1972

American Express Co. v. Utah Feathers, A Division Of Miller Ski Company : Brief of Respondent

In The Supre
of the Sta

AMERICAN EXPE
Plaintiff

-vs-

UTAH FEATHER
MILLER SKI CO
corporation,
Defend

BRIEF O

Appeal from a
The Hono

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In The Supreme Court of the State of Utah

AMERICAN EXPRESS CO.,
Plaintiff and Respondent,

-vs-

UTAH FEATHERS, a division of MILLER SKI COMPANY, a corporation,
Defendant and Appellant.

Case No. 12,852

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

This is an action in contract, by an International Freight Forwarder (Respondent, American Express Company) against a shipper (Appellant, Utah Feathers) for freight and other charges advanced by American Express Co., in shipping feathers for the appellant to Europe.

DISPOSITION IN THE LOWER COURT

The trial court, sitting without a jury, awarded judgment to American Express Co. for the freight

and other charges they had incurred in the principal sum of $4,111.56.

NATURE OF RELIEF SOUGHT

The Appellant acknowledges owing $1,534.35, but is seeking a reversal of that part of the judgment that exceeds $1,534.35.

STATEMENT OF FACTS

The Statement of Facts set forth in the brief of Appellant is correct except for the following exceptions and clarifications:

It is not only claimed that the American Express Co. expended $4,111.56 on behalf of Utah Feathers for ocean freight charges, inland freight charges, insurance premiums, and documentation charges, but it is admitted by Utah Feathers that this sum was so expended. (Transcript page 59 lines 1-2, lines 15-20, page 24 lines 15-16, page 73 lines 7-30, page 74 lines 1-3); and in expending this sum there is no dispute but that three different shipments of feathers were made for Utah Feathers. (Transcript pages 10-18 and Appellant's brief, page 10 paragraph 2 lines 1-2)

Also, the contract for shipping in this case was between Utah Feathers and the shipping company. (Transcript page 41 lines 12-13, page 33 lines 8-12, page 34 lines 16-28, page 39 lines 26-30, page 40 lines 1-3, and

page 41 lines 12-15) Only the contract of agency was between Utah Feathers and the American Express Co. The American Express Co. was not licensed to, and made no quotation to Utah Feathers on rates. (Transcript page 25 lines 27-30, and page 26 lines 1-14.) The American Express Co. had no tariffs on file with the Federal Maritime Commission permitting American Express Co. to quote charges. The American Express Co. could only obtain the charges from the correct source and convey them to the shipper, which it did in this case. (Transcript page 24 lines 28-30 and page 25 lines 1-16, page 33 lines 8-30, page 34 lines 16-28, and page 36 lines 20-23.)

The American Express Co. acted as an agent for Utah Feathers in arranging for a shipping company to haul the Appellant's feathers, and the sole question involved in this case is whether or not the American Express Co. is entitled to reimbursement for all of the ocean freight charges which they advanced to the shipping company in getting the feathers to Europe, or whether the conduct of the American Express Co. was such as to prevent it from securing reimbursement for all of these charges. Utah Feathers admits owing all of the other charges and admits owing the ocean freight charges to the extent that the rate is computed on the weight of the cargo rather than on the volume. In other words, Utah Feathers admit that they owe the sum of $1, 534.35 and not the sum of $4,111.56, which American Express Co. actually paid. The difference of $2,-

577.21 being the computation of the rate on a volume basis rather than on a weight basis.

STATEMENT OF POINTS

POINT I

THE TRIAL COURT DID NOT AWARD JUDGMENT TO THE AGENT FOR SUMS BEYOND THE AMOUNT AUTHORIZED BY THE PRINCIPAL, AND THERE WAS THEREFORE NO ERROR COMMITTED BY THE TRIAL COURT.

POINT II

THE TRIAL COURT DID NOT ERR IN FAILING TO FIND THAT THERE WAS AN OFFER MADE BY THE AMERICAN EXPRESS CO. TO WHICH UTAH FEATHERS CONVEYED AN ANSWER VARYING THE TERMS OF THAT OFFER BY LIMITING THE RATES TO MEASURE BY WEIGHT ONLY, AND THE TRIAL COURT DID NOT ERR IN FAILING TO FIND THAT THERE WAS A COUNTEROFFER WHICH SET THE LIMIT OF THE AGENT'S AUTHORITY.

POINT III

THE TRIAL COURT COMMITTED NO ERROR IN FINDING THAT UTAH FEATHERS WAS CHARGEABLE WITH KNOWLEDGE THAT THE RATES GIVEN TO UTAH FEATHERS BY THE AMERICAN EXPRESS CO. WERE MADE WITHIN THE CUSTOM AND USAGE OF THE BUSINESS.

POINT IV

THE AMERICAN EXPRESS CO. ADVANCED IN GOOD FAITH AND ON BEHALF OF UTAH FEATHERS ALL OF THE OCEAN FREIGHT CHARGES IN ACCORDANCE WITH BOTH THE RATE SCHEDULE FURNISHED UTAH FEATHERS AND THE PUBLISHED TARIFFS, AND THEY ARE THEREFORE ENTITLED TO REIMBURSEMENT.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT

AWARD JUDGMENT TO THE AGENT FOR SUMS BEYOND THE AMOUNT AUTHORIZED BY THE PRINCIPAL, AND THERE WAS THEREFORE NO ERROR COMMITTED BY THE TRIAL COURT.

The American Express Co. was an International Freight Forwarder and as such was licensed by the Federal Maritime Commission to handle export and import documtation. (Transcript page 24 lines 23-28) The American Express Co. did not have any files or tariffs on file with the Federal Maritime Commission permitting it to quote charges. The Americn Express Co. could only obtain the charges from the correct source and relay them on to Utah Feathers. (Transcript page 24 lines 28-30, page 25 lines 1-16) This is exactly what the American Express Co. did after receiving Utah Feathers' letter of August 20, 1968 (Exhibit 20) inquiring as to the rates for the shipment of feathers. The American Express Co. replied with their letter of August 26, 1968 (Exhibit 11) stating that there was no specific rate item for feathers quoted in the Pacific Coast European Conference Tariff, but that the cargo would go as cargo not otherwise specified, and the American Express Co. set forth in this letter the non-conference rate and the conference rate as they had been given to them, together with the other charges involved in shipping, and the American Express Co.

set forth the advantages of signing a Conference Agreement and securing a lower rate.

To this letter Utah Feathers responded August 30, 1968, stating that they wished to sign a Conference Agreement, and American Express Co. then replied by letter September 3, 1968, enclosing two copies of Shippers' Rate Agreement (Exhibit 12) from the Pacific Coast European Conference. The Conference Agreement was never signed by Utah Feathers although they maintained they had done so right up to the very end of the trial, and at which time they finally admitted they had not signed it. (Transcript page 84 lines 11-20, Exhibit 12, page 9 Appellant's brief)

The foregoing admittedly constitute all of the evidence relative to the principal and agency relationship of Utah Feathers and American Express Co., except for Exhibit 21, which is a letter which Utah Feathers claims to have mailed to the American Express Co. September 4, 1968, but which letter the trial court correctly ruled was never delivered to nor received by the American Express Co. All of the evidence with regards to that letter is contained in the following pages of the transscript. (Transcript page 77 lines 29-30, page 78 lines 1-13, page 67 lines 7-30, page 68 lines 1-28, and page 37 lines 19-25)

It is hard to understand with any stretch of the imagination how Utah Feathers can say that the American Express Co., in this case, exceeded their authority

in arranging for the shipment of feathers under the rate schedule that had been relayed to Utah Feathers, and which schedule had been set up by the Pacific Coast European Conference and approved by the Federal Maritime Commission. The American Express Co. arranged for the feather shipments on the only rate that was available, paid the shipping company the freight charges, and then looked to Utah Feathers for reimbursement.

Contrary to the Appellant's contention, there can be no question as to the loyalty and good faith of the American Express Co. throughout the entire transaction. For their nominal fee of $25 they endeavored to get Utah Feathers together with an Ocean Freight line on the shipment of their feathers. The American Express Co. set no rates, neither did they have any power or voice in determining whether the rate would be charged by weight or by volume. They simply passed on to Utah Feathers the rates quoted to them by the Pacific Coast European Conference, and which Conference represents all conference vessels to Europe.

It is no fault of American Express Co. if Utah Feathers placed an erroneous interpretation upon this rate schedule and tried to obtain a shipment of their feathers at such a ridiculously low figure. As the record in this case clearly shows, the rates were set by the shipping companies, who, before they can actually charge the rate, must obtain the approval of the Federal Mari-

time Commission, and there is therefore an assurance of fairness in these rates to both carrier and shipper.

This is certainly not a case where the agent has a duty to shop around in the interest of his principal to find the very lowest rate, because the rates in this case are fixed, and are uniform, and no carrier is permitted to charge either a lower or a higher rate than the published tariff. The American Express Co. merely acted as an intermediary in relaying to Utah Feathers the information they had received relative to rates and available ships.

POINT II

THE TRIAL COURT DID NOT ERR IN FAILING TO FIND THAT THERE WAS AN OFFER MADE BY THE AMERICAN EXPRESS CO. TO WHICH UTAH FEATHERS CONVEYED AN ANSWER VARYING THE TERMS OF THAT OFFER BY LIMITING THE RATES TO MEASURE BY WEIGHT ONLY, AND THE TRIAL COURT DID NOT ERR IN FAILING TO FIND THAT THERE WAS A COUNTEROFFER WHICH SET THE LIMIT OF THE AGENT'S AUTHORITY.

There is no question but that the agency relationship between the American Express Co. and Utah

Feathers was created by correspondence and by the acts of the parties, and that the terms of that agency were determined by the trial court from the correspondence heretofore referred to and by the act of Utah Feathers in delivering their feathers to the carrier.

There is no doubt but that Utah Feathers inquired of the American Express Co. as to what rates and what vessels were available for shipment of feathers, and that American Express Co. replied giving them the rate schedule supplied by the Pacific Coast European Conference, and that following that Utah Feathers had the American Express Co. arrange for shipment of their feathers and that the feathers were shipped and that American Express Co. then billed Utah Feathers for the money they had advanced in getting the feathers to Europe. The American Express Co. made an offer to assist Utah Feathers with their feather shipments by providing them with the rate schedule for the Ocean Freight, insurance and documentary charges. This offer was accepted by the delivery by Utah Feathers of their cargoes to the carrier for shipment.

We submit, in spite of the Appellant's contention to the contrary, that the American Express Co. used all the care, skill and diligence required of them in carrying out their duties in this matter. In 3 Am. Jur. 2nd, Agency, Section 202, page 584, we find the law clearly stated:

"Only a reasonable degree of care is required,

> and an agent is held only to the standard of skill ordinarily possessed by persons of common capacity engaged in the same occupation or business. Nor can an agent be held liable to the principal because he failed to procure for him something to which the latter is not entitled; actionable negligence on the part of an agent can be predicated only upon the invasion or loss of some legal right of the principal."

Utah Feathers, under the published tariffs, was not entitled to any lower rate than they received for the shipment of their feathers, and under no pretext can they be heard to complain that the agent failed to procure for them a lower rate to which they were not entitled.

And in Section 204 and 205 of this same text we find:

> "An agent who contracts to perform personal servcie does not undertake to render perfect service, and mere error in judgment, not due to want of care or diligence, or to fraud or unfair dealing, are not actionable." "But even an agent with proported skills is not an insurer of his work and will not be responsible for a mere error of judgment where he exercised the due care and appropriate skill of his profession." (*Scott et al. vs. Security Title Ins. & Guarantee Co.,* 72 Pac. (2nd) 143, Calif.

And in 3 C. J. S., Agency Section 156:

"Since an agent is required to exercise only ordinary care, skill and diligence, he is not, in the absence of an express argreement, an insurer of the success of his undertaking, and does not guarantee the principal against incidental losses, or undertake that he will commit no errors or mistakes, and so will not be liable for losses occurring without any fault or negligence on his part. Neither is he liable if he has acted in good faith and with due care, for loss due to a mere mistake, including losses arising out of mistakes in doubtful matters of law."

POINT III

THE TRIAL COURT COMMITTED NO ERROR IN FINDING THAT UTAH FEATHERS WAS CHARGEABLE WITH KNOWLEDGE THAT THE RATES GIVEN TO UTAH FEATHERS BY THE AMERICAN EXPRESS CO. WERE MADE WITHIN THE CUSTOM AND USAGE OF THE BUSINESS.

It is undisputed that by custom and usage at the

San Francisco Port, from which port these feathers were shipped, that the carrier has the option whether to charge the rate by weight or by volume. (Transcript page 26 lines 15-22, page 43 lines 19-30, and page 44 lines 1-21) Any other custom or usage would soon bankrupt an Ocean Carrier if they were compelled to haul such cargo as feathers on any other rate charge than by volume.

Earl Miller claims in one breath to be a novice in oceanic shipping and to be relying heavily upon the superior knowledge and experience of American Express Co., and in the next breath he testifies that he has been shipping feathers to Europe for the past 20 years, (Transcript page 52 line 30, and page 53 lines 1-2) and that he has been engaged in international trade in 42 countries, (Transcript page 76 line 30 and page 77 lines 1-8) and yet Utah Feathers would have us believe from their brief (Page 28) that Earl Miller is a man of only ordinary experience in this field and that "Ordinary experience would not have told him (Mr. Miller) that Mr. Ewing's quote of rates would allow the carrier the option of how to charge the rate." (Appellant's brief page 28 paragraph 4)

Mr. Miller testified that all of his previous 20 years of experience in oceanic shipping had been through the New York port and that there, by custom and usage, it was shipper's choice. (Transcript page 52 line 30 and page 53 line 102) (We submit that it was certainly gross negligence, even recklessness, for Mr.

Miller to assume that all customs and usage would be the same in all ports and to fail to make some investigation or inquiry as to who had the choice at San Francisco, and especially in shipping such an extraordinary cargo as feathers. There is no question but that Utah Feathers were chargeable with knowledge of the usage and custom in question in this case.

In 3 Am. Jur. 2nd, Agency, Section 72, we find:

> "To effectuate an authority conferred upon an agent, there will be implied authority to adopt any recognized usage or mode of dealing in that business. That is, an agent will be deemed to have implied authority from his principal to do business in his behalf in accordance with the general custom, usage and procedures in that business." (Restatement, Agency, 2nd Edition, Section 34, 76 A. L. R. 1250)

In Restatement, Agency, 2nd Edition, Section 36, we find:

> "Unless otherwise authorized, an agent is authorized to comply with relevant usages of business if the principal has notice that usages of such a nature *may exist.* (Emphasis added)

And in 3 Am. Jur. 2nd, Agency, Section 72:

> "The fact that the principal is not aware of the exact character of the custom or usage is

not material if he has notice that usages of such nature *may exist.*" (Emphasis added)

(*Hall vs. Paine,* 224 Mass. 62, 112 N.E. 153; *Rohobough vs. United States Exp. Co.,* 50 W.Va. 148, 40 S.E. 398; *Peterson vs. New York City,* 194 N.Y. 437, 87 N.E. 772; *Hilsinger vs. Trichell,* 86 Ohio St. 286, 99 N.E. 305)

There is no question but that Utah Feathers knew, not only that custom may, but that it actually did exist in the matter of fixing the rate for oceanic shipment of feathers.

And in 3 C. J. S., Agency, Section 149 at page 31 we find:

"Except as limited by special instructions, the known usages and customs of the particular business for which an agent is engaged enter into and form a part of his authority and duty and he will be held liable for losses due to a failure to act according to such usages and customs, and on the other hand, if he does act in accordance therewith he will not, in the absence of any instructions to the contrary, be liable for any loss resulting."

In *Burke v. Bonat,* 255 N. Y. 226, 174 N.E. 635, we find:

"The determination of what is the ordinary business procedure is commonly one of fact to

be answered by the jury unless the course of business is well-known as to be a subject of judicial notice."

Utah Feathers contends that for 20 years they had been following a custom and usage at the New York port and although Utah Feathers knew full well that custom and usage played an important part in arriving at the rate to be charged for shipping feathers, they had no reason to assume that this custom and usage would be the same at the San Francisco port, which is situated on the opposite end of the continent.

POINT IV

THE AMERICAN EXPRESS CO. ADVANCED IN GOOD FAITH AND ON BEHALF OF UTAH FEATHERS ALL OF THE OCEAN FREIGHT CHARGES IN ACCORDANCE WITH BOTH THE RATE SCHEDULE FURNISHED UTAH FEATHERS AND THE PUBLISHED TARIFFS, AND THEY ARE THEREFORE ENTITLED TO REIMBURSEMENT.

In 3 Am. Jur. 2nd, Agency, Section 243, we find: "As a general rule, where an agent is employed or directed by another to do an act in his behalf, the law implies a promise of indemnity by the principal for damage resulting to

the agent proximately from the execution of the agency, and of reimbursement for necessary expenses advanced or incurred by the agent in order to consummate that which he is directed to do." Restatement, Agency, 2nd Edition, Section 438.

And in 3 C. J. S., Agency, Section 197, Page 103 and Section 198, Page 108:

"Money advanced by the agent to others under the terms of the Agency Agreement, if not for illegal purposes, may be recovered from the principal by the agent."

"An agent is not to be deprived of his right to indemnity, however, for mere mistakes of judgment where he has acted in good faith."

And in Restatement of Agency, 2nd Edition, Section 439:

"Unless otherwise agreed, a principal is subject to a duty to exonerate an agent who is not barred by the illegality of his conduct to indemnify him for:

(a) Authorized payment made by the agent on behalf of the principal.

(e) Payments resulting in benefit to the principal, made by the agent under such cir-

cumstances that it would be inequitable for indemnity not to be made."

And on page 330 of the same text:

"The authority to pay money to third persons on account of the principal, or to incur liability in the course of the person's business, may be created by specific directions or may be the result of the course of business between the principal and the agent, or of the customs of the business in which the agent is engaged by the principal."

And in Section 8C of this same text:

"A person who has been unjustly enriched at the expense of another is required to make restitution to the other."

"Similarly the duty of the principal to indemnify the agent and in other situations, the duty of the agent to indemnity the principal, is created by the rules of restitution. In fact, a large proportion of the rule stated in the Restatement of Restitution are applicable to agency situations."

And in *Hoggan vs. Cahoon,* 26 Ut. 444, 73 Pac. 512:

"When an agent is employed or directed by his principal to do an act and he acts within the

scope of his authority, the law implies a promise to reimburse for necessary expenses advanced or incurred by the agent in order to consummate that which he is directed to do."

CONCLUSION

There is no question but that the American Express Co. was loyal and used due care and good faith in transmitting to Utah Feathers the rate quotations they had received from the Pacific Coast European Conference, and that using this rate schedule Utah Feathers had three shipments of feathers shipped to Europe, and for which, American Express Co. advanced in behalf of Utah Feathers, $4,11.56 in freight and other charges, and for which the American Express Co. is entitled to reimbursement.

RECPECTFULLY SUBMITTED this 14th day of August, 1972.

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