

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT, IN AND
FOR LEON COUNTY, FLORIDA

ORBITZ, LLC; and
INTERNETWORK PUBLISHING
CORP., d/b/a LODGING.COM, *et al.*

CASE NO. 2009-CA-126

Plaintiffs,

v.

BROWARD COUNTY, FLORIDA
and FLORIDA DEPARTMENT OF
REVENUE, a state agency,

Defendant.

_____ /

**ORDER GRANTING PARTIAL SUMMARY JUDGMENT IN FAVOR OF THE OTC'S
ON THEIR AFFIRMATIVE CLAIMS
AND ALL OF BROWARD COUNTY'S COUNTERCLAIMS**

THIS CASE is before me on the Plaintiffs online travel companies' (OTCs') motion for partial summary judgment on their affirmative claims, Broward County's cross-motion for summary judgment as to Count I of the OTCs' complaint, and the OTCs' motion for summary judgment as to Broward County's counterclaims. The attorneys have done a good job of briefing the issues thoroughly and arguing their respective positions at the hearing on the motions. I have reviewed the filings for and against summary judgment and considered the case law and other authorities presented. For the reasons set forth below, I grant the OTCs' motions and deny those of the County.

The central issue raised is whether the OTCs must pay tax on the amount they pay hotels for rooms booked by their customers or on the full amount the customers pay the OTCs. The answer to that question lies in the nature of the tax, the nature of the OTCs' business and the nature of the

relationship between the OTCs and the various hotels with which they contract.¹ There are no appellate decisions on point but other Florida Circuit Courts have considered the issue under similar facts. These rulings, while not binding on me, provide me with considerable guidance.

My colleague in the Second Circuit, Judge Shelfer, determined that the wording of a similar tourist development tax ordinance was ambiguous when applied to the OTC transactions at issue and that the ambiguity must be resolved in favor of an interpretation against imposition of the tax. Judge Frederick Lauten's recent order granting summary judgment in favor of the OTCs in *Orange County v. Expedia, Inc.*, 2006-CA-2104 (Fla. Cir. Ct, June 22, 2012) is a very thorough and well reasoned analysis of the issue, the logic of which I find compelling. I find that I disagree with Judge Lauten only on the question of whether the OTCs act as agent for the hotels, but also find that it does not affect the conclusion reached. Because Judge Lauten has done such a thorough job of addressing the principal arguments, I find it unnecessary to discuss them at great length here. Nevertheless, out of respect for the litigants and those beyond who have an interest in this issue, I will briefly set forth my reasoning.

The Nature of the Tax

The tax is imposed pursuant to Broward County Ordinance Code sections 31½-16, *et seq*, which levies a Tourist Development Tax ("TDT") on the rent charged for hotel rooms, short-term leases, and other transient accommodations in that county. The Broward County TDT is permitted by Florida's Local Option Tourist Development Act ("State Enabling Statute") at sections 125.0104, *et seq*, Florida Statutes. The language used and case law interpreting it makes clear that what is being taxed is the privilege of engaging in the business of renting out transient

¹ The tax is imposed on a variety of transient accommodations. I use "hotel" to include all such forms for ease of discussion.

accommodations. Although it is the ultimate consumer who is charged and pays the tax, the person or entity who engages in this business is responsible for collecting and remitting the tax.

The Nature of the OTC Business

The OTCs offer customers an opportunity to review, compare, and book a number of travel-related services such as airline flights, car rentals, and transient accommodation rentals. As to the latter, the OTCs contract with the hotels to make available a certain number of rooms through the OTCs at a rate lower than that generally offered to the public.

If a customer wishes to book a room through an OTC, he is generally shown three sums: the “Room Rate,” “Taxes and Service Fees,” and “Total Cost.” The Room Rate bundles the pre-determined net-rate established by the hotel with the mark-up established by the OTC. The Taxes and Services fees bundles the TDT with other taxes and fees. The Total Cost is the full sum of both. This is the extent of the itemization presented to the customer; he is not provided with the discounted rate for the room, the OTC’s mark-up, or the individualized tax and fee amounts.

The OTC transactions at issue are structured in what is known as the Merchant Model. In this model, a customer wishing to rent a room at the total cost presented by the OTC will pay that amount to the OTC. At or immediately after the customer makes his payment to the OTC, the OTC communicates with the hotel via a computer system to establish a reservation with the hotel. When the customer submits his payment to the OTC it is held until the hotel invoices the OTC for payment. This typically occurs when the guest checks out of the hotel, having completed his stay. The OTC deducts and retains a pre-determined mark-up and forwards the remaining amount on to the hotel, which then remits the applicable taxes to the appropriate taxing authorities.

The Nature of the Relationship between the OTC and the Hotel

The County maintains that under the clear wording of the statute and ordinance, the OTCs, by these transactions, exercise the privilege of renting out the hotel rooms at the time they receive the consideration from the consumer, and they should pay the tax on the full consideration received by the OTC. The County points out that under all other business models (travel agent, direct rental by hotel and modified merchant model), tax is paid on the full amount paid by the consumer. Under each, the County argues, the guest pays the same amount in order to occupy and use the room, and to create an exemption for the merchant model transaction would lead to an absurd result.

This is a compelling argument from a public policy standpoint, but it is not supported by either the wording of the statute and ordinance, principles of statutory construction or pertinent case law. The primary problem for the County is that, as noted above, the tax is on the privilege of renting out rooms. It is, in essence, a tax on the hotelier for the privilege of engaging in that business. The OTCs are not hoteliers and do not engage in that business. They do not purchase the rooms from the hotels, then resell or sublet the rooms to their customers. They have no possessory interest in the hotel rooms nor can they grant others that right. The OTC's do not, themselves, select which rooms are rented to the customer. They do not operate, maintain, or control the physical premises, and they do not set rules or procedures governing the customer's stay.

What they do is act as an agent of the hotel for purposes of reserving a room for members of the public, at an agreed upon rate. The hotel authorizes the OTCs to offer the room to the customer at a marked up rate so long as the OTCs collect an amount equal to the rate quoted them by the hotel, plus the applicable estimated taxes, and remits that amount to the hotel upon invoice when the guest departs. It is understood and agreed between them that it is the hotel which will remit the appropriate tax to the taxing authority.

The OTCs strenuously argue that they are not agents of the hotels and Judge Lauten agreed with them in his analysis. I am at a loss, however, to understand how or under what authority the OTCs can reserve a room at the hotel on behalf of a consumer if the hotel has not authorized the OTC to speak and act on its behalf and to bind it in the same way an employee would bind the hotel if a consumer called the hotel directly to make a reservation. The scope of the agency may be rather narrow, but it is an agency relationship.²

For these reasons, I find that summary judgment should be entered in favor of the OTCs on their affirmative claims and against the County.

The Counterclaims

In a similar vein, when taken in a light most favorable to the non-moving parties, the evidence presented compels summary judgment in favor of the Plaintiff OTCs as to Broward County's counterclaims. These claims (for Breach of Fiduciary Duty, Conversion, Civil Theft, Permanent Injunction, and Imposition of a Constructive Trust) are for the most part dependent upon a finding that the OTCs are liable for the additional tax claimed. To the extent those counterclaims may independently hinge upon a finding of fraud or other inequitable conduct, the undisputed material facts established by the record evidence demonstrate that there is no basis for such a finding.

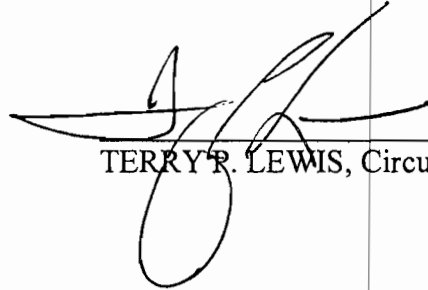
Wherefore it is

ORDERED and ADJUDGED that the OTCs' motion for partial summary judgment on their affirmative claims is GRANTED and Broward County's cross motion for partial summary judgment is DENIED. The OTCs' motion for summary judgment as to Broward County's

² The County argues that because the OTC acts as an agent of the hotel, it is responsible for collecting and remitting the tax. If in fact that was the nature of the agency, the agreement between the hotel and the OTC, I would agree, but it is not. Rather, the hotel assumes that responsibility. And even if the OTC was responsible for remitting the tax, the fact is, the tax has been paid, so it is not material for purposes of these motions.

counterclaims is also GRANTED. The non-operator Plaintiffs' motion for summary judgment is GRANTED.

DONE and ORDERED in Chambers at Tallahassee, Leon County, Florida, this 13th day of July, 2012.



TERRY R. LEWIS, Circuit Judge

Copies to: All parties