

Affirmed and Memorandum Opinion filed March 8, 2011.



In The

Fourteenth Court of Appeals

NO. 14-09-00809-CV

BEN SILVA, Appellant

V.

RELIANT ENERGY POWER GENERATION, INC., Appellee

**On Appeal from the 11th District Court
Harris County, Texas
Trial Court Cause No. 2008-45068**

MEMORANDUM OPINION

The owner of an energy-equipment brokerage business challenges the trial court's summary judgment dismissing his claims against an equipment seller. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Appellant Ben Silva, the owner of an energy-equipment brokerage business, brought suit against appellee Reliant Energy Power Generation, Inc. seeking to recover a commission that Reliant allegedly owed him under a Turbine Brokerage Agreement executed in August 2007 ("Agreement"). Under this agreement, Reliant appointed Silva as its agent to promote and assist in the sale of certain turbines ("Equipment"), and the

parties agreed that Silva would be entitled to a commission under certain circumstances. During the term of this agreement, Reliant sold the Equipment to Turbine Energy Solutions, LLC. Silva sought a commission based upon this sale and sent an invoice to Reliant. Rejecting the invoice, Reliant refused to pay Silva any commission.

Silva sued Reliant seeking to recover a commission under the Agreement and asserting that Reliant breached this contract.¹ Reliant moved for summary judgment asserting that, as a matter of law, certain conditions precedent to Silva's recovery of a commission had not been satisfied. In support of its summary-judgment motion Reliant attached the Agreement and excerpts from Silva's deposition testimony. Reliant also asserted that there was no evidence that the conditions precedent to Silva's recovery of a commission under the Agreement had been satisfied or waived. In response, Silva moved for a continuance of the summary-judgment hearing, claiming he needed to obtain documents from Turbine Energy pertaining to the sale of the Equipment as well as testimony from the president of Turbine Energy. Nonetheless, Silva filed a summary-judgment response and attached summary-judgment evidence.

The trial court granted Reliant's summary-judgment motion and rendered a take-nothing judgment against Silva. On appeal, Silva asserts that the trial court should have granted his motion to continue the summary-judgment hearing so that he could obtain additional discovery. In addition, Silva challenges the trial court's summary judgment in favor of Reliant as to Silva's breach-of-contract claim.

II. STANDARDS OF REVIEW

In a traditional motion for summary judgment, if the movant's motion and summary-judgment evidence facially establish its right to judgment as a matter of law,

¹ Silva also pleaded a promissory-estoppel claim. Reliant asserted traditional and no-evidence grounds for summary judgment against both of Silva's claims. But Silva did not address Reliant's arguments pertaining to promissory estoppel in responding to the summary-judgment motion, nor does Silva challenge on the appeal the trial court's dismissal of his promissory-estoppel claim. Therefore, we do not address promissory estoppel in this opinion.

the burden shifts to the nonmovant to raise a genuine, material fact issue sufficient to defeat summary judgment. *M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000). In reviewing a no-evidence summary judgment, we ascertain whether the nonmovant pointed out summary-judgment evidence raising a genuine issue of fact as to the essential elements attacked in the no-evidence motion. *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 206–08 (Tex. 2002). In our de novo review of a trial court’s summary judgment, we consider all the evidence in the light most favorable to the nonmovant, crediting evidence favorable to the nonmovant if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not. *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006). The evidence raises a genuine issue of fact if reasonable and fair-minded jurors could differ in their conclusions in light of all of the summary-judgment evidence. *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755 (Tex. 2007). When, as in this case, the order granting summary judgment does not specify the grounds upon which the trial court relied, we must affirm the summary judgment if any of the independent summary-judgment grounds is meritorious. *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872 (Tex. 2000).

III. ANALYSIS

A. Denial of Continuance

Silva asserts that the trial court erred in denying his motion for a continuance. Silva has not provided any legal authorities in support of this argument. We conclude that Silva has failed to adequately brief his contention that the trial court erred in denying his motion for continuance. Therefore, Silva has waived this complaint. *See* TEX. R. APP. P. 38.1(i); *San Saba Energy, L.P. v. Crawford*, 171 S.W.3d 323, 338 (Tex. App.—Houston [14 Dist.] 2005, no pet.) (holding that, even though courts interpret briefing requirements reasonably and liberally, parties asserting error on appeal still must put forth some specific argument and analysis citing the record and authorities in support

of the parties' argument). Accordingly, we overrule Silva's challenge to the trial court's denial of his motion for continuance.²

B. Summary Judgment as to the Contract Claim

Reliant sought summary judgment on the ground that the conditions precedent for Silva's recovery of a commission had not been satisfied as a matter of law. Reliant asserted that Turbine Energy was not a "Broker's Buyer" as defined in the Agreement. In pertinent part, the Agreement provides as follows:

This is an exclusive agreement. Notwithstanding such exclusivity, this Agreement does not preclude [Reliant] from selling the Equipment to any of the parties, or affiliates of the parties set forth in Exhibit 2 without any consent of or obligations to [Silva]. As such, [Reliant] shall be free and without any obligations to [Silva] to advertise, market, solicit, enter into contracts or engage in negotiations with the parties set forth In exhibit 2 or their affiliates regardless of geographical location, and shall be free to consummate a transaction on the sale of the Equipment worldwide with anybody at any time Without notifying [Silva].

...

[Silva's] responsibilities under this Agreement shall be to use diligent efforts to secure prospective buyers for the Equipment as further set forth in Exhibit 3. A prospective buyer who (i) is first identified to [Reliant] by [Silva] and (ii) with whom [Reliant] subsequently signs a confidentiality agreement and engages in negotiations on the sale of the Equipment shall be deemed to be a Broker's buyer (the "Broker's Buyer"). For the avoidance of doubt, the parties set forth in Exhibit 2 have directly or through [Reliant's] other brokers discussed the purchase of the Equipment with [Reliant] and such parties shall in no event be deemed a Broker's Buyer. For purposes of registering the Broker's Buyers under this Agreement, [Silva] shall submit to [Reliant] in writing the name, address, and contact information of Broker's Buyer as well as information pertaining to the project for which the Equipment is being considered. In addition, [Silva] shall take reasonable measures to review such project and

² Even if we were to address the merits of this issue, we would conclude the trial court did not abuse its discretion by denying Silva's motion for continuance.

qualifications of Broker's Buyer to determine the ability of Broker's Buyer to close the Transaction.

...

Upon closing and funding of the Transaction with a Broker's Buyer, which shall be deemed to have occurred when (i) [Reliant] has received from the Broker's Buyer payment representing the full purchase price for the Equipment (the "Closing"), and (ii) circumstances referred to in (i) preceding shall have occurred prior to the expiration of the Term of this Agreement, [Silva] shall have a right to receive from [Reliant] and [Reliant] shall be liable to pay to [Silva] a commission (the "Brokerage Fee"), payable as described below. In this connection, it is understood that each of the circumstances respectively referred to in (i) and (ii) of the preceding sentence shall constitute a condition precedent to the obligation of [Reliant] to pay [Silva] the Brokerage Fee; and, accordingly, in the absence of the fulfillment of any one or more of such conditions precedent, [Reliant] shall have no liability to [Silva] for any amount irrespective of why any one or more of the aforesaid circumstances constituting such condition precedent may not have been fulfilled including, without limitation, defects in title or default of the buyer or default of [Reliant]. The Brokerage Fee shall be the sole compensation of [Silva] for the services rendered in connection with consummation of the Transaction with the Broker's Buyer.

The Brokerage Fee shall be paid in US\$ in the amount of two percent (2.0%) of the full purchase price for the Equipment received by [Reliant] from a Broker's Buyer. For example should the full purchase price for the Equipment be Thirty Million Dollars, [Silva] will receive Six Hundred Thousand Dollars (\$600,000.00) as the Brokerage Fee. The Brokerage Fee will be paid within ten (10) working days after satisfaction of all conditions precedent and [Reliant's] receipt of the invoice from [Silva] for the Brokerage Fee.

...

It is clearly understood by the Parties that neither the Brokerage Fee nor any other compensation or reimbursement of any kind shall be payable by [Reliant] to [Silva] if the Closing on the Transaction does not occur.

In construing contracts, our primary concern is to ascertain and give effect to the intentions of the parties as expressed in the contract. *Kelley-Coppedge, Inc. v. Highlands*

Ins. Co., 980 S.W.2d 462, 464 (Tex. 1998). To ascertain the parties' true intentions, we examine the entire agreement in an effort to harmonize and give effect to all provisions of the contract so that none will be rendered meaningless. *MCI Telecomms. Corp. v. Tex. Utils. Elec. Co.*, 995 S.W.2d 647, 652 (Tex. 1999). Whether a contract is ambiguous is a question of law for the court. *Heritage Res., Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996). A contract is ambiguous when its meaning is uncertain and doubtful or is reasonably susceptible to more than one interpretation. *Id.* But, when a written contract is worded so that it can be given a certain or definite legal meaning or interpretation, it is unambiguous, and the court construes it as a matter of law. *Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 157 (Tex. 2003). We cannot rewrite the Agreement or add to its language under the guise of interpretation. *See American Mfrs. Mut. Ins. Co.*, 124 S.W.3d at 162. Rather, we must enforce the Agreement as written. *See Royal Indem. Co. v. Marshall*, 388 S.W.2d 176, 181 (Tex. 1965).

Under the Agreement's unambiguous language, Silva is not entitled to any compensation from Reliant unless the Equipment is sold to a "Broker's Buyer," a term defined as "[a] prospective buyer who (i) is first identified to [Reliant] by [Silva] and (ii) with whom [Reliant] subsequently signs a confidentiality agreement and engages in negotiations on the sale of the Equipment." As a matter of law, Silva was not entitled to any compensation under the Agreement unless the Equipment was sold to a buyer who was first identified to Reliant by Silva. Silva testified at his deposition that Turbine Energy was not a contact that was first identified to Reliant by Silva, and the summary-judgment evidence proves this proposition as a matter of law.³ The summary-judgment evidence established as a matter of law that Reliant sold the Equipment to Turbine Energy and that Turbine Energy was not a "Broker's Buyer." Therefore, Silva was not entitled to any compensation under the Agreement as a matter of law, and the trial court correctly granted summary judgment as to Silva's breach-of-contract claim. *See SAS*

³ Silva also testified that he did not register Turbine Energy as a "Broker's Buyer" and that Reliant had contacted Turbine Energy on its own.

Institute, Inc. v. Breitenfeld, 167 S.W.3d 840, 841–42 (Tex. 2005) (enforcing unambiguous provisions of commission contract as a matter of law on summary judgment) (per curiam).

Silva asserts that the Agreement was “an exclusive agreement.” But, a statement in the Agreement that it is exclusive does not, by itself, mean that Silva is entitled to a commission upon any sale of the Equipment, even to a buyer that Silva has not identified. *See Alba Tool & Supply Co. v. Industrial Contractors, Inc.*, 585 S.W.2d 662, 664–65 (Tex. 1979). The fact that a person is an exclusive agent, by itself, does not deprive the principal of the right to sell without paying a commission to the agent. *See id.* This court must give effect to the unambiguous language of the Agreement as to whether Silva is entitled to compensation under the Agreement, and Silva’s status as an exclusive agent does not alter the unambiguous language requiring a sale to a “Broker’s Buyer” before Silva is entitled to any compensation under the Agreement.

Silva also notes two sentences in the Agreement, in which the parties state that Reliant can sell the Equipment to any entity listed on Exhibit 2 or any of their affiliates, without any obligation to Silva. Silva asserts that this part of the Agreement reflects the parties’ agreement that Silva will be compensated on sales to any entity other than an entity listed on Exhibit 2 or an affiliate of such an entity. Turbine Energy is not listed on Exhibit 2, and there is no evidence that it is an affiliate of any entity listed on that exhibit. But, stating that Reliant can sell to certain entities without owing any compensation to Silva does not necessarily mean that Reliant must pay compensation to Silva upon a sale to any other entity. The part of the Agreement dealing with the “Brokerage Fee” unambiguously states that (1) Silva is not entitled to any compensation from Reliant unless the Equipment is sold to a “Broker’s Buyer”; (2) the foregoing requirement is a condition precedent to Reliant’s obligation to pay Silva a “Brokerage Fee”; (3) absent fulfillment of this condition precedent, Reliant shall have no liability to Silva; and (4) it is clearly understood by the parties that neither the “Brokerage Fee” nor any other compensation of any kind shall be payable by Reliant to Silva if the “Closing” does not

occur, and this “Closing” is defined as a closing of a transaction with a “Broker’s Buyer.” The statement that Reliant did not have to pay a “Brokerage Fee” if it sold to certain specified entities did not change or conflict with the condition precedent that the Equipment be sold to a “Broker’s Buyer” before Reliant owed Silva any compensation.

Silva also notes that, in the Equipment Purchase and Sale Agreement between Reliant and Turbine Energy, Reliant represented to Turbine Energy that, except for Silva, Reliant had not employed any broker in connection with the sale of the Equipment, and Reliant indemnified Turbine Energy against any claim by Silva for compensation. Silva correctly quotes this contract; however, Silva is not a party to that contract and he has not sought to recover under that contract. In addition, the cited language does not state that Reliant owed or would owe Silva any compensation based on the sale of the Equipment to Turbine Energy.

Silva also asserts arguments regarding the parties’ intent based on draft agreements and proposals from before the execution of the Agreement. The Agreement is an unambiguous contract, which we enforce as written, and parol evidence, such as that cited by Silva, cannot be used to create an ambiguity or to give the Agreement a meaning different from that which its language imports. *See David J. Sacks, P.C. v. Haden*, 266 S.W.3d 447, 450–51 (Tex. 2008) (per curiam).

Under the applicable standards of review, Reliant was entitled to summary judgment as to Silva’s contract claim under both its traditional and no-evidence grounds.

Having addressed all of Silva’s arguments, we overrule his appellate issue and affirm the trial court’s judgment.

/s/ Kem Thompson Frost
Justice

Panel consists of Justices Anderson, Frost, and Brown.