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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES FIDELITY AND  
GUARANTY COMPANY,

Plaintiff - Appellee,

v.

SOCO WEST, INC., aka Brenntag West,  
Inc.,

Defendant - Appellant,

and

STINNES CORPORATION;  
BRENNTAG HOLDING NV;  
BRILLIANT NATIONAL; BRILLIANT  
NATIONAL SERVICES, INC.,

Defendants,

v.

CONTINENTAL INSURANCE  
COMPANY,

Plaintiff-intervenor -

Appellee.

No. 07-35591

D.C. No. CV-04-00029-RFC

MEMORANDUM\*

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

Appeal from the United States District Court  
for the District of Montana  
Richard F. Cebull, District Judge, Presiding

Argued and Submitted November 21, 2008  
Seattle, Washington

Before: B. FLETCHER and RAWLINSON, Circuit Judges, and EZRA, \*\* District Judge.

Soco West, Inc. appeals the district court's grant of Judgment as a Matter of Law in favor of United States Fidelity and Guaranty Company. We find that the case was properly submitted to the jury in the first instance, and that the district court erred in dismissing the jury and entering its own judgment instead. We therefore REVERSE and REMAND.

Judgment as a Matter of Law is appropriate if "a reasonable jury would not have a legally sufficient evidentiary basis to find for the [non-moving] party." *Fed. R. Civ. P. 50(a)*. "In making this determination, a court must not weigh the evidence, but should simply ask whether the [nonmoving] party has presented sufficient evidence to support the claim." *Wallace v. San Diego*, 479 F.3d 616, 624 (9th Cir. 2007).

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\*\* The Honorable David Alan Ezra, United States District Judge for the District of Hawaii, sitting by designation.

We find that Soco West presented sufficient evidence to entitle it to a jury verdict. Although Soco's theory required the jury to draw several inferences, this is not a case with "a complete absence of probative facts." *Lavender v. Kurn*, 327 U.S. 645, 653 (1946). Inferences are permissible so long as they are not unreasonable. *Neely v. St. Paul Fire & Marine Ins. Co.*, 584 F.2d 341, 346 (9th Cir. 1978). It is the function of the jury to "settle the dispute by choosing what seems to them to be the most reasonable inference." *Lavender*, 327 U.S. at 653.

Where the district court has serious doubts as to the sufficiency of the evidence, ordering a sealed verdict is preferable to taking the case from the jury during deliberations. That way, the entire case need not be re-tried if the appeals court sustains the sufficiency of the evidence.

Accordingly, the judgment of the district court is REVERSED and the case is REMANDED for further proceedings consistent with this memorandum.