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Manuel Guevara v. Morris Air, Inc., Turmexico, John Does 1-10 : Reply Brief

Utah Court of Appeals

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DOCKET NO

MANUEL GUEVARA,

vs.

Defendant/Respondent.

Priority No. 15

APPEAL FROM SUMMARY JUDGMENT IN FAVOR OF
DEFENDANT MORRIS AIR, INC. IN THE THIRD
JUDICIAL COURT FOR SALT LAKE COUNTY, STATE OF
UTAH, THE HONORABLE SANDRA PEULER PRESIDING

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COURT OF APPEALS

MANUEL GUEVARA,)	
)	
Plaintiff/Appellant,)	
)	
vs.)	
)	
MORRIS AIR, INC., TURMEXICO,)	Appeal No. 960832-CA
and JOHN DOES 1-10, inclusive,)	
)	Priority No. 15
Defendant/Respondent.)	
)	

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III.

STATEMENT OF THE CASE

The following additional facts are relevant to points raised by the respondent/defendant Morris Air.

Defendant has asserted that the phrase in the contract, that Morris "acts as principal," applies only to "public charter trips." The travel package, which Mr. Guevara purchased from Morris, was a "public charter trip." Defendant specifically admitted this fact in its reply memorandum below, wherein it stated, "for public charter trips (such as this one) Morris Air 'acts as principal . . .'" (R. 116-17) (emphasis added).

Defendant now admits that TurMexico did more than provide ground transportation. See Resp. Br. pp. 13-14. The evidence shows that TurMexico coordinated Mr. Guevara's activities on behalf of Morris, and that providing ground transportation was part of that role. The materials provided to Mr. Guevara in connection with his trip included, among other items, a letter from TurMexico dated December 1992 (R. 84). Mr. Guevara took his trip in March of 1993. That letter advises that his "fun value package" includes a fiesta, two tours and a cruise (R. 84). It also refers to a "welcome briefing" to be conducted by TurMexico (R. 84). A TurMexico letter provided Mr. Guevara with information about checking-out of his hotel (R. 85). A TurMexico letter cautioned Mr. Guevara about time share promotions (R. 83).

IV.

ARGUMENT

The summary judgment in favor of defendant can be sustained only if one of two propositions is correct -- 1) the contract between Morris and Mr. Guevara unequivocally precludes the liability in question, or 2) the undisputed facts establish, as a matter of law, that TurMexico was not an agent or associate of Morris. Although these issues are analytically distinct, this Court should not lose sight of the broader picture here. In a more general sense, this appeal should turn upon the answer to one very basic question. Considering the facts, circumstances and contract as a whole (as they must be considered), could a reasonable person in Mr. Guevara's position have understood TurMexico to be an agent or associate of Morris? Because this question must be answered in the affirmative, summary judgment was inappropriate.

A.

The Contract, As A Whole, Does Not Preclude Liability For The Negligence Of TurMexico

Defendant argues, and the court below found, that the charter ticket unambiguously precludes vicarious liability for the negligence of TurMexico and, alternatively, that plaintiff's evidence fails to support any contrary interpretation. Both conclusions are in error as a matter of law.

1. Defendant's Interpretation of the Contract Renders Meaningless the Term "Principal."

The key provision -- but not the exclusively relevant provision -- is paragraph 13 of the charter ticket (R. 108). On appeal, Morris states that the meaning of this provision is clear, but it fails to offer a coherent interpretation which harmonizes and gives meaning to each term. See Nielsen v. O-Reilly, 848 P.2d 664, 665 (Utah 1992). Rather than ascribing any meaning to its use of the term "principal," Morris directs its efforts to "explain" that term out of the contract. The law requires construing contract provisions as a whole, not finding excuses to justify ignoring part of it. See Bailey-Allen Co. v. Kurzet, 876 P.2d 421, 424 (Utah App. 1994).

Morris' primary explanation is, that it "acts as principal" only for "public charter trips." Morris further contends, that its role as principal is limited to making arrangements with other providers which are independent contractors. The first point supports plaintiff's position, that Morris was TurMexico's principal, because this was a public charter trip. Thus, whatever role Morris has as a principal is applicable in this case. Morris' second point purports to set forth what is included in its role as principal (i.e., making arrangements with independent contractors). The flaw is that this explanation fails to ascribe any meaning or significance to the use of that term "principal." It still fails to identify who the agents are. If Morris "acts as principal,"

even in some limited capacity, it must do something in that role as a principal and, there must be agents. Merely making arrangements is not the act of a principal.

2. Defendant has Failed to Show that the Contract is Unambiguous.

One plausible interpretation of ¶ 13 is that the terms upon which Morris seeks to rely -- the disclaimer and the reference to independent contractors -- apply only "[i]n all other cases" (R. 108). That is, these terms do not apply to public charter trips, such as this one, where Morris "acts as principal." This view is certainly consistent with the structure of ¶13. Most important, it is plausible and reasonable, which is the standard for determining whether or not an ambiguity exists. See Willard Pease Oil and Gas Co. v. Pioneer Oil and Gas Co., 899 P.2d 766 (Utah 1995) ("provision is ambiguous [if] it is susceptible to more than one reasonable interpretation"); Seare v. University of Utah School of Medicine, 882 P.2d 673, 677 (Utah App. 1994) (provision is ambiguous if it "may be understood to have two or more plausible meanings"); Sparrow v. Tayce Construction Co., 846 P.2d 1323, 1327 (Utah App. 1993).

According to defendant, Sparrow, supra, is distinguishable because, there, the ambiguity related to price in a "contract for sale." See Resp. Br., p. 23.¹ Sparrow does not stand for the

¹Defendant also discusses Cox v. Cox, 877 P.2d 1262 (Utah App. 1994) as a case which plaintiff cites "as an example of an ambiguous contract." Resp. Br., p. 23. That is inaccurate.

proposition that a contract is unambiguous unless there is some sort of empirical, mathematical conflict. It holds that an ambiguity exists where, as here, there is an internal contradiction with regard to material terms. See 846 P.2d at 1327. Neither Willard Pease Oil, 899 P.2d at 772-73 nor Seare, 882 P.2d at 677 involved a numerical conflict, yet the courts in both cases held the contracts to be ambiguous. In the case at bar, Morris' relationship with the service providers and its potential liability for their acts were sufficiently important to be the subject of an entire paragraph. This is hardly a trivial or immaterial inconsistency. Moreover, a clear contradiction exists when that paragraph states that Morris "acts as principal" (in some vaguely defined manner), then purportedly disclaims that the only other entities mentioned are not agents of Morris in any respect.

Defendant's invocation of the rule, that merely stating a differing interpretation is insufficient, is rather ironic. Plaintiff agrees -- the test is not whether or not one can state "some interpretation," but whether or not that interpretation is objectively reasonable. See Willard Pease Oil, 899 P.2d at 772-73. Mr. Guevara's construction is at least as reasonable as Morris' interpretation, which fails to explain why it chose to use the term "principal." Thus, even if Mr. Guevara's and Morris' respective

Plaintiff cited Cox for the proposition that, where an agreement is set forth in more than one document, all documents must be considered in construing that agreement. See App. Br., p. 21.

interpretations are viewed in the same light, ¶ 13 is ambiguous in itself.

3. Defendant has Failed to Respond to Other Issues of Contract Interpretation.

Plaintiff raised several points to which defendant has failed to respond. There are legal presumptions which operate against the drafter of the writing and against exculpatory clauses in general. See Jones, Waldo, et al. v. Dawson, 923 P.2d 1366, 1372 (Utah 1996) (doubtful terms construed against drafter); Interwest Construction v. Palmer, 923 P.2d 1350, 1357 (Utah 1996) (exculpatory clause must be unequivocal). Under these recent Supreme Court cases, one who drafts a provision intending to limit its liability must do so in terms which are objectively clear to the other party. Morris' unilateral intent to exculpate itself is irrelevant, where the language it has chosen is confusing or unclear.²

Defendant has also declined to dispute plaintiff's assertion that the contract was not integrated, and that all documents generated by Morris were part of the agreement. See Bailey-Allen, 876 P.2d at 424; Hall v. Process Instruments and Controls, 890 P.2d 1024, 1028 (Utah 1995); Cox, 877 P.2d at 1268-69. Thus, these other documents must be considered in determining whether or not an ambiguity exists, and not merely in resolving one.

²Just as the subjective opinion of one party will not, by itself, defeat summary judgment, neither does the moving party's subjective belief in what a provision means provide a basis for granting it.

4. The Evidence Extrinsic to the Charter Ticket Is Sufficient to Create a Dispute of Material Fact.

Once the contract is shown to be ambiguous, summary judgment is proper only if the extrinsic evidence offered by the parties undisputedly establishes that the moving party's interpretation is correct. Defendant asserts that the evidence offered by Mr. Guevara was insufficient. It does not explain how or why this evidence is insufficient, except to say that the court below was of that opinion. See Resp. Br., p. 25.³ That sounds very much like asking this Court to defer to the trial court's assessment of the facts and evidence, which would not be proper. First, a trial court cannot weigh conflicting evidence on a motion for summary judgment. See Winegar v. Froerer Co., 813 P.2d 104, 107 (Utah 1991). Second, and precisely because the trial court cannot engage in fact-finding, this Court does not defer to a lower court's factual or legal conclusions on an appeal from summary judgment. See Schurtz v. BMW of N.A., 814 P.2d 1108, 1111-12 (Utah 1991). Thus, it is really no response at all to merely invoke the decision of the trial court.

What both defendant and the court below seem to have missed here is that a court, on summary judgment, can no more interpret

³Calling plaintiff's documentary evidence "brochures" is neither accurate nor persuasive. The itineraries, confirmations and letters received from Morris, which plaintiff offered as evidence, are not merely general advertising materials. Most of these were tailored to this trip. Defendant has completely failed to address the specifics of this evidence.

the meaning of an agreed-upon set of facts, than it can resolve a dispute as to such facts. See Sandberg v. Klein, 575 P.2d 1291, 1292 (Utah 1978). It is not only the underlying facts, but also the inferences to be drawn therefrom, which must be undisputed and viewed in favor of the opposing party. Id. This is why summary judgment is rarely, if ever, proper once a contract is found to be ambiguous -- because the ultimate issue is not what was said or done, but what may be inferred therefrom as to the intent of the parties. See Winegar, 813 P.2d at 107; Willard Pease Oil, 899 P.2d at 770. Unless the non-moving party has made some conclusive admission or has offered no relevant objective evidence, this is inevitably a matter for the jury.

Here, Morris offered no extrinsic evidence at all, much less an admission by Mr. Guevara that he understood and intended the contract to mean what Morris says it means. By contrast, Mr. Guevara offered specific objective evidence (Morris' own representations), from which a jury could reasonably infer that one in Mr. Guevara's position could interpret the contract as he has interpreted it. Mr. Guevara has not, as defendant claims, simply expressed an opinion as to what the contract means and expected that to suffice. Thus, summary judgment was improper because, even if both parties agree as to what occurred, there is a dispute as to what each intended and as to whether or not there was a "meeting of

the minds" as to the meaning of the provision in question. See C & Y Corp. v. General Biometrics, Inc., 896 P.2d 47, 52 (Utah App. 1995).

B.

**A Jury Could Infer From The Facts Presented
That TurMexico Was An Apparent Or Actual Agent**

Defendant relies very heavily upon the "control test," as discussed in Foster v. Steed, 432 P.2d 60, 62 (Utah 1967) and Glover v. Boy Scouts of America, 923 P.2d 1383 (Utah 1996). Such reliance is misplaced, and these cases are not controlling. The control test is completely irrelevant as to whether or not Morris held out TurMexico as an apparent agent. It is only marginally relevant to actual agency under the circumstances of this case. A factual dispute as to either (or both) types of agency precludes summary judgment.

1. Plaintiff's Evidence Shows that Morris Held out TurMexico as its Agent.

It is axiomatic, that there are two types of agency -- actual and apparent. See Luddington v. Bodenvest Ltd., 855 P.2d 204, 208-9 (Utah 1993). Actual agency derives from the relationship between the alleged principal and agent. Luddington, 855 P.2d at 208; King v. Riveland, 886 P.2d 160, 165 (Wash. 1994). In proper cases, the principal's right of control might be a critical factor. On the other hand, apparent agency derives from the relationship between the third party asserting such agency and the alleged principal.

See Luddington, 855 P.2d at 208-9; King, 886 P.2d at 165. The principal's right of control is irrelevant to apparent agency.

In the case at bar, Mr. Guevara's primary theory is apparent agency. The elements of apparent agency are: that the principal has, by acts or representations, held out the alleged agent as having authority; that the third party believed that the agent had such authority; and, that the third party relied thereon to his detriment. See Luddington, 855 P.2d at 209; see also King, 886 P.2d at 165 (third party must believe agent has authority, and such belief must be "objectively reasonable"). Here, Mr. Guevara's evidence consists, primarily, of representations by Morris indicating that TurMexico was its agent or associate.⁴ Mr. Guevara has testified that he believed TurMexico to be an agent or associate of Morris, and that he relied upon that in purchasing his ticket. Mr. Guevara's belief was objectively reasonable, as discussed in Part A, above. His reliance proved detrimental when he was injured during the course of the trip. See Greil v. Travelodge International, Inc., 541 N.E.2d 1288, 1293 (Ill. App. 1989) (principal may be vicariously liable for negligence of apparent agent). These facts are sufficient to create a jury question on the issue of apparent agency, as to which Morris' control of TurMexico has no bearing. Id.

⁴These include statements by TurMexico, which Morris ratified by transmitting them to plaintiff. In addition to its representations, Morris also "knowingly permitted [TurMexico] to assume the exercise" of responsibilities and authority indicating agency. Luddington, 855 P.2d at 209.

Like the meaning of an ambiguous contract, the issue of apparent agency is not particularly amenable to disposition on summary judgment. Again, even where the underlying facts are undisputed, the ultimate fact issue is Mr. Guevara's reliance and its objective reasonableness -- which must be inferred from those facts. Once again, defendant confuses the issue of "what is sufficient" with "what is relevant." Although Mr. Guevara's belief and reliance are not sufficient to establish apparent agency, they are relevant. Unless Mr. Guevara's understanding, that TurMexico was an agent, and his reliance thereon were unreasonable, as a matter of law, summary judgment was improper. See Sandberg, 575 P.2d at 1292. Clearly, that is not the case, and the judgment must be reversed.

2. There Exists a Factual Dispute as to Actual Agency.

Defendant incorrectly argues that actual agency cannot be proved without evidence of control. As Glover makes clear, the control test is not "the" test in every case of actual agency. 923 P.2d at 1386. It is, fundamentally, a test of whether there exists a master/servant relationship, which was applied to a franchiser/franchisee situation in Foster. Indeed, the test has its origin in workers' compensation law. See Glover, 923 P.2d at 1386. Right of control is not a prerequisite to agency in every case, but only in those cases where the alleged agency is of a master/servant nature.

Here, plaintiff has not argued that TurMexico was the servant of Morris. Indeed, plaintiff has specifically asserted, among other things, that Morris and TurMexico may have functioned as

joint venturers. See App. Br., p. 12, citing Score v. Wilson, 611 P.2d 367, 369 (Utah 1980); Strand v. Cranney, 607 P.2d 295, 296 (Utah 1980). When two companies associate in a joint venture, each is liable for the negligent acts of the other -- yet, neither pays the other a wage or tells it whom to hire and fire. Further, a general contractor may be held vicariously liable for the negligence of a subcontractor's employee. See Pate v. Marathon Steel Co., 777 P.2d 428 (Utah 1989). Although a general contractor does exercise some control over subcontractors, it does not exercise the authority to hire and fire employees. In this regard, Morris' relationship with the employee of TurMexico, who caused the harm, is wholly irrelevant. No one is alleging that the bus driver was a servant or employee of Morris -- he was an employee of Morris' agent.

Additionally, in both Foster and Glover, the defendant offered evidence in support of summary judgment, which specifically detailed the nature of their respective relationships with the alleged agents. Here, Morris has offered no such evidence. Instead, it relies upon a lack of evidence and upon its own self-serving, conclusory statements. In Foster, the defendant produced a contract spelling-out the nature of the relationship in question, and establishing that no agency existed. Here, Morris seeks to rely upon the lack of a written contract with TurMexico. That can be hardly accorded similar weight. Moreover, instead of explaining

the nature of its relationship with TurMexico, Morris is noticeably vague and reliant upon conclusory characterizations.

Such evidence might be sufficient to sustain a motion for summary judgment, but only if allowed to go unopposed. Here, plaintiff offered evidence that TurMexico actually acted on behalf of Morris with regard to welcoming travelers and coordinating their activities. Indeed, TurMexico even provided information about services provided by others, such as the hotel (R. 85). Clearly, TurMexico did more than simply provide ground transportation. Although this evidence might not be sufficient to raise an issue of fact as to actual agency in the context of the type of evidence offered in Foster or Glover, it is more than sufficient here.⁵

3. The Evidence Fails to Show That the Bus Tour, on Which Mr. Guevara was Injured, was Separate from TurMexico's Role as an Agent.

Morris admits that TurMexico served "as a representative of Morris Air in Puerto Vallarta," but claims that, much like its own role as a principal, TurMexico's agency was somehow limited. According to Morris, TurMexico's operation of the bus (which injured Mr. Guevara) was some how separate from its role as an agent. See Resp Br., pp. 13-14. As usual, this assertion is noticeably lacking in detail. Morris makes no effort to delineate the parameters of these supposedly separate roles, beyond the self-

⁵Regardless of whether or not there is an issue as to actual agency, Morris's oral and written representations create a dispute as to the separate issue of apparent agency.

serving claim that operating the bus was not part of any agency. It offers no evidence or reason in support of that claim.

The bus tour was expressly part of the vacation package which Mr. Guevara purchased from Morris and for which he paid it valuable consideration. It was operated by a party which Morris now admits had some equivocally-defined role as its representative. It was listed as part of his package, along with other items (not involving ground transportation) in a letter on TurMexico's letterhead, sent to Mr. Guevara months before the trip (R. 84). By contrast, in Glover, the injured scout's Boy Scout membership did not include the right to a ride home from the scoutmaster after a meeting. In Foster, the injured party had not purchased from Texaco the right to help the service station proprietor fix a car. Indeed, unlike the case at bar, the plaintiff in Foster had no dealings with Texaco, the alleged principal.

More fundamentally, there is clearly a jury issue on this particular point. Morris has, basically, admitted that TurMexico was more than just an independent contractor with respect to this trip. There is no evidence to support Morris' attempt to sever the bus tour from TurMexico's broader role. In coordinating activities on behalf of Morris, TurMexico transported clients to and from these activities and conducted tours, including the bus tour, during which Mr. Guevara was injured. Having established that TurMexico had an agency role of some type, it is for a jury to determine its parameters.

4. Defendant's Reliance Upon "Travel Agent" Cases is Misplaced.

Morris attempts to distinguish the cases involving "travel agents," which plaintiff has cited, on the ground that the facts in those cases are different from the facts here. That may be true, but it misses the point. These cases support two key propositions, notwithstanding any factual differences. First, they show that a defendant is not immune from vicarious liability simply because it calls itself "a travel agent." Liability depends upon what the defendant has said and done, not upon a label. Second, these cases show that summary judgment is improper where, as here, there is evidence that the defendant had a broader role than that of "travel agent."

The "travel agent" cases cited by Morris are not to the contrary. There was no vicarious liability in those cases because there was no evidence, that the so-called "travel agent" did anything more than book a trip. The key was a lack of any evidence as to a broader or different role. These cases do not, as defendant suggests, obviate the need to look at the facts just because the defendant is a so-called "travel agent." They do not pre-empt the application of standard contract and agency law in cases involving travel agents. They do not establish that the evidence offered by Mr. Guevara is inherently irrelevant or insufficient. They merely show that doing nothing more than booking a trip does not subject one to vicarious liability.

Here, there is specific evidence that Morris had a broader role than just booking a trip. The objective facts contradict Morris' claim that it was only a travel agent. Summary judgment was, therefore, improper.

V.

CONCLUSION

Defendant is correct in one respect -- Mr. Guevara's belief that TurMexico was an agent of Morris is insufficient by itself to preclude summary judgment. However, the issue here is whether or not that belief was objectively reasonable in light of the contract language and other evidence. Whether analyzed in terms of the contract, the circumstances or both, it was not unreasonable for Mr. Guevara to understand that TurMexico was an agent or associate of Morris. It was not unreasonable for Mr. Guevara to rely upon the presence of an authorized representative in Mexico, in deciding to purchase this trip. There are facts from which a jury could infer a basis for liability. That is all the court below was permitted to consider. It was not permitted to "decide" the issue. Summary judgment was, therefore, improper, and this case must be reversed and remanded for trial.

DATED this 8th day of May, 1997.

ROBERT J. DEBRY & ASSOCIATES
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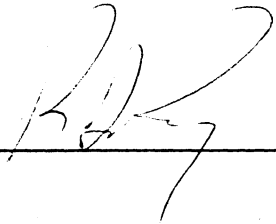
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CERTIFICATE OF MAILING

I hereby certify that two true and correct copies of the foregoing **REPLY BRIEF OF APPELLANT** (Guevara v. Morris Air) was mailed, postage prepaid, this 8th day of May, 1997 to the following:

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