its commission was earned at the time the policy was 'fully paid,' and unless T&A proved that there was, in fact, an overpayment of premiums, no commissions need be returned." Appellant's Reply Brief, at 1 (July 5, 2005).

[15] This court begins with a review of the three clauses of the contract which may conceivably invoke the return of a premium. This is because the first place to look in interpreting a contract is the writing itself. In interpreting a contract, the language governs if it is clear and explicit and is not involving absurdity. *Ronquillo v. Korea Auto, Fire, & Marine Ins. Co.,* 2001 Guam 25 ¶ 10 (citing

18 GCA § 87104) (2005)). Generally, with a written contract, the intent of the parties is ascertained from the writing alone. Title 18 GCA § 87105 (2005); *see also Camacho v. Camacho*, 1997 Guam 5 ¶ 33. If the agreement addresses the return of a commission, then the agreement will control, and resort to industry practice and to course of dealings is not suitable.

[16] First, Paragraph VIII provides, "**T&A** shall pay the **BROKER** commission due as provided in the attached commission schedule only on fully paid policies." Appellee's SER, at 2 (Broker's Agreement). The commission was paid and the policies, at one time, were fully paid. Therefore, this clause does not work to invoke a return of the commissions. Though the premiums were returned, they were fully paid at the time the policies were in effect. This is so because if there had been an accident during the years in which the policies were in effect, the accident would have been covered. The policies were paid for and in effect. Therefore, looking at the strict language of Paragraph VIII, the broker earned the commissions because the policies were fully paid.

[17] The trial court found that the policies were "not 'fully paid.'" Appellant's ER, Tab 5, at 5 (Findings of Fact and Conclusions of Law). This finding of fact is in clear error because, as stated above, had a claim arisen, the policies were in effect, and a claim would have been covered. The facts presented at trial showed that the policies were paid, though the premiums were later returned. They were, nonetheless, fully paid policies. Because they were fully paid policies, Paragraph VIII provides that the commissions were earned.

[18] Next, Paragraph IX provides, "Should there be a return premium brought about by a cancellation, the return premium shall be forwarded through the **BROKER**." Appellee's SER, at 2 (Broker's Agreement). Since there was no cancellation, it cannot be said that the return of a premium was brought about by a cancellation. The policies remained in effect in 1995, 1996 and

1997. Parts of the premiums paid for the policies were returned. However, this did not trigger a cancellation; if there had been a claim under the policies, it would have been honored. For this reason, we find that Paragraph IX does not apply to this situation because there was no cancellation.

[19] Finally, we look at Paragraph X. This provides, "On over-payment of commission brought about by a return premium, **T&A** shall make the necessary adjustment by deducting corresponding amount of return commission from the monthly payment of commissions as indicated under Item VIII." Appellee's SER, at 3 (Broker's Agreement). We must determine whether this clause is invoked in the return of the premiums from Takagi to PDI. The "Settlement Agreement and Release of All Claims" states, "[p]ayment is not to be construed as an admission of liability by Releasees [Takagi] or anyone else" and the checks returning the premiums state "Return Premium" as the description of the purpose for the check. Appellee's SER, at 10, 12. There was a return of premiums, but did the return of the premiums bring about an "over-payment" of commission?

[20] The trial court's conclusion of law that the return of premiums resulted in an overpayment of commission stems in part from the trial courts erroneous findings of fact that the policies were not fully paid. The trial judge stated that: "A policy which is fully paid is a condition to Defendant being paid the commission due. In this case, premiums were returned to PDI which resulted in an over-payment of commission to Defendant." Appellant's ER, Tab 5 at 5 (Findings of Fact and Conclusions of Law). We do not think that this conclusion of law is supported by the facts as found by the trial court. The trial court found that premiums were returned (Findings of Fact ¶ 6), but this is not equivalent to a finding of fact that the policies were not fully paid or that there was an overpayment of commission . We recognize that the trial court's findings of fact are entitled to great deference, and in this case, there was a return premium, but there was no finding of fact that there

had ever been an overpayment of commission. From the evidence and documents, the court is unable to say that there was an overpayment. There is no document showing that there was an overpayment and no evidence presented of an overpayment. Takagi could have, in order to bring this situation within the corners of the contract, put on evidence of fraud – evidence that would show an overpayment. It could have brought in evidence of mistake without fraud, or simple wrongful calculation. But it did neither. Takagi's proof consisted of the testimony of their employee, Pam Cruz, who testified to the terms of the settlement with PDI. This does not, however, establish that there was an overpayment of commission. There is a mere return of premiums with no further explanation. The court cannot conclude that there was an overpayment of commission brought about by a return premium as contemplated by Paragraph X of the contract between the parties. This is a conclusion of law which, because we review *de novo*, we find was in error. Returned premiums do not automatically mean there was an overpayment; this is the error we now reverse. In order for there to be a return commission Takagi must prove not only that there was a return premium but that there was an overpayment of commissions brought about by the return premium. Takagi failed to prove the latter.[2]

[21] Therefore, this court agrees with IIU, that though Takagi has presented four grounds for affirming the trial court, in fact, the four corners of the contract do not contemplate that the fully paid commissions are returnable for any reason. Takagi argues that we should read the Broker's

[2] A simple hypothetical shows the flaw in assuming that an overpayment of commission is always brought about by a return premium necessarily permitting the Insurer to deduct the return commission from future payments due in accordance with Section X of the Contract. If Broker, entitled to a 15% commission on a $100 premium, was initially paid only $12 of the $15 owed and there was a return premium of $10 (resulting in Broker being entitled to a commission of $13.50 instead of $15), there has not an overpayment of commission even though there was a return premium, because Broker has not yet been fully paid under the Contract. Broker would still be owed $1.50 of the $13.50 commission due after the return of premium. The mere fact that there was a return premium does not mean there was an overpayment of commission. In order for Insurer to deduct any amounts from future commissions, Insurer would still have to prove that there was an overpayment of commission brought about by the return premium, which the Insurer in the hypothetical obviously could not here. Similarly Takagi did not offer any proof that there was an overpayment of commission.

Agreement as a whole, reading Paragraph VIII ("commission . . . [paid] only on fully paid policies") with Paragraph IX (addressing a return premium brought about by cancellation), and Paragraph X (return of commission on return of premium). Takagi, relying on *GHURA*, 2003 Guam 19 ¶ 21, argues that it contemplates that if a premium is returned as overpaid, for whatever reason, then the commission is refunded. However, the contract, read as a whole, does not reveal such implied promises. The contract, read as a whole, permits the return of commissions on policies that are not fully paid (¶ VIII), on policies that are cancelled (¶ IX) or on overpayment of commission brought about by a return premium (¶ X). There was no evidence presented to the trial court that any of the clauses permitting a return of premiums was triggered, and the conclusion of law that there was an overpayment is not supported by the record.

[22] The ultimate question is: does any return of premiums trigger a return of commission? Or, does the return of a commission have to rest on a ground contemplated by the parties in the contract? We think it is the latter. The return of a commission cannot be on just any ground. This would not only allow secret dealings between the parties,[3] it would also do injustice to the parties' agreement. If Takagi and IIU had wanted all commissions adjusted upon refund of any premium whatsoever, they would have so contracted. However, this is not what the parties agreed upon. The parties provided for the return of a commission on an "overpayment," not on a return of a premium at any time for any reason. There is simply no evidence that there was an overpayment, despite the fact that there was an eventual return of premium. For this reason, we do not agree with the trial court.

[23] Therefore, since the four corners of the contract address the situation in which a commission is returned, there was no need to look to industry practice or custom, or any other extrinsic evidence

[3] Theoretically, an Insured and an Insurer could arrange for the purchase of an insurance policy via a broker, who earns 15% commission. If a commission had to be returned no matter what the circumstances, then theoretically an unscrupulous insurer could contrive to accept the premium back from the insured, thus requiring the return of the 15% commission, and the unscrupulous insured and insurer could continue with their insurance contract, having saved themselves 15%.

and the trial court erred. As we held in *Guam United Warehouse*, 2003 Guam 20 ¶ 24, if the language of the "four corners of the contract is unambiguous, then a court does not resort to extrinsic evidence of the contract's meaning." The agreement provides that commissions are due on fully paid policies and these policies were fully paid and were not cancelled. The agreement here further provides that on overpayment of commissions bought about by a return premium, Takagi shall make the necessary adjustment by deducting the amount from future commissions. There is simply no evidence of an overpayment and this provision does not apply .

V.

[24] We therefore **REVERSE** the ruling of the trial court that Takagi was entitled to a refund of the commission that it had paid IIU, and **REMAND** for entry of judgment in favor of IIU .