

Jieming Liang v. NCL (Bah.) Ltd.

2019 N.Y. Slip Op. 51345
Decided Aug 20, 2019

Robert I. Caloras, J.

The names of counsel are: John L. O'Kelly, Esq. Of Counsel, Pontisakos & Branman, P.C. Attorneys For Plaintiff 600 Old Country Road-Suite 323 Garden City, New York 11530 Peter A. Junge, Esq. JUNGE & MELE, LLP Attorneys for Defendant 303 South Broadway, Suite 470 Tarrytown, New York 10591 Robert I. Caloras, J.

The following papers numbered E18-E69 read on this motion by defendant for an order for summary judgment pursuant to CPLR 3212 to dismiss the Amended Complaint based upon a forum selection clause in the cruise ticket contract, or in the alternative, for summary judgment due to lack of personal jurisdiction over said defendant. PAPERS NUMBERED Notice of Motion-Affirmation-Affidavit-Exhibits-Memorandum of Law E18-E36 Stipulation -Adjournment of Motion E37 Notice of Cross-Motion-Affirmation in Support of Cross-Motion and in Opposition-Affidavit-Exhibits E39-E53, E55-E56 Proposed Order E54 Reply Memorandum of Law in Support of defendant's Motion and in opposition to plaintiff's Cross-Motion-Affidavits-Exhibits E57-E64 Reply Affirmation-Affidavits E65-E69

Upon the foregoing papers, it is ordered that defendant's motion and plaintiff's cross-motion are determined as follows:

In the Complaint, plaintiff alleges that on January 13, 2018, she fell and injured herself in stateroom No.5119 on the cruise ship known as Norwegian Breakaway, owned by defendant NCL Corporation, Ltd. Plaintiff further alleges that on

December 27, 2017, defendant WMPH Incorporated booked plaintiff's reservation for this cruise from January 5, 2018 to January 20, 2018. On February 25, 2019, the parties executed a stipulation, which was "So Ordered" by this Court, wherein, among other things, the caption of the action was amended *nunc pro tunc* to substitute as defendant NCL (Bahamas) Ltd., which party was incorrectly named in the initial suit as NCL Corporation, Ltd., and the action was discontinued without prejudice as against the NCL defendants. This "So Ordered" stipulation also directed that the caption was amended to, *Jieming Liang v NCL (Bahamas) Ltd.*

Defendant NCL (Bahamas) Ltd. ("NCL") now moves for summary judgment to dismiss the Amended Complaint, based upon a forum selection clause in the cruise ticket contract, which it alleges requires that the instant action be brought exclusively in the United States District Court for the Southern District of Florida, except in cases where that Court does not have jurisdiction, then in any State Court located in Miami, Dade County, Florida. NCL has submitted, among other things, the following: Summons and Complaint; Answer to the Complaint; Amended Complaint; Answer to the Amended Complaint; Reservation; Specimen Ticket; Fare Payment; Ticket print history; contract acceptance; Mr. Cai's client maintenance page; Guest Ticket Contract; Memorandum of Law; Michelle Williams Inman's affidavit.

In her affidavit, Ms. Williams-Inman states that she is the claims representative for NCL (Bahamas) Ltd., d/b/a Norwegian Cruise Line., and is familiar with the terms and conditions of NCL's "Guest Ticket Contract", as well as the procedures for ticketing passengers on its cruises, and the methods by which notice is provided to passengers regarding the terms and conditions of the cruise ticket contract. Ms. Williams-Inman states that NCL's business records show that plaintiff's travel agent, WMPH Vacations, ("WMPH"), whose office is located at 220 Congress Park Dr., Ste. 330, Delray Beach, Florida, contacted NCL in Miami, Florida on December 26, 2017 to obtain a booking for plaintiff and her two travel companions for the January 5, 2018 to January 18, 2018 cruise on NCL's Vessel, Norwegian Breakaway. Plaintiff's travel agent maintains a website on which prospective cruise customers may request assistance in obtaining bookings with various cruise lines. Ms. Williams-Inman states that the plaintiff and her family contacted WMPH in Florida with their request to obtain a booking on the subject cruise. Ms. Williams-Inman states that WMPH was not involved in any manner with how the Vessel was operated, and was only the travel agent for these passengers. After the fare was fully paid to NCL on the day of the booking, NCL's Florida office sent an e-mail notification (the e-Docs letter) with a link to the cruise tickets and travel documents (the e-Docs) directly to the subject passengers. On December 27, 2017, the day after the booking, the e-Docs were "READY" to be "PRINTED". Before being able to print the e-Docs, Ms. Williams-Inman states that the plaintiff's family had to, and in fact did, acknowledge and accept the terms and conditions of the "Guest Ticket Contract" after having the opportunity of scrolling through its terms and conditions. On December 28, 2017, a full week before the start of the cruise, Ms. Williams-Inman states that the plaintiff and her family "ACCEPTED" the terms and conditions of the Cruise Ticket Contract. The person who accepted

the contract for all three passengers was "USER" "242262443" (identified as Mr. Zhaoquang Cai, plaintiff's husband). The cruise tickets and travel documents were printed on December 28, 2017, and re-printed on January 4, 2018, a day before the cruise, which would have created an extra copy of the eDocs. Ms. Williams-Inman states that Mr. Zhaoquang Cai's email address of "cnishacquanggyahoo.com" is the same for plaintiff in NCL's electronic files. As such, Ms. Williams-Inman claims that his email account would have been the one to have accessed NCL's portal. The Guest Ticket Contract, in addition to being available for inspection during the check-in and ticket-printing process on December 28, 2017, was also available for viewing on-line both before and after the subject cruise was booked at NCL's website (www.ncl.com). In addition to the acknowledgment and acceptance of the Guest Ticket Contract during check-in, Ms. Williams-Inman states that the plaintiff and her family again accepted the contract's terms and conditions by boarding the Vessel and taking the cruise. In order to gain entry onto the Vessel on January 5, 2018, plaintiff or someone in her family had to present to NCL's boarding agents the single page in the travel documents entitled "GUEST TICKET TO BE PRESENTED FOR PASSAGE". The "GUEST TICKET TO BE PRESENTED FOR PASSAGE" contains notices near the bottom which state, in clear black letters against a white background, a "NOTE" wherein the passenger is "specifically directed to the Terms and Conditions of this contract which you have accepted during the online registration process" which "affect important legal rights" and the passenger is "advised to read them carefully". The "Guest Ticket Contract" consists of clauses which are printed in black lettering against a clear white background and can be easily read. Before those clauses, the following "IMPORTANT NOTICE" appears in clear black ink against a white background, and distinctly enclosed in a rectangular black border:

IMPORTANT NOTICE: Guests are advised to carefully read the terms and conditions of the Guest Ticket Contract set forth below which affect your legal rights and are binding. The Guest's attention is specifically directed to Paragraphs 10 and 14 of the Terms and Conditions of the Guest Ticket Contract. Acceptance or use of this Contract shall constitute the agreement of Guest to these Terms and Conditions. (Emphasis added)

Section 14 states, in relevant part, the following:

14. Venue and Governing Law

Except as otherwise specified herein, any and all disputes whatsoever arising out of or relating to this Contract or the Guest's cruise, as well as the interpretation, applicability, and enforcement of this Contract shall be governed exclusively by the general maritime law of the United States, which shall include the Death on the High Seas Act ([46 U.S.C.S. § 30302](#)) without regard to choice of law rules, which replaces, supersedes and preempts any provision of law of any state or nation to the contrary. It

is hereby agreed that any and all claims, disputes or controversies whatsoever arising from, related to, or in connection with this Contract or the Guest's voyage, including any activities on or off the vessel or transportation furnished therewith, with the sole exception of claims subject to binding arbitration under Section 10(b) above, shall be commenced, filed and litigated, if at all, before the United States District Court for the Southern District of Florida in Miami, Florida, U.S.A., or as to those lawsuits for which the United States District Court for the Southern District of Florida lacks subject matter jurisdiction, before a court of competent jurisdiction in Miami-Dade County, Florida, U.S.A., to the exclusion of the Courts of any other country, state, city or county where suit might otherwise be brought.

In opposition, plaintiff argues that NCL's forum selection clause argument has no merit. Plaintiff has submitted, among other things, the following: plaintiff's affidavit; Zhaoqiang Cai's affidavit; December 26, 2017 NCL Caribbean Cruise Confirmation; NCL Registration to do business with NYS Dept. Of State; description of NCL Manhattan Cruise Terminal Operation; and NCL letter to plaintiff re: disembarking from the Breakaway following her injury. Plaintiff, and her party deny receiving, or presenting the ticket to board. Plaintiff also claims that NCL has failed to produce the ticket it claims that plaintiff presented at boarding. Even if this ticket existed, plaintiff claims that it is unenforceable because it was printed on December 28, 2017, two days after the trip had been booked and paid for. Plaintiff further claims that Ms. Williams-Inman's affidavit is deficient because she doesn't have personal knowledge of the averred facts, and she failed to disclose pertinent information regarding her employment and the alleged basis of her familiarity with the defendant's documents and procedures. Plaintiff further claims that Williams-

Inman's affidavit does not address whether she has first-hand knowledge of ticketing and boarding procedures concerning the NYC/Caribbean Breakaway cruises at issue in this suit. Plaintiff also claims that NCL relies upon electronic business records which weren't authenticated pursuant to CPLR 4518. Plaintiff further claims that the forum selection clause was not reasonably communicated to her.

In reply, NCL argues that plaintiff's affidavit is not competent evidence. In her affidavit, plaintiff states that "I do not speak or read English. I don't understand English. I speak and read only Cantonese. (I've had this affidavit read to me.)". Plaintiff did not submit a translator's affidavit. Therefore, NCL argues that plaintiff's affidavit is facially defective and inadmissible. NCL also argues that in her supplemental affidavit, Ms. Williams-Inman sufficiently authenticates the documents and testifies regarding NCL's practices and procedures. NCL has also submitted an affidavit from Ufuk Tukul, the co-President of WMPH. In his affidavit, Mr. Tukul states that WMPH informed plaintiff that in order to board the cruise ship, the passengers had to provide all documentation and valid passports. If not, they "will be denied boarding by the cruise line without recourse for failure to present proper documentation and no refund will be given by the cruise line or WMPH Vacations". NCL also claims that production of a specimen ticket rather than the original ticket is routinely done in these matters and is an accepted practice by the Federal Courts.

4 The validity of the terms of a contract for a cruise turn on federal principles of ^{*4} maritime law (see *Carnival Cruise Lines, Inc. v Shute*, 499 US 585, 590 [1991]; *Lerner v Karageorgis Lines*, 66 NY2d 479, 484-485 [1985]). In deciding such issues, "we must look to the decisions of the Federal courts to define the liabilities of shipowners for maritime torts, leaving out of consideration decisions of our own courts or statutes of the State which conflict with the rules of liability established in the Federal courts" (*Riley v*

Agwilines, Inc., 296 NY 402, 405-406 [1947]). Applying federal maritime principles, forum selection clauses in cruise ship contracts are generally enforceable (see *Carnival Cruise Lines, Inc. v Shute*, 499 US at 593; *The Bremen v Zapata Off-Shore Co.*, 407 US 1, 8-12 [1972]), provided that the terms have been reasonably communicated to the passenger (see *Ward v Cross Sound Ferry*, 273 F3d 520 [2001]) and do not violate notions of "fundamental fairness," either because the passenger's assent was the result of fraud or overreaching or the forum restriction is inconvenient (*Carnival Cruise Lines, Inc. v Shute*, supra at 595; *Effron v Sun Line Cruises, Inc.*, 67 F3d 7, 9-11 [1995]). A party contesting enforcement of a forum selection provision bears the "heavy burden" of demonstrating why enforcement would be unreasonable (*The Bremen v Zapata Off Shore Co.*, supra, see also *Norwegian Cruise Line v. Clark*, 841 So. 2d 547, 550 [Fla. Dist. Ct. App. 2003]).

Initially, the Court notes that plaintiff claims in her opposition papers that an affidavit from her son, Henry Cai was E-filed. Although an affidavit from Henry Cai was not E-filed as an exhibit to plaintiff's opposition papers, plaintiff did subsequently E-file an affidavit from Henry Cai (NYSEC Doc. 65) with her reply papers. Therefore, the Court will consider this affidavit in determining this motion. As to plaintiff's affidavit, the Court finds that it is facially defective and inadmissible, because it was not accompanied by a translator's affidavit executed in compliance with CPLR 2101(b) (*Gonzalez v Abreu*, 162 AD3d 748 [2d Dept. 2018]). Although plaintiff's affidavit will not be considered by the Court in determining this motion, Zhaoqiang Cai's affidavit was properly submitted. In their affidavit, both Henry Cai and Zhaoqiang Cai, among other things, deny that NCL notified them and/or the plaintiff of the forum selection clause.

The Court finds that plaintiff's claim that she and her family were not reasonably notified of the forum selection clause is without merit

(*Lischinskaya v Carnival Corp.*, 56 AD3d 116, 119—20 [2d Dept. 2008]). Failure to read a ticket will not relieve a passenger of the contractual limitation (*Vavoules v Kloster Cruise, Ltd.*, 822 F. Supp. 979, 981 [EDNY 1993], citing *Marek v Marpan Two, Inc.*, 817 F.2d 242, 247 [3d Cir.], cert. denied, 484 U.S. 852 [1987] [plaintiffs, who received their tickets only moments before boarding the ship and had not had a chance to read the conditions in advance of sailing, could not blame others for failure to read it within six months of the accident]).

The Court further finds that Ms. Williams-Inman properly authenticated the documents containing NCL's forum selection clause in her initial affidavit and supplemental affidavit. The Court also finds that plaintiff's claim that the forum selection clause is unenforceable, because she paid for the cruise before receiving the ticket is without merit. It is well settled that the reasonable communication of the ticket, that is, the ability to become informed, and not the timing of its purchase or receipt, controls the issue of whether the forum selection clause, or any other clause for that matter, was reasonably communicated to *5 the passenger (*Norwegian Cruise Line v. Clark*, supra, see also *Viney v Kloster Cruise, Ltd.*, No. 96-20480, 1996 WL 904762 [N.D.Cal.1996]).

Under these circumstances, the Court finds that the forum selection clause was reasonably communicated to the plaintiff, and they were informed of it prior to embarking on the cruise. Therefore, the forum selection clause is enforceable (*Lischinskaya v Carnival Corp.*, supra), and this action may only be brought in Florida pursuant to the terms of the forum selection clause in the cruise ticket contract, which as set forth above, provides that this action be brought exclusively in the United States District Court for the Southern District of Florida, except in cases where that Court does not have jurisdiction, then in any State Court located in Miami, Dade County, Florida. Accordingly, this Court has no jurisdiction, and the motion for summary judgment is granted and the Complaint is dismissed.

In the cross-motion, plaintiff seeks leave to add NCL Corporation, Ltd. and WMPH as defendants. As set forth above, this Court does not have jurisdiction to hear this action, pursuant to the forum selection clause in the cruise ticket contract. Consequently, the cross-motion is denied.

Based upon, the foregoing, the motion is granted, and the cross-motion is denied. Dated: August 20, 2019 ROBERT I. CALORAS, J.S.C.