UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 16-20924-CIV-MARTINEZ/GOODMAN

DONNA INCARDONE, et al.,

Plaintiffs,

v.

ROYAL CARRIBEAN CRUISES, LTD.,

Defendant.
_____/

REPORT AND RECOMMENDATIONS ON PLAINTIFFS' MOTION *IN LIMINE* TO PRECLUDE EVIDENCE OF PLAINTIFFS' CONSENTING TO OR SIGNING TICKETS

This Report and Recommendations recommends the denial of Plaintiffs' Motion *in Limine* to Preclude Testimony or Evidence of Plaintiffs' Consenting to or Signing Tickets [ECF No. 278], which United States District Judge Jose E. Martinez referred [ECF No. 376] to the Undersigned.[1] Defendant Royal Caribbean Cruises, Ltd. ("RCCL") filed an opposition response and Plaintiffs filed a reply. [ECF Nos. 300; 315].

[1] If a motion *in limine* concerns a case-dispositive matter, such as motion to exclude a Plaintiff's sole expert on liability and causation in a medical malpractice lawsuit, then the Undersigned issues a Report and Recommendations; if it concerns a non-dispositive matter, then an Order is entered. Because this motion involves a ticket contract containing a purported "Act of God" limitation on liability which Defendant contends, in its still-pending Renewed and Amended Summary Judgment Motion [ECF No. 241], entitles it to a defense judgment, this motion concerns a dispositive matter. Therefore, the Undersigned has opted for a Report and Recommendation, rather than an Order.

Plaintiffs' motion references RCCL's initial motion to dismiss, which attached the affidavit of Amanda Campos, an in-house RCCL attorney who is the senior manager of guest claims and litigation. [ECF No. 9-1]. In her affidavit, Ms. Campos said that all passengers are provided with a Guest Ticket Booklet (which contains the cruise/passenger ticket contract), and that all passengers are required to check-in and accept the terms and conditions of the ticket contract before boarding. [ECF No. 9-1, p. 2]. She also explained that "Royal Caribbean requires a valid **signed** contract before any passenger can board a ship." [ECF No. 9-1, p. 2 (emphasis added)].

In their motion *in limine*, Plaintiffs allege that RCCL's second motion to dismiss [ECF No. 34] argued that the "Plaintiffs each received and signed ticket contracts, which would somehow limit the Defendant's liability in this action." [ECF No. 278, p. 1]. Plaintiffs' motion *in limine* states that Plaintiffs did not sign any cruise ticket contracts, and they point out that RCCL never produced copies of signed ticket contracts, despite their request.

In its motion to dismiss, RCCL does not expressly allege that Plaintiffs **signed** the ticket contracts. [ECF No. 34]. Instead, it says that Plaintiffs checked-in and accepted the terms of the ticket contracts. The motion to dismiss did, however, reference Ms. Campos' affidavit, which, as noted above, *implicitly* represents that the specific Plaintiffs here did in fact **sign** the electronic ticket contracts. This contention was made implicitly because

Ms. Campos represented in her affidavit that RCCL "requires a valid signed contract before any passenger can board a ship." [ECF No. 9-1, p. 2].

In any event, it appears as though a portion of Ms. Campos' declaration was inartfully drafted, as RCCL no longer asserts that these passengers *signed* the ticket contracts. Rather, RCCL's position is that the ticket contracts were reasonably *communicated* to the passengers, who were required to agree to the ticket contract terms as part of their online check-in for the cruise. [ECF No. 300]. In addition, RCCL notes that the terms and conditions of the ticket contract are publicly available on its website.

Plaintiffs still seek exclusion of the ticket contract evidence because they say RCCL did not produce the information in discovery. But RCCL now concedes that the Plaintiffs never *signed* in the traditional sense, the ticket contracts, so there are no signed contracts to be produced. Plaintiffs' deny in their motion and reply that they signed the ticket contracts, but that contention addresses a point that is no longer in dispute. Plaintiffs also deny that a ticket contract was communicated to them. The Undersigned **respectfully recommends** that the Court **deny** Plaintiff's Motion *in Limine* and not prevent RCCL from mentioning the ticket contracts or introducing evidence about them merely because the Plaintiffs say the ticket contracts were never provided to them.

Moreover, the Undersigned **respectfully recommends** that the Court not exclude evidence of the ticket contract because RCCL supposedly failed to provide a copy in discovery. A copy of the ticket contract was attached to Ms. Campos' affidavit and was

filed on the public CM/ECF docket on April 5, 2016, more than three years ago (and probably before Plaintiffs even propounded any discovery in the first place).[2] So Plaintiffs have had the ticket contract terms since almost the inception of this lawsuit.

Plaintiffs further allege that RCCL presented no evidence that they knowingly agreed to any "terms and conditions" of the ticket contract. But Ms. Campos' affidavit, which explains the procedure used by RCCL and specifies that no passenger is permitted to board without agreeing to the terms during the on-line check-in process, is in fact evidence of the agreement, and it was filed on April 5, 2016. RCCL represents that every passenger must acknowledge the terms and conditions of the ticket contract and it is undisputed that these Plaintiffs did go on the cruise.

Under general maritime law, once a term or condition of the ticket contract is reasonably communicated to the passenger, it is enforceable. *See Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991). The reasonable communicativeness test involves an analysis of the overall circumstances not only of the ticket itself, but also of any extrinsic factors indicating the passenger's ability to become meaningfully informed on the contractual terms at stake. *Wallis v. Princess Cruises, Inc.*, 306 F.3d 827, 835 (9th Cir. 2002).

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[2] Plaintiffs filed the Complaint [ECF No. 1] on March 14, 2016 and the parties filed the Joint Scheduling Report [ECF No. 14] on April 25, 2016. Federal Rule of Civil Procedure 26(d)(1) provides that a party may not seek discovery from any source before the parties have conferred as required by Federal Rule of Civil Procedure 26(f), absent certain limited exceptions inapplicable here.

The reasonable communicativeness test involves a two-pronged analysis that considers: (1) the physical characteristics of the clause in question; and (2) whether the plaintiffs had the ability to become "meaningfully informed" of the contract terms. *Myhra v. Royal Caribbean Cruises, Ltd.*, 695 F.3d 1233, 1244 (11th Cir. 2012). The terms of a ticket contract are "presumptively enforceable" absent a "strong showing" from plaintiffs that enforcement of the terms would be unreasonable. *Shute*, 499 U.S. at 590-91. The plaintiff need not actually have read the terms for them to have been reasonably communicated. *See Myhra*, 695 F.3d at 1246 n.42 ("We note that whether the Myhras chose to avail themselves of the notices and to read the terms and conditions is not relevant to the reasonable communicativeness inquiry."); *see also Caron v. NCL (Bahamas) Ltd.*, 910 F.3d 1359, 1367 (11th Cir. 2018) (validating two-factor test for reasonable communication and holding that cruise ship ticket's waiver term was reasonably communicated to passenger).

Moreover, at least one Florida court has specifically held that **RCCL's** ticket contract satisfied the reasonable communications test. *Royal Caribbean Cruises, Ltd. v Clarke*, 148 So. 3d 155, 157 (Fla. 3d DCA 2014) (stating the inquiry is "not whether the passenger actually received and read the ticket contract"); *cf. Krenkel v. Kerzner Int'l Hotels, Ltd.*, 579 F.3d 1279, 1281 (11th Cir. 2009) (using the "reasonable communicativeness" test to affirm an order of dismissal based on forum selection clause which plaintiffs signed when they checked into a Bahamas hotel).

For the reasons outlined above, the Undersigned **respectfully recommends** that the Court **deny** Plaintiffs' *in limine* motion.

Objections

The parties will have seven (7) days from the date of being served with a copy of this Report and Recommendations within which to file written objections, if any, with United States District Judge Jose E. Martinez. Each party may file a response to the other party's objection within seven (7) days of the objection.[3] Failure to file objections timely shall bar the parties from a *de novo* determination by the District Judge of an issue covered in the Report and shall bar the parties from attacking on appeal unobjected-to factual and legal conclusions contained in this Report except upon grounds of plain error if necessary in the interest of justice. *See* 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140, 149; *Henley v. Johnson*, 885 F.2d 790, 794 (11th Cir. 1989); 11th Cir. R. 3-1 (2016).

DONE AND ORDERED in Chambers, in Miami, Florida, on August 5, 2019.

Jonathan Goodman
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:
The Honorable Jose E. Martinez
All Counsel of Record

[3] The Undersigned is shortening the deadlines for the oppositions and responses because this motion has been fully briefed and was also discussed at the multi-hour hearing.