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

Utah Supreme Court

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 UTAH SUPREME COURT

BRIEF

14335-PRH

IN THE SUPREME COURT

OF THE STATE OF UTAH

DeBRY AND HILTON TRAVEL SERVICES, INC.,

Plaintiff and Appellant,

vs.

CAPITOL INTERNATIONAL AIRWAYS, INC.,

Defendant and Respondent.

Case No. 14335

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

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vs.

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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 for the following reasons:

1. The Court's interpretation of regulations of the Civil Aeronautics Board is in direct conflict with the controlling federal statute providing remedies to the parties.

2. The trial court did not make and enter findings of fact or conclusions upon which the above-entitled Court based its opinion.

Respectfully submitted,

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Attorneys for Plaintiff and Appellant

APPELLANT'S BRIEF IN SUPPORT OF
PETITION FOR REHEARING

PRELIMINARY STATEMENT

The petition of Plaintiff-Appellant DeBry and Hilton Travel Services, Inc., is not filed for the purpose of re-arguing matters originally presented. It is intended to bring to the Court's attention errors in its conclusions and an omission to consider material points in the case. The petition is within the criteria established by this Court for the granting of rehearing.

ARGUMENT

POINT I

THE COURT'S INTERPRETATION OF REGULATIONS OF THE CIVIL AERONAUTICS BOARD IS IN DIRECT CONFLICT WITH THE CONTROLLING FEDERAL STATUTE PROVIDING REMEDIES TO THE PARTIES.

The Court's Opinion is based largely upon an interpretation of regulations of the Civil Aeronautics Board.[1]

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[1] 14 C.F.R., § 208.3(b) (1976).

In its Opinion, the Court states as follows:

> "It is not open to question and the findings of the trial court recite that the Civil Aeronautics Board Regulations apply to both defendant Capitol, as a supplemental air carrier, and to plaintiffs DeBry, as ticket agent, and that they require a written agreement for the payment of commissions to a ticket agent."

The Opinion goes on to quote in pertinent part Section 208.31a of the CAB Regulations as follows:

> "Each agreement between a supplemental air carrier and any ticket . . . agent shall be reduced to writing and signed by all the parties thereto, if it relates to any of the following subjects . . . (b) The arranging for flights for the accomodation of persons . . . ;"

Later in the Opinion, the Court, in interpreting the purposes of the Regulation quoted above, indicates that one of the main purposes in requiring a contract of the nature here in question to be in writing is to provide a sound foundation for settling disputes which may arise as to <u>who is entitled to commissions</u>; and further that a party claiming such commissions has a burden of proving such a written contract or otherwise satisfying the requirement. In short, the above-entitled Court construes the Regulation to be a sort of "statute of frauds" for the airline charter industry.

DeBry respectfully submits, however, that the above-entitled Court's analysis has overlooked and ignored the controlling federal statute specifying the remedies of parties which provides as follows:

> "Nothing contained in this chapter shall in any way <u>abridge or alter the remedies now existing at common law</u> or by statute, but the provisions of this

chapter are in addition to such remedies." (emphasis added)

49 U.S.C.A. § 1506.

It would follow, then, that if DeBry was entitled to enforce the terms of an oral brokerage contract and to collect commissions at common law, the federal statute would prohibit the regulations from in any way abridging or altering DeBry's rights with respect thereto. Notwithstanding the general rule that statutes requiring contracts for the employment of brokers to be in writing are in derogation of the common law,[2] the above-entitled Court has held that DeBry cannot enforce and collect such commissions under common law principles without first "proving such a written contract or otherwise satisfying the requirement." Such a holding appears to be in direct conflict with the clear language of the statute and such a holding does in fact alter and abridge DeBry's right with respect to commissions and the enforcement of the terms of an oral brokerage contract the existence of which was stipulated to by both of the respective parties. The foregoing principles were presented to the above-entitled Court on pages 23-25 of the Brief of Appellant.

The legislative history of Section 208.31a of the Civil Aeronautics Board Regulations sustains the conclusion that such section was originally implemented to assist the CAB in policing the activities of charter airlines by

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[2] 12 Am. Jur. 2d, Brokers, § 41, p. 803.

imposing certain reporting requirements on such charter airlines, not to defeat the right of a broker to commissions due the broker under the terms of an oral brokerage contract.

The geneology of that regulation is as follows:

On November 15, 1955, by Order E-9744, the CAB granted exemption authority to a number of charter air carriers (then called "large irregular carriers"). One condition of this authority was that the agreements between the air carriers and the ticket agents be reduced to writing.

By Order E-13436 issued January 28, 1959, the CAB granted Certificates of Public Convenience and Necessity to 23 supplemental airlines. The condition requiring written contracts between carriers and their ticket agents was carried over from the exemptions to these certificates.

A condition requiring written contracts remained in the certificates until September 27, 1966, when it was moved to the Regulations, becoming Section 298.31a by the Board's Order in the Supplemental Air Service Proceedings.

The regulatory intent can be traced from 14 C.F.R. Part 242 (August 28, 1952), which states in part: "The proposed amendments are designed to obtain more uniform and in some respects more detailed data in response to these reporting requirements of these provisions of the regulations."

Compare 14 C.F.R. Part 242 (January 7, 1953), which states:

" . . . the objectives are to improve uniformity of reported information and to provide the Board with more adequate information."

A companion regulation requires contracts for charter carriage to be in writing. 14 C.F.R. Part 208.31b. The regulatory history of that section is similar:

"The execution and retention of written contracts on the other hand will greatly assist the Board in monitoring the carriers' compliance with charter regulations and Board tariffs."

14 C.F.R. Part 208 (June 20, 1967).

Thus it is clearly the Board's intent to regulate the air carrier for protection of the public, not to give the air carrier a loophole through which it can avoid its common law obligations pursuant to a contract formed under well established common law principles. The title to Part 208 of the regulations, "Terms, Conditions and Limitations of Certificates to Engage in Supplemental Air Transportation", 14 C.F.R. Part 208.1, reflects that the regulations are aimed not at the public or even the air charter industry. The regulation is a part of the carriers' Certificate of Public Convenience and Necessity--nothing more, nothing less. The Certificate so conditioned may fairly be paraphrased as follows: Capitol is permitted to engage in the business of a charter airline on the condition (inter alia) that Capitol maintain written records of all its transactions. The effect of Capitol's failure to satisfy such a condition is simply that Capitol violates the term of its Certificate. It stretches

the imagination to suppose that the Civil Aeronautics Board ever intended (let alone had the power and authority) to abrogate or change the common law requirements of the validity and enforceability of contracts.

The Opinion rendered by the above-entitled Court will have far-reaching effects on the entire charter airline industry. That industry is now regulated by a delicate balance of common law principles as well as complex Government regulations. The Opinion of this Court has by judicial interpretation imposed a further unwarranted requirement on the entire airline charter industry. This is particularly true where, as in the instant case, the contract forms are not submitted by the airline (Capitol) for execution by the broker (DeBry) until after the flights are negotiated, prices and terms finalized and agreed upon and the broker's performance substantially completed (R. 811). Such a requirement leaves no protection to a broker who in good faith introduces his customer to the airline, negotiates the terms of transportation and is willing to execute the written contract. It is difficult to believe that the regulations of the Civil Aeronautics Board, as interpreted by the above-entitled Court, contemplate such a result, particularly where the obvious legislative intent is to require the airline to comply with record keeping requirements and to provide the CAB with uniform and detailed reported information.

POINT II

THE TRIAL COURT DID NOT MAKE AND ENTER FINDINGS OF FACT OR CONCLUSIONS UPON WHICH THE ABOVE-ENTITLED COURT BASED ITS OPINION.

The Court recognizes that "procuring cause" is a central issue in this case. The Opinion states in part,

> "Plaintiffs urge that even though they had no written contract they were entitled to the commissions because: (a) the evidence shows that they were the actual procuring agency in booking the flights in question . . . . We recognize the soundness of the principles of law advocated by Plaintiffs as to the propositions just stated. . . ."

DeBry pointed out on pages 8 through 16 of the Brief of Appellant that procuring cause is the central issue in any litigation over brokerage commissions. Frederick May & Co. v. Dunn, 13 Utah 2d 40, 368 P.2d 266 (1962).

However, after correctly acknowledging the importance of the procuring cause issue, this Court concluded that the trial court had made a finding on that issue. The Opinion states:

> "We recognize the soundness of the principles of law advocated by plaintiffs as to the propositions just stated, [procuring cause] when they are applied under appropriate circumstances. But the difficulty with the plaintiff's position is that the trial court did not find the facts as they contend to bring the case within those principles . . . . However plausible the plaintiff's arguments may seem to themselves, the trial court, whose prerogative it is to find facts, was not so persuaded."

This Court's Opinion speculates that DeBry was not the procuring cause for the sale. However there is absolutely

nothing in the findings adopted by the trial court on the issue of procuring cause. There is simply no way to stretch the findings of the trial court to include anything concerning the issue of "procuring cause."

DeBry specifically requested the Court to make a finding on this material issue, but the trial court made none. The trial court might have made a finding that DeBry was the procuring cause or the trial court might have made a finding that DeBry was not the procuring cause. However, the court made no finding either way, which DeBry respectfully submits the trial court was required to do as a matter of law. Gaddis Investment Co. v. Morrison, 3 Utah 2d 43, 278 P.2d 284 (1954). Such a finding either way would eliminate any speculation as to whether DeBry was or was not the procuring cause of the flights in question.

DeBry has contended and argued, both in the trial court and in this appeal, that the arrangement for all three parties to execute a charter agency agreement was only a formality. The trial court determined that such arrangement was a condition precedent to DeBry's entitlement to receive commission.

The thrust of the opinion of the above-entitled Court is that the findings of fact of the trial court would not now be reviewed. DeBry respectfully submits that the construction of the arrangement between the parties as a condition precedent or a formality is an issue of law for

the above-entitled Court to determine. If the arrangement was a condition precedent as the trial court determined and the condition was not waived by Capitol, the decision of the trial court was proper. If the reverse is true, the judgment of the trial court should be reversed. It is just that simple.

While the above-entitled Court is on solid ground in its refusal to weigh the evidence presented in the trial court, it appears that the Opinion of this Court does not consider this, the pivotal legal issue, properly presented for review, i.e., Was the arrangement for all three parties to execute a charter agency agreement a condition precedent to DeBry's entitlement to commissions or a mere formality after DeBry's substantial performance? The general rule with respect to this question has been stated as follows:

> "It has been said that conditions precedent are not favored and the courts will not construe stipulations to be such unless required to do so by plain, unambiguous language or by necessary implication. This is particularly so when interpreting a stipulation as a condition precedent rather than a promise or covenant would work a forfeiture or result in inequitable consequences."

17 Am. Jur. 2d, Contracts, § 321.

This issue was presented in detail on pages 20 and 21 of the Brief of Appellant and pages 11 through 13 of the Reply Brief of Appellant.

CONCLUSION

Based upon the foregoing, the 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 mailed to STRONG & HANNI, Suite 604, Boston Building, Salt Lake City, Utah, 84111, and to GINSBURG & KOHN, 9454 Wilshire Boulevard, Suite 800, Beverly Hills, California, 90212, Attorneys for Defendant and Respondent Capitol International Airways, Inc., in a postage prepaid, properly addressed envelope, on this 3rd day of November, 1976.

CLARK W. SESSIONS
WATKISS & CAMPBELL