Brigham Young University Law School
BYU Law Digital Commons

Utah Supreme Court Briefs

2001

DeBry and Hilton Travel Services Inc. v. Capitol International Airways, Inc. : Reply Brief

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc2

Part of the Law Commons

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.
Ramon M. Child; Strong and Hanni; Ginsburg and Kohn; Attorneys for Respondent.
Clark W. Sessions, Gregory B. Monson; Watkiss and Campbell; Attorneys for Appellant.

Recommended Citation
Reply Brief, *Debry and Hilton Travel v. Capitol International Airways*, No. 14335.00 (Utah Supreme Court, 2001).
https://digitalcommons.law.byu.edu/byu_sc2/1423

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

DOCUMENT UTAH SUPREME COURT
KFU
45.9 BRIEF
.S9
DOCKET NO. 14335-A RB

RECEIVED
LAW LIBRARY
13 JUN 1977
BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

IN THE SUPREME COURT

OF THE STATE OF UTAH

DeBRY AND HILTON TRAVEL SERVICES, INC., Plaintiff and Appellant, v. CAPITOL INTERNATIONAL AIRWAYS, INC., Defendant and Respondent.	Case No. 14335

REPLY BRIEF OF APPELLANT

Clark W. Sessions
Gregory B. Monson
WATKISS & CAMPBELL
Attorneys for Plaintiff
and Appellant
Suite 400
315 East Second South
Salt Lake City, Utah 84111

RAMON M. CHILD
2188 Highland Drive, Suite 201
Salt Lake City, Utah 84106

STRONG AND HANNI
Suite 604
Boston Building
Salt Lake City, Utah 84111

GINSBURG & KOHN
9454 Wilshire Boulevard
Suite 800
Beverly Hills, CA 90212

Attorneys for Defendant
and Respondent.

FILED
JUL 27 1976
Clerk, Supreme Court, Utah

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1

ARGUMENT

POINT I. RESPONDENT'S ANALYSIS OF THE "FALLING OUT" BETWEEN APPELLANT AND PRESTIGE HAS NOTHING TO DO WITH THE INSTANT CASE 2

POINT II. THE FACTS ESTABLISH CONCLUSIVELY THAT APPELLANT WAS EMPLOYED AS A BROKER BY RESPONDENT 3

POINT III. THE CENTRAL ISSUE IN THE INSTANT CASE IS THE DUTY OF GOOD FAITH WHICH A SELLER OWES TO ITS BROKER OR AGENT 4

POINT IV. CAB REGULATIONS DO NOT PRECLUDE A RECOVERY BY APPELLANT 8

POINT V. APPELLANT DID NOT RECEIVE ANY COMMISSIONS FOR THE CHAIN "C" AND CHAIN "D" FLIGHTS 10

POINT VI. THE SEQUENCE AND TIMING OF EVENTS SHOW CONCLUSIVELY THAT THE EXECUTION OF THE CHARTER AGENCY AGREEMENT WAS ONLY A FORMALITY 11

CONCLUSION 13

AUTHORITIES CITED:

Abels v. Iceland Products, Inc., 274 F.2d 213 (7th Cir. 1960) 7

Bamford v. Cope, Colo. App., 499 P.2d 639 (1972) 7

Foster v. Blake Heights Corp., 530 P.2d 815, 817 (Utah 1974) 2, 3

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

Page

Weinger v. Union Center Plaza Associates, 387 F. Supp. 849 (S.D.N.Y. 1974) 7

Treatices and Other Authorities:

12 American Jurisprudence 2d, Brokers, Section 100 (1964) 5

Restatement of Agency (2d) Section 434 (1958). 5

Statutes Cited:

49 U.S.C.A. § 1373 (1963) 7

49 U.S.C.A. § 1506 (1963) 10

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

IN THE SUPREME COURT

OF THE STATE OF UTAH

DeBRY AND HILTON TRAVEL SERVICES, INC.,	:	
	:	
Plaintiff and Appellant,	:	
v.	:	Case No. 14335
CAPITOL INTERNATIONAL AIRWAYS, INC.,	:	
	:	
Defendant and Respondent.	:	

REPLY BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Respondent's brief does not meet factual or legal issues raised by Appellant. Respondent's brief is rather an artful attempt to disguise and avoid the true issues.

As an aid and convenience to the trial court, counsel for Appellant and counsel for Respondent laboriously drafted and executed a detailed stipulation of fact (R. 806). Appellant will not burden this record with a detailed analysis of the factual account in Respondent's brief. Suffice it to say that the true and binding factual background is set forth for the Court in the stipulation of the parties. Respondent's brief is in large measure

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

an attempt to avoid these stipulated facts and to argue issues not raised by the appeal.

ARGUMENT

POINT I

RESPONDENT'S ANALYSIS OF THE "FALLING OUT" BETWEEN APPELLANT AND PRESTIGE HAS NOTHING TO DO WITH THE INSTANT CASE.

This court has noted that "it is not always true that a broker who is negotiating a transaction must be exclusively the agent of one (seller) or the other (buyer). He may well be a 'go-between' acting for both". Foster v. Blake Heights Corp., 530 P.2d 815, 817 (Utah 1974).

This lawsuit deals with the relationship between a broker (appellant) and a seller (respondent). Respondent's brief seeks to disguise the true issue by focusing on the relationship between the broker (appellant) and the buyer (Prestige). For purposes of this lawsuit, it simply doesn't matter how or why Prestige and Appellant had a "falling out", although Respondent's brief weaves a most fanciful tale about how and why it happened. This case must be decided by examining the duties which the seller (respondent) owes to its agent or broker (appellant).

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

POINT II

THE FACTS ESTABLISH CONCLUSIVELY THAT APPELLANT WAS EMPLOYED AS A BROKER BY RESPONDENT.

The threshold issue in this case is to accurately characterize the relationship between Appellant and Respondent. The duties and responsibilities of the parties will clearly follow from an accurate identification of that relationship.

Here Respondent takes the unsupported position that:

> "Under the undisputed facts appellant was simply the agent of Prestige to obtain quotations on charter flights from respondent." (Brief of Respondent, p. 24)
>
> * * * * *
>
> "Here it is clear that Prestige not respondent hired appellant;" (Brief of Respondent, p. 29) [Emphasis in original]
>
> * * * * *
>
> "Respondent had not hired and did not "fire" Appellant". (Brief of Respondent, p. 34)

Appellant does not deny that it was in some respects the agent for Prestige. However, the facts clearly show that Appellant was at the same time the agent for Respondent. *Foster v. Blake Heights Corp.*, *supra*.

This agency relationship is established by extensive factual development (R. 809, 810), as well as overwhelming case authority (Brief of Appellant, p. 9). Respondent's Brief undertakes no rebuttal to any of these facts or authorities. In addition, this agency relationship is conclusively established by a specific brokerage agreement which is in evidence by

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

stipulation of the parties (R. 819, 825).

In light of such agreement, the existence of which was stipulated between the parties, it is simply incredible for Respondent to deny the existence of a brokerage or agency relationship between Appellant and Respondent. The decisive fact is simply that the Respondent pays a brokerage or sales commission every time a travel agent completes a sale and did so in the instant case in connection with the Chain "C" and Chain "D" flights. If the travel agent is not a broker why does the airline pay the sales commission. Appellant requested the trial court to make and enter a specific finding and conclusion on the issue of agency between the parties (R. 829) The trial court made none. A finding on this issue is clearly material to the resolution of this lawsuit. An examination of the duties and responsibilities between Appellant and Respondent requires the Court to first establish the nature of the legal relationship which creates such duties and responsibilities. The trial court's refusal to make such a finding was, Appellant respectfully submits, error.

POINT III

THE CENTRAL ISSUE IN THE INSTANT CASE IS THE DUTY OF GOOD FAITH WHICH A SELLER OWES TO ITS BROKER OR AGENT.

Respondent's only defense in this entire lawsuit is that Appellant was not entitled to the 5% sales commission on the Chain "C" and Chain "D" flights unless and until Prestige had signed the charter agency agreement.

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

Appellant concedes that the parties anticipated the final execution of the formal charter agency agreement. Appellant further concedes that Prestige refused to sign the charter agency agreement for the Chain "C" and Chain "D" flights. The issue in this case is why Prestige refused to sign. In other words, did Prestige refuse to sign because Respondent violated its duties of good faith to Appellant.[1]

In point of fact Respondent violated its duties to Appellant in several particulars:

First, a specific term of the brokerage agreement, was a promise by Respondent not to compete with Appellant in connection with the agency (Tr. 42, 43). Notwithstanding this undisputed promise not to compete, Respondent initiated direct negotiations with Prestige in direct competition with Appellant. Respondent's conduct violated not only a term of the agreement but the well settled doctrine that a principal has a duty to refrain from unreasonably interfering with the work and performance of its agent.[2]

Second, Appellant was only authorized to negotiate with Prestige by demanding large up front deposits for charter flights. However, when Respondent negotiated directly with

---

[1]It has long been well settled that a principal is under a duty to exercise good faith toward a broker with whom the principal deals and is liable to the broker in the event of the principal's failure to do so. 12 Am. Jur. 2d § 100.

[2]Restatement of Agency (2d), § 434.

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

Prestige, Respondent designed a "floating deposit" which in essence meant that Respondent sold the Chain "C" and Chain "D" flights with no separate deposit required (Tr. 277, 278).

Third, notwithstanding the terms of the brokerage agreement, Respondent refused to provide Appellant with price quotations which Appellant needed to close the deal (R. 826).

Fourth, Respondent entered into an arrangement whereby the 5% commission went directly to Prestige (R. 828, Tr. 318).

These techniques proved successful and the flights as negotiated by Appellant were sold and flown by Respondent. Appellant received no commission for its efforts in connection with such flights.

In light of the foregoing, it is little wonder that Prestige failed to sign the charter agency agreement. Respondent and Prestige could simply make a better deal by cutting Appellant out and that is exactly what they did.

Respondent argues that it made no difference to Respondent whether the 5% commission was paid to Appellant or Prestige (Brief of Respondent, p. 3). Thus, presumably Respondent had no motive to circumvent Appellant as a broker. The facts are otherwise. It is clear from the record that not only was Respondent bidding against other airlines for the Prestige business but that Prestige was prepared to enter into an agreement with a competing carrier (Tr. 274, 275-277, Ex. D-31).

In other words, Respondent was being underbid by

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

other airlines on the Prestige account. However, Respondent could not lower the price to meet the competition because of its own filed tariffs.[3] To remedy this situation, Respondent hit upon the idea of giving the 5% sales commission directly to Prestige instead of paying Appellant thereby effectively reducing its price by 5%. The success of the plan is evidenced by the fact that Respondent has in fact sold several million dollars of charter flights to Prestige (Tr. 125).

Appellant's brief cites a host of cases which hold that a principal or seller cannot unfairly avoid paying a sales commission (Brief of Appellant, p. 18). Respondent's brief failed to cite one case to meet this central issue of the case.

Respondent has instead artfully tried to disguise and avoid the issue. For example, Respondent argues (<u>and without any supporting authority</u>) that real estate broker cases are not analogous to this case (Brief of Respondent, p. 28). Respondent has cited no cases which hold that different principles of law apply depending upon the type of merchandise to be sold. In point of fact, one of the key cases upon which Appellant relies has to do with a fish broker, <u>Abels v. Iceland Products, Inc</u>., 274 F.2d 213 (7th Cir. 1960). Another key case upon which Appellant relies, deals with a financing broker, <u>Weinger v. Union Center Plaza Associates</u>, 387 F. Supp. 849 (S.D.N.Y. 1974). See, also, <u>Bamford v. Cope</u>, Colo. App., 499 P.2d 639 (1972).

---

[3] The Federal Aviation Act only permits Respondent to fly charters at set published prices. 49 U.S.C.A. § 1373.

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

The great body of law on this issue cited by Appellant's brief sounds exclusively in contract or agency. Respondent's only rebuttal to these cases is the evasive response that Appellant should not be able to pursue its remedy in contract or agency unless it also simultaneously pursues a remedy in tort for tortious interference. (Brief of Respondent, pp. 19, 35) Again Appellant has asserted this major argument without any citation of legal authority.

POINT IV

CAB REGULATIONS DO NOT PRECLUDE A RECOVERY BY APPELLANT.

Respondent argues the interesting proposition that it is required to pay only one commission pursuant to Regulations of the Civil Aeronautics Board, which payment is made only pursuant to a written charter agency agreement. Respondent acknowledges that while it is willing to pay one 5% commission, it obviously wants to protect itself from the possibility of being compelled to pay two or more 5% commissions. Certainly, no one can fault Respondent for desiring to shield itself from the payment of double commissions.

Respondent goes one step farther and indicates that it must "thus have a means of protecting itself" (Brief of Respondent, p. 31), and that if a written contract is the sole criterion of obtaining such commission, the problem of possible double liability of Respondent is easily eliminated.

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

Respondent, however, fails to consider the testimony setting out the established practice of Respondent when such a claim for "double commissions" is made. Mr. Mansfield, Regional Vice President of Sales of Respondent, testified that when a dispute arises between two parties as to their entitlement to commissions that Respondent ". . . don't pay anyone until the dispute is settled among the other people." (Tr. 177)

Respondent, in addition, urges that the regulations of the Civil Aeronautics Board protect Respondent in determining to whom the commissions should be payable. There is absolutely no foundation for such an assertion in the regulations of the Civil Aeronautics Board. The CAB regulations say that Respondent can pay only one commission. The regulation does not say to whom the commission should be paid in the event of a dispute between parties. Here Respondent determined to pay the commission to the wrong party (Prestige), in violation of Respondent's established practice and notwithstanding the fact that Appellant introduced the parties, negotiated the sale of the Chain "C" and Chain "D" flights, negotiated reduction in the deposit requirements for the flights and otherwise performed under the agreement between the parties the existence of which agreement was admitted by stipulation. The CAB regulation is clearly not designed to protect Respondent from its own conduct in paying commissions to a party without regard to its legal obligations or to someone who has not earned them.

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

Respondent likewise disregards that section of the Federal Aviation Act which clearly delineates that nothing in that legislation shall in any way abridge or alter the remedies existing at common law.[4]

POINT V

APPELLANT DID NOT RECEIVE ANY COMMISSIONS FOR THE CHAIN "C" AND CHAIN "D" FLIGHTS.

With respect to Respondent's argument that Appellant has received at least in part commissions on the Chain "C" and Chain "D" flights as set out in Finding of Fact XV (R. 802), adopted by the trial court, Appellant respectfully submits that such a finding and conclusion cannot be justified by the evidence.

The parties in the instant case stipulated as to what the payment of $7,287.00 from Capitol to Prestige represented, i.e., commissions on the Chain "A" flights (R. 818).

While there was no evidence at the trial of this case as to the payment of any other sums, counsel for Respondent argued that an additional amount had also been received in settlement of the Prestige litigation (Tr. 340-347). In that regard, it is noted that the Prestige litigation involved claims and allegations in addition to the claim for commissions, which other claims were compromised, settled and released (Ex. D-53).

---

[4] 49 U.S.C.A. § 1506.

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

Appellant timely moved to set the Findings and Conclusions, including Finding of Fact XV aside, but the trial court denied Appellant's motion and adopted such Finding as submitted by Respondent's counsel, notwithstanding the Court's own acknowledgement that Finding XV is not one upon which the Court based its Findings (Tr. 345).

POINT VI

THE SEQUENCE AND TIMING OF EVENTS SHOW CONCLUSIVELY THAT THE EXECUTION OF THE CHARTER AGENCY AGREEMENT WAS ONLY A FORMALITY.

The brokerage agreement between the parties provided that the airline (respondent), the travel agent (appellant), and the customer (Prestige), would all sign a document called a charter agency agreement. Respondent's defense in this lawsuit is simply that the document was not signed by Prestige and, therefore, the airline (respondent) owes no sales commission to the travel agent (appellant). Appellant has argued that the failure of Prestige to execute such an agreement was due to the unfair conduct of Respondent in dealing directly with Prestige. The sequence of events shows conclusively that the execution of that agreement was only a formality. Again Respondent has failed to meet that issue head on and has instead tried to artfully dodge and avoid the issue. The record clearly shows that Respondent never circulates that agreement for signature before the charter contract negotiations. Rather, Respondent always circulates

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

that document for signatures <u>after</u> all the negotiations for the sale of the charters are completed (R. 811).

After all the negotiations for chartering the airplane are finished, and after the charter contract is consummated, then and only then does Respondent produce the charter agency agreement and request signatures. It is simply unfair and unconscionable for a seller to induce a broker to do all the work and then avoid responsibility for paying a commission because a document was not formalized after all of the substantive work was finished. Respondent urges this Court to ignore the time, effort and performance of the Appellant in connection with the Chain "C" and Chain "D" flights and by so doing ratify and approve the payment of the 5% sales commission on said flights to Prestige.

Respondent places great emphasis on the argument that the parties had previously signed a charter agency agreement with respect to the Chain "A" flights. A reading of Respondent's Brief on this particular argument could easily lead to the conclusion that the charter agency agreement with respect to the Chain "A" flights was signed by the parties and that Respondent paid Appellant the 5% commission with respect to said flights in the normal course of Respondent's business. However, the plain fact is that notwithstanding the execution of a Charter Agency Agreement with respect to the Chain "A" flights, the payment of the commissions was made only after a suit was instituted by Appellant to recover those commissions (R. 818). Thus on the

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

one hand Respondent claims that the execution of the charter agency agreement is conclusive and determinative on the issue of who gets commissions and on the other hand Respondent refused payment of such commissions even where the charter agency agreement was signed by all parties.

CONCLUSION

Appellant therefore urges that the judgment of the trial court be reversed, as heretofore submitted.

Respectfully submitted,

CLARK W. SESSIONS and
GREGORY B. MONSON of
WATKISS & CAMPBELL:

By: ______________________
CLARK W. SESSIONS

Attorneys for Plaintiff and Appellant

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.