

**Baldasano v Norwegian Cruise Line & Up Date
Travel, Inc.**

2008 NY Slip Op 31204(U)

April 28, 2008

Supreme Court, Nassau County

Docket Number: 4757-07/

Judge: F. Dana Winslow

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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

FRANCES B. BALDASANO

**TRIAL/IAS, PART 9
NASSAU COUNTY**

Plaintiff,

MOTION DATE: 12/6/07

-against-

**MOTION SEQ. NO.: 001
INDEX NO.: 014757/07**

**NORWEGIAN CRUISE LINE & UP DATE
TRAVEL, INC.**

Defendants.

The following papers having been read on the motion (numbered 1-5):

Notice of Motion.....1
Notice of Cross-Motion for Summary Judgment.....2
Affirmation in Opposition.....3
**Memorandum of Law in Support of Motion by
Defendant for Summary Judgment.....4**
**Reply Memorandum of Law in Support of Motion for
Summary Judgment.....5**

Motion (seq. No. 1) by the attorneys for the defendant Norwegian Cruise Line, and cross motion (seq. No. 2) by the attorneys for the defendant Up Date Travel, Inc. for an order pursuant to CPLR 3212 directing summary judgment in favor of the defendants and against the plaintiff are **granted**.

This is an action for personal injuries allegedly sustained while the plaintiff was a passenger on co-defendant Norwegian Cruise Line's (NCL) vessel Norwegian Dream. Plaintiff had a ticket for an Alaskan cruise which sailed from Seattle, Washington, on September 1, 2005. The defendants seek to dismiss the complaint based on a forum selection clause in the ticket contract which states that

all claims arising during the cruise must be brought exclusively in the U.S. District Court for the Southern District of Florida, and if that court does not have jurisdiction, then in the state courts located in Miami-Dade County, Florida. The plaintiff argues that the contractual Florida forum selection clause is unenforceable against her because (1) she does not recall receiving the ticket, 2) she had trouble reading it, and 3) pursuant to New York CPLR § 4544, the font size is too small.

“. . . a passenger ticket contract is a maritime contract and is therefore governed by the general Maritime law of the United States.” *Lurie v Norwegian Cruise Lines, Ltd.*, 305 F.Supp2d 352, 356; *see also Cronin v Cunard Line Ltd.*, 250 AD2d 486, 486 citing *Feingold v Cunard Line*, 767 F.Supp. 84, 85 (“A passenger cruise ticket for an ocean voyage constitutes a maritime contract”). “In maritime cases, State courts must apply Federal law to secure a single and uniform body of maritime law.” *Lerner v Karageorgis Lines, Inc.*, 66 NY2d 479, 485, quoting *Matter of Rederi [Dow Chem. Co.]*, 25 NY2d 576, 581, *cert den.* 398 U.S. 939. Whether the terms and conditions of the passage contract were reasonably communicated is a question of law for the court to determine. *Marek v Marpan Two, Inc.*, 817 F.2d 242, 244-45, *cert den.* 484 U.S. 852. “A party contesting enforcement of a forum selection provision bears the heavy burden of demonstrating why enforcement would be unreasonable.” *Ferketich v Carnival Cruise Lines*, 2002 WL 31371977, *2 (ED Pa 2002) quoting *The Bremen v Zapata Off-Shore Co.*, 407 U.S. 1, 9-10.

It is alleged that the contractual relationship between NCL and the plaintiff is governed by the terms and conditions of a Passenger Ticket Contract booklet issued by NCL and then forwarded to plaintiff’s travel agent, the co-defendant Up

Date Travel on July 7, 2005, almost two months before the start of plaintiff's cruise on September 1, 2005. A true fall color specimen copy of the NCL Passenger Ticket Contract booklet similar to the one issued and provided to the plaintiff was annexed to the moving papers as Exhibit D. The Passenger Ticket Contract booklet issued to the plaintiff allegedly contained cautionary language at various places throughout the document to communicate to the plaintiff that there were terms and provisions within it which affect her legal rights and that she should read it. The NCL Passenger Ticket Contract booklet is a rectangular document measuring approximately 8-3/4 by 3-1/2 inches, and is bound by staples and black tape on the left or shorter side. Inside the booklet covers are similarly-sized pages which consist of travel reminders, travel itinerary, transportation vouchers, general cruise information, and the NCL "Passenger Ticket Contract booklet." The front cover of the NCL Passenger Ticket Contract booklet contains a notice on its lower border which states, in black letters, the following:

IMPORTANT NOTICE: The Passenger's attention is specifically directed to the terms and conditions of this contract set forth within. The terms and conditions affect important legal rights and the passenger is advised to read them carefully.

The cover page of the NCL Passenger Ticket Contract booklet is followed by one double-sided page with travel reminders. The second or inside page is identified as the "Passenger Ticket Contract" and "Cruise Ticket" in the upper right corner. This page is perforated on its left edge because it is removed by NCL personnel at boarding. The document states in its lower margin "To Be Presented for Passage,"

and in its upper margin “Do Not Separate Until Pier Check-in.” The actual “Cruise Ticket” (the “Lifted Ticket”) removed from plaintiff’s Passenger Ticket Contract booklet and retained by NCL is annexed as Exhibit E to the moving papers. NCL contends that after boarding the NCL personnel removed the “Cruise Ticket” (the “Lifted Ticket”). The remainder of the entire ticket booklet, including all previous and subsequent pages and the front and end covers, was returned to plaintiff for her future use and reference. NCL asserts that since the plaintiff and her travel agent had possession of the ticket contract for almost two (2) months before the cruise began on September 1, 2005, there was more than an adequate opportunity for the plaintiff to have become familiar with the ticket provisions. Appearing on the back of the Passenger Copy of the “Passenger Ticket Contract booklet” and continuing onto the next three double-sided pages in the ticket booklet are the enumerated terms and conditions of the “Passenger Ticket Contract.” Preceding those terms and conditions, in clear black lettering against a white background and surrounded by a dark black border, appears the following warning:

Passengers are advised to carefully read the terms and conditions of the Passenger Ticket Contract set forth below which affect your legal rights and are binding. Acceptance or use of this Contract shall constitute the agreement of Passenger to these Terms and Conditions.

Immediately following that warning are the terms of the “Passenger Ticket Contract.” They consist of 23 clauses printed in black lettering against a clear white background.

The forum selection clause, which includes a choice of law section appears

in clause 22.

The plaintiff in her affidavit in opposition claims that in August, 2005 she “received some documentation from the defendants.” She recalls “having at least a boarding pass for the ship and airplane tickets.” She does not recall ever receiving a copy of a Passenger Ticket Contract booklet that was issued by NCL and forwarded to plaintiff’s travel agent, co-defendant on July 7, 2005. In her affidavit in opposition the plaintiff states that after reading the Passenger Ticket Contract booklet, annexed as Exhibit D to the motion in support “although I am able to read some of the words in the documentation with my glasses, it is very difficult and does, in fact, cause me eye strain and headaches and I must stop continually. I can read the words. The small print requires me to read so slowly the words no longer make sense at all. In fact, if this was presented to me, I would have given up shortly after beginning to read because of the small print and the difficulty it presents.”

In his affidavit sworn to October 12, 2007, Rocco Morelli, the owner of defendant Up Date Travel, stated the plaintiff first called his office on May 21, 2005 to inquire about booking a cruise on the NCL. The plaintiff actually did book the cruise on May 31, 2005. Jane E. Kilgour, the manager of passenger claims for NCC, states in her affidavit that after the Cruise Ticket is removed from plaintiff’s ticket booklet at boarding by NCL’s boarding personnel, the entire booklet would have been returned to plaintiff for her future use and reference. NCL argues that since “plaintiff admits having the ‘boarding pass,’ her failure to recall receiving the ticket booklet is nothing more than a supremely convenient lapse of memory given this motion.” The plaintiff questions whether the sample ticket annexed to the motion in support contains terms identical to those features in the actual ticket

issued to plaintiffs. Plaintiff claims that NCL has not produced the actual Passenger Ticket Contract booklet applicable to her cruise, but rather, a sample ticket from another passenger. NCL asserts that plaintiff ignores the fact that NCL could not produce the actual ticket covering her cruise, but rather a sample, because her actual Passenger Ticket Contract booklet was returned to her upon boarding. Under the circumstances, the submission to the court of a sample Passenger Ticket Contract booklet in the absence of the actual Passenger Ticket Contract booklet issued fails to raise a triable issue of fact when the plaintiff is unable to rebut its authenticity in any significant way. *See Lousaraian v Royal Caribbean Corp.*, 951 F.2d 7, 9-10; *Ames v Celebrity Cruises*, 1998 WL 427694 (S.D.N.Y.). Plaintiff's claim that she does not remember the Passenger Ticket Contract booklet fails to contradict NCL's affidavit testimony that the plaintiff must have possessed the complete four-page packet to be allowed to board the cruise ship without incident, which she apparently did. Plaintiff has failed to rebut NCL's *prima facie* showing of the merits of its claim that she received a complete Passenger Ticket Contract booklet by August, 2005. Plaintiff admits receiving what she categorizes as a "boarding pass" but was actually the one page "Cruise Ticket" removed from the Passenger Ticket Contract booklet before she boarded the ship. The "boarding pass" states:

"Passenger Ticket Contract"

"Cruise Ticket"

Do Not Separate Until Pier Check-In

IMPORTANT NOTICE

The Passenger's attention is specifically directed to the terms and conditions of this contact set forth within. The

terms and conditions affect important legal rights and the passenger is advised to read them carefully.

Where there is nothing left to be resolved at trial, the issue may be summarily decided. Feigned or unsubstantiated allegations or assertions are insufficient to raise a trial issue of fact as to the receipt by the plaintiff of the entire Passenger Ticket Contract booklet. *Andrew v Pomeroy*, 35 NY2d 361; *Zuckerman v City of New York*, 49 NY2d 557; *Banco Popular North America v Victory Taxi Management, Inc.*, 1 NY3d 381.

In scrutinizing a passenger ticket for fairness, federal courts have developed a two-prong inquiry that focuses on (1) the appearance of the ticket itself and (2) the circumstances surrounding its purchase. *Lieb v Royal Caribbean Cruise Line, Inc.*, 645 F.Supp. 232, 234 citing *Barbachym v Costa Line Inc.*, 713 F.2d 216. From a review of the sample ticket it appears that the notice of the forum selection clause was adequately disclosed in paragraph 22 of the Passenger Ticket Contract booklet and the plaintiff had ample opportunity to review the terms of the ticket contract that were mailed to her travel agent before the cruise. Plaintiff's contention that she was unaware of the contents of the Passenger Ticket Contract booklet fails to raise an issue of fact as to whether she received adequate notice of the forum selection clause. A passenger who has the ticket in her possession and fails to read it takes the risk of such omission. *Baron v Compagnie Generale Transatlantique*, 108 F.2d 21, 23 (lawful provisions on a ticket as part of a contract of passage bind the passenger regardless whether passenger read them); *Melnik v Cunard Line Ltd.*, 875 F.Supp. 103, 107 (“[f]ailure to read a ticket will

not relieve a passenger of the contractual limitation”); *De Carlo v Italian Line*, 416 F.Supp. 1136, 1137 (plaintiff charged with notice of ticket provisions even though plaintiff never saw ticket which was held by traveling companion); *Barkin v Norwegian Caribbean Lines*, 1988, A.M.C. 645, 1987 WL 766923, *4 (plaintiff charged with notice provisions even though she did not read the ticket contract, which contained both her and her mother’s name).

The plaintiff’s claim that she does not recall receiving the full Passenger Ticket Contract prior to boarding the ship is unconvincing and insufficient to overcome the other evidence presented in support of the within motion. *Lurie v Norwegian Cruise Line Ltd.*, 305 F.Supp.2d 352, 359-361. The ticket reasonably communicated to the plaintiff the forum selection clause and is enforceable.

Plaintiff attempts to utilize New York’s CPLR § 4544 to argue that the ticket contract is unenforceable against her. She claims that CPLR § 4544 renders inadmissible consumer contracts which are illegible or smaller than certain dimensions. CPLR § 4544 provides, in pertinent part: “The portion of any printed contract or agreement involving a consumer transaction where the print is not clear and legible or is less than eight points in depth or five and one-half points in depth for upper case type may not be received in evidence in any trial, hearing or proceeding on behalf of the party who printed or prepared such contract or agreement, or who caused said agreement or contract to be printed or prepared.” A state court may not limit a party’s substantive rights by applying its own procedural rules if those rules would significantly affect the result of the litigation, i.e., would be outcome determinative. CPLR 4544, which is a rule of evidence, may not be employed to nullify a contractual limitation enforceable under Federal Maritime Law. *Lerner v Karageorgis Lines, Inc.*, 66 NY2d 479, 484. The attorneys

for the plaintiff offer not a single citation to refute the determination that the courts of New York State are not the proper forum to adjudicate the within dispute.

The complaint is **dismissed**. All proceedings under Index No. 014757/07 are terminated.

This constitutes the Order of the Court.

Dated: *March 28*, 2008

ENTER:

[Handwritten Signature]
J.S.C.

ENTERED
APR 18 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE