

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

OCT 31 2007

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

SERVICIOS AEREOS DEL CENTRO
S.A. DE C.V.,

Plaintiff - Appellant,

v.

HONEYWELL INTERNATIONAL, INC.,
a Delaware corporation,

Defendant - Appellee,

And

DALLAS AIRMOTIVE, INC.,

Defendant.

No. 05-16988

D.C. No. CV-03-01993-JWS

MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona

John W. Sedwick, District Judge, Presiding

Argued and Submitted October 17, 2007
San Francisco, California

Before: HUG, W. FLETCHER, and CLIFTON, Circuit Judges.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Servicios Aereos del Centro S.A. de C.V. (“SACSA”) appeals a summary judgment entered by the district court in favor of Honeywell International, Inc. We affirm.

The authority cited by SACSA to support its argument that resolution of the materiality of a breach of contract is inappropriate on summary judgment, *Foundation Dev. Corp. v. Loehmann’s, Inc.*, 788 P.2d 1189, 1197-98 (Ariz. 1990) (en banc), does not support that proposition, because the court in that case affirmed just such a summary judgment, in that instance a conclusion that a given breach was immaterial. SACSA failed to make payments not only when those payments were initially due under the terms of the contract, but also by the deadline subsequently set by Honeywell for SACSA to avoid contractual termination. Honeywell gave proper notice that it intended to strictly enforce the termination deadline. The district court properly concluded, applying the relevant factors, that the breach here was material and that there was no genuine issue of material fact as to that issue. *See* Restatement (Second) of Contracts § 241.

Honeywell’s prior acceptance of late payments did not waive its right to terminate the contract in this instance. SACSA had previously always paid Honeywell before the announced termination deadline, but it failed to do so this time. *See Dorn v. Robinson*, 762 P.2d 566, 572-73 (Ariz. Ct. App. 1988).

Honeywell also withdrew any arguable waiver by giving SACSA notice that it intended to strictly enforce the termination deadline. *See Ariz. Title Guar. & Trust Co. v. Modern Homes, Inc.*, 330 P.2d 113, 115 (Ariz. 1958). To the extent that Honeywell's actions at the time could be taken to constitute a further waiver, such a waiver was conditioned upon SACSA's subsequent payments being made by certain specified dates – a condition which SACSA acknowledges it neither accepted nor adhered to. Honeywell's brief forbearance upon being contacted by SACSA after the August 22 termination deadline had passed was not sufficient to create a genuine issue of material fact as to whether Honeywell had waived its right to terminate the contract if the remaining payments were not made pursuant to the schedule.

AFFIRMED.