1978

Debry and Hilton Travel Services, Inc. v. Capitol International Airways, Inc. : Petition for Rehearing

Utah Supreme Court

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Clark W. Sessions; Watkiss & Campbell; Attorneys for Plaintiff and Appellant;

IN THE SUPREME COURT

OF THE STATE OF UTAH

DEBRY AND HILTON TRAVEL SERVICES, INC.,	:	
Plaintiff and Appellant,	:	
vs.	:	Case No. 15219
CAPITOL INTERNATIONAL AIRWAYS, INC.,	:	
Defendant and Respondent.	:	

PETITION FOR REHEARING
AND
APPELLANT'S BRIEF IN SUPPORT OF PETITION FOR REHEARING

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CAPITOL INTERNATIONAL AIRWAYS, INC.,

Defendant and Respondent.

PETITION FOR REHEARING

The Plaintiff and Appellant, DeBry and Hilton Travel Services, Inc., respectfully petitions this Honorable Court for rehearing in the above-entitled case, pursuant to Rule 76 (e) of the Utah Rules of Civil Procedure on the grounds that the Court erroneously found that Plaintiff did not request an instruction as to the time Plaintiff's duty to mitigate arose. This finding precluded the Court's consideration of Plaintiff's contention that the trial court erred in failing to instruct the jury on this point. Such an instruction was requested, therefore the Court should grant a rehearing to determine whether or not the trial court erred in refusing to give the requested instruction.

Respectfully submitted,

CLARK W. SESSIONS
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Attorneys for Plaintiff and Appel.

APPELLANT'S BRIEF IN SUPPORT OF
PETITION FOR REHEARING

ARGUMENT

Plaintiff, DeBry, contended on appeal that the trial court erred by failing to instruct the jury as to when DeBry's duty to mitigate arose. Brief of Appellant at 14-19. The Court did not reach the merits of this contention, however, because the Court was not aware that such an instruction had been requested.

> DeBry's allegation of error concerning Instruction 28 cannot be sustained. DeBry further contends the trial court had a duty to instruct the jury as to the date when plaintiff's duty arose to mitigate the damages. DeBry urges such a date was either October 30, 1974, the date Capitol filed an answer in this action, denying there was a contract; or November 22, 1974, the date of departure of the tour, when Capitol didn't perform. A review of the record and DeBry's proposed instructions indicates DeBry did not urge such an instruction. Thus it cannot be considered for the first time on appeal. (emphasis added) DeBry and Hilton Travel Services, Inc. v. Capitol International Airways, Inc., No. 15219, August 10, 1978 at 5.

DeBry did request such an instruction, however. [illegible] requested jury instruction states in part:

> The whole concept of mitigation turns on the idea that a damaged party should pursue a course, after a breach, which is designed to assist the party in breach. (emphasis added) (R. at 609).

The position taken in the requested instruction, that there is no duty to mitigate until after breach, accurately states the applicable law:

> The duty comes into existence when the particular contract is breached, that is when the cause of action arises, even though the damages may not then have been completely ascertained. 25 C.J.S., Damages § 34 at 707.

The earliest point at which Capitol could be found to have breached the contract was on October 30, 1974, when Capitol filed an answer in this action, denying the existence of a contract. Technically, Capitol could not breach its duty to perform under the contract until the time for performance, November 22, 1974, had passed. However, the doctrine of anticipatory repudiation allows the injured party to treat an absolute, unequivocal repudiation of the contract as a present breach which can be sued upon immediately even though the time for performance has not yet arrived. Jordan v. Madsen, 69 Utah 112, 252 P. 570, 573 (1926); 22 Am. Jur. 2d, Damages § 37; 17A C.J.S., Contracts § 472(1).

Under this doctrine, Capitol's repudiation of the contract on October 30, 1974 may be considered a breach which gave rise to the duty to mitigate. Prior to October 30, 1974, there were no communications from Capitol which could qualify

as an absolute unequivocal repudiation by Capitol giving rise to a cause of action for breach of contract in DeBry.

The requested instruction is also consistent with the prior decisions of this court, which have invariably imposed a duty to mitigate only after a breach in the form of an unequivocal repudiation of the contract has occured. For exam in University Club v. Invesco Holding Corp., 29 Utah 2d 1, 504 P. 2d 29 (1972), this Court stated:

> The recognized rule is that where one party definitely indicates that he cannot or will not perform a condition of a contract, the other is not required to uselessly abide time, but may act upon the breached condition. Indeed in appropriate circumstances he ought to do so to mitigate damages. (emphasis added) Id. at 504 P. 2d 29,30.

The Defendant-lessor in University Club had a duty under the lease agreement with Plaintiff to repair or replace the faulty air conditioning system within thirty days after written demand by Plaintiff. Upon Plaintiff's request for repairs, Defendant's manager informed Plaintiff that he could not replace the air conditioning system within the agreed peri of time.

The definite statement that Defendant would not perform within the agreed period of time constituted a breach of that condition of the contract which in turn gave rise to a du to mitigate the damages caused by the breach. If Defendant ha not made a definite repudiation of his duty to perform and Plaintiff had made alternate arrangements for repairs before Defendant's time to perform had passed, Plaintiff would have

been at fault, as Defendant argued in that case.

In Casey v. Nelson Brothers Construction Co., 24 Utah 2d 14, 465 P. 2d 173 (1970), this court again imposed a duty to mitigate on the Plaintiff only after a positive statement by Defendant that Defendant would not perform under the contract. Defendant there had leased a piece of equipment from Plaintiff, but before the termination of the lease period, Defendant informed Plaintiff that he would make no further use of the equipment and ordered Plaintiff to remove it from the job site. The Court stated:

> Under the circumstances shown, it was not only permissible for Casey to do as Nelson told him, and take the grader from the job, but it was his duty to do so and to use reasonable efforts to put it to use and thus mitigate damages. Id. at 405 P. 2d 173, 174.

In the Casey case, as in the University Club case, the Defendant argued that Plaintiff's actions in removing and rerenting the equipment precluded recovery by Plaintiff.

As is apparent from these two cases, it was the breach caused by Defendant's anticipatory repudiation which excused the Plaintiffs from further performance under the contract and permitted the Plaintiffs in those cases to make alternative arrangements which would mitigate their damages. If Debry had undertaken to arrange alternative transportation before Capitol had definitely indicated it would not perform under the contract, DeBry would have violated his own duties under the contract and

would thereby have subjected himself to a ten percent penalty as provided in the contract. The contract between Capitol and DeBry contains the following provision:

> If charterer cancels this contract no less than 90 days prior to scheduled departure, the carrier will refund all monies paid by the charterer. In the event charterer cancels and engages another air carrier to perform the transportation contemplated herein, this clause will not apply and 10% of the charter price will be retained as liquidated damages. (Emphasis added) (Ex. 3-P. ¶16A)

The trial court in the present case instructed the jury that:

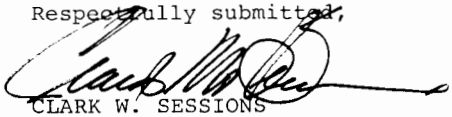
> . . . . as soon as the aggrieved party learns that the other party, or should have learned that the other party, will not perform, that party must begin to mitigate his damages. (Instruction No. 28, addition to the record on appeal)

This instruction does not clearly limit the duty to mitigate to the period of time after breach or unequivocal repudiation by Defendant. This failure to properly instruct the jury as to the time the duty to mitigate arose, resulted in the application of an incorrect measure of damages by the jury. The jury computed the amount of damages based on the cost of a Salt flight which was no longer available for charter as of October 30, 1974, the date that Capitol repudiated the contract.

CONCLUSION

Based upon the foregoing, the Plaintiff and Appellant, DeBry and Hilton Travel Services, Inc., respectfully submits that its Petition for Rehearing should be granted.

Respectfully submitted,



CLARK W. SESSIONS
WATKISS & CAMPBELL

Attorneys for Plaintiff and Appellant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Rehearing and Appellant's Brief in Support of Petition for Rehearing was hand delivered to PHILIP R. FISHLER, STRONG & HANNI, 605 Boston Building, Salt Lake City, Utah, 84111, Attorneys for Defendant and Respondent Capitol International Airways, Inc., on this 14 day of August, 1978.

CLARK W. SESSIONS
WATKISS & CAMPBELL