

Pogoda v Meyers

2010 NY Slip Op 32925(U)

September 30, 2010

Sup Ct, NY County

Docket Number: 110383/2009

Judge: Doris Ling-Cohan

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: *Hon. Doris Ling-Cohan*

PART 36

Index Number : 110383/2009

POGODA, BEVERLY S.

vs

MEYERS, JOSEPH J.

Sequence Number : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1, 2, 3

7, 8

9, 10

Cross-Motion: Yes No

5, 6

Upon the foregoing papers, it is ordered that this motion & cross-motion to

dismiss are denied in accordance with the attached memorandum decision

FILED

OCT 04 2010

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9-30-10

[Signature]
DORIS LING-COHAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

* 2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

-----X
BEVERLY S. POGODA,

Plaintiffs,

-against-

JOSEPH J. MEYERS, ROYAL CARIBBEAN CRUISES,
LTD. and EXPLORER OF THE SEAS, INC.,

Defendants.
-----X

Index No. 110383/2009

Motion Ser. No.: 001

FILED
OCT 04 2010
COUNTY CLERK'S OFFICE
NEW YORK

Defendants Royal Caribbean Cruises, Ltd. and Explorer of the Seas, Inc. (collectively "Royal Caribbean") move, pursuant to CPLR 3211(a)(1) (documentary evidence), for an order dismissing this action and the cross-claim for indemnity and contribution asserted by defendant Joseph J. Meyers, based upon: (1) the forum selection clause in the Cruise Ticket Contract (the "Ticket Contract"); and (2) the Agreement and Release Form (the "Release"). Defendant Meyers cross-moves pursuant to CPLR 327(a), to dismiss on the grounds of forum non conveniens.

Background

Defendant Meyers was hired by non-party Sixth Star Entertainment & Marketing ("Sixth Star"), via an email Confirmation Letter on December 12, 2008, to serve as a Bridge Director onboard the "Explorer of the Seas," ("vessel") sailing March 27, 2009 through April 5, 2009, from Cape Liberty, Bayonne, New Jersey. Pogoda

Aff. Ex. 4. Meyers was permitted to bring one guest to travel in the same stateroom, at no additional charge. Meyers chose plaintiff Beverly Pogoda, as his guest, to stay in the same cabin. Neither plaintiff, nor Meyers, were paid any wages or charged a cruise fare by Royal Caribbean, the operator of Explorer of the Seas; they were only required to pay Sixth Star's administrative fee of \$65.00 per night (total \$585.00).

It is undisputed that the December 12, 2008 Confirmation Letter, was sent to Meyers only via e-mail, and provided the following in bold and capital letters:

THIS LETTER CONTAINS IMPORTANT DETAILS ABOUT YOUR CRUISE. PLEASE BE SURE TO READ THIS E-MAIL AND ALL ATTACHMENTS IN THEIR ENTIRETY...

Pogoda Aff. Ex. 4.

The Confirmation Letter further provides:

Attached is the Sixth Star and Royal Caribbean's Manual for Success which will provide you with the information and insight needed to help you obtain positive feedback for your assignment. You are responsible for carefully reviewing the "Manual for Success" as well as the "Terms and Conditions" and "Important Points" for your particular voyage. Please print copies of these documents and this confirmation letter, review them carefully, and take them with you to the ship for reference...

Id.

Plaintiff and Meyers were required to sign a Release Form which was sent by Sixth Star, attached to the Confirmation Letter

received on December 12, 2008. The Release was signed by plaintiff and Meyers on December 15, 2008 and provides as follows:

The undersigned do further release and forever discharge Sixth Star Entertainment & Marketing and/or, Royal Caribbean International, their successors and assigns, of and from any and all liability whatsoever for damage, personal injury, assault, illness, or death suffered by any of the undersigned receiving free or reduced rate transportation, and whether caused by the negligence of Royal Caribbean International or the negligence or fault or its agents of employees, or Sixth Star Entertainment & Marketing or its employees or agents, or otherwise, and whether suffered on board the vessel or elsewhere, and also from any liability for loss of or damage or delay to baggage or other property, whether or not caused by such negligence or fault, and the undersigned assume all such foregoing risks.

The undersigned further jointly and severally covenant and agree to protect and save harmless said Sixth Star Entertainment & Marketing and/or Royal Caribbean International and all employees of the same, from any loss, damage or expense by reason of litigation or otherwise on account of claims, liabilities and injuries to person or property aforesaid arising out of or in contemplation of said voyage, on the part of undersigned or legal representatives thereof.

Oneill Aff., Exh 4. Meyers signed as "Enrichment Staff" and plaintiff signed as "Guest."

The Confirmation Letter sent to Meyers also indicated that a "boarding letter" would be forwarded by Sixth Star via e-mail approximately five business days before the March 27, 2009 sailing date. Plaintiff states she cannot locate the actual boarding letter, but procured a sample that is "virtually

identical" to the one received by Meyers. Pogoda Aff. ¶ 17. The sample provided was an email letter that states:

Attached is the Boarding Letter for your upcoming cruise...Royal Caribbean does not issue actual cruise documents; therefore, please take this letter, your Sixth Star Confirmation letter, and the attached Boarding Letter with you as your Proof of Passage.

Pogoda Aff. Ex. 6. The Boarding Letter provided general guidelines for boarding. The third paragraph of the email letter states that:

Also, attached are the Terms and Conditions for Royal Caribbean Cruise Lines. Please be sure to review this document in its entirety.

Id.

The court notes that it does not appear from the submissions by the parties, nor is it alleged by Royal Caribbean, that information as to the forum selection clause was supplied in any of the attachments sent to Meyers along with the Confirmation Letter or the Boarding Letter; significantly, the parties have not supplied copies of such alleged attachments in the within submitted papers.

Plaintiff claims that, prior to their arrival at the pier on March 27, 2009, neither she nor Meyers had ever been provided with a ticket (which contains the parties' contract terms

[*6]
including the forum selection clause), cabin assignment, or booking number. Significantly, this is not disputed by Royal Caribbean.

According to Royal Caribbean, the Ticket Contract is a multi-part brochure which includes a "SetSail Pass" that passengers are to sign and hand in to the embarkation staff at the pier prior to boarding the vessel, but passengers get to keep the remaining pages of the Ticket Contract, which contain the contract terms, including the forum selection clause. Section 9 of the Contract contains the following forum selection clause:

IT IS AGREED BY AND BETWEEN PASSENGER AND CARRIER THAT ALL DISPUTES AND MATTERS WHATSOEVER ARISING UNDER, IN CONNECTION WITH OR INCIDENT TO THIS AGREEMENT, PASSENGER'S CRUISE, CRUISETOUR, RCT LAND TOUR OR TRANSPORT, SHALL BE LITIGATED, IF AT ALL, IN AND BEFORE THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA LOCATED IN MIAMI-DADE COUNTY, FLORIDA, U.S.A., (OR AS TO THOSE LAWSUITS TO WHICH THE FEDERAL COURTS OF THE UNITED STATES LACK SUBJECT MATTER JURISDICTION, BEFORE A COURT LOCATED IN MIAMI-DADE COUNTY, FLORIDA, U.S.A.) TO THE EXCLUSION OF THE COURTS OF ANY OTHER STATE, TERRITORY OR COUNTRY. PASSENGER HEREBY CONSENTS TO JURISDICTION AND WAIVES ANY VENUE OR OTHER OBJECTION THAT HE MAY HAVE TO ANY SUCH ACTION OR PROCEEDING BEING BROUGHT IN THE APPLICABLE COURT LOCATED IN MIAMI-DADE COUNTY, FLORIDA.

Banciella Aff. ¶ 6, Ex. A

Plaintiff does not deny that both she and Meyers signed the document given to them at check-in, prior to boarding, however,

she claims that after signing the document, she and Meyers were "immediately instructed to return the entire document to the representative". Pogoda Aff. ¶ 21. Plaintiff maintains that she and Meyers "kept none of this paperwork. The check-in person returned no paperwork to either Mr. Meyers or myself". *Id.* (emphasis in affidavit).

On March 29, 2009, while the vessel was on the high seas, plaintiff sustained personal injuries when she tripped and fell while on the deck of the vessel. Plaintiff received initial treatment onboard the vessel from March 29, 2009 until April 1, 2009, after which she was removed from the vessel in St. Thomas, United States Virgin Islands, and treated at Schneider Regional Medical Center in St. Thomas. On April 2, 2009, plaintiff was taken from St. Thomas to Miami, Florida, where on April 6, 2009, she underwent surgery at Jackson Memorial Hospital, Miami.

Discussion

A. Royal Caribbean's Motion to Dismiss

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction...We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the fact as alleged fit within any cognizable legal theory...Under 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively

establishes a defense to the asserted claims as a matter of law..."

Leon v. Martinez, 84 NY2d 83 (1994) (citations omitted); see also *Epifani v Johnson*, 65 AD3d 224, 229 (2d Dep't 2009) ("A party seeking dismissal on the ground that his or her defense is founded on documentary evidence under CPLR 3211(a)(1) has the burden of submitting documentary evidence that resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim").

Applying such principles herein, Royal Caribbean's motion to dismiss pursuant to CPLR 3211(a)(1), documentary evidence, is denied as detailed below.

(1) Forum Selection Clause

In its motion, Royal Caribbean argues that the forum selection clause contained in the Ticket Contract requires that this case be dismissed and litigated before a court in Miami, Dade County, Florida. Royal Caribbean maintains that before embarking the vessel on March 29, 2009, plaintiff and Meyers received the Ticket Contract, which governs the parties' relationship. According to Royal Caribbean, plaintiff and Meyers were given adequate warning, an opportunity to read the provisions of the Ticket Contract, and voluntarily signed it indicating that they accepted

its terms, and therefore the forum selection clause should be binding on the parties; this, however, has not been conclusively established in the submitted papers.

The validity of forum selection clauses has repeatedly been upheld by both federal and state courts. See *Carnival Cruise Lines, Inc. v Shute*, 499 US 585 (1991); *Lurie v Norwegian Cruise Lines, Ltd.*, 305 F Supp 2d 352 (SD NY 2004); *Golden v Celebrity Cruises Inc.*, 4 Misc 3d 33 (App Term, 9th & 10th Judicial Districts 2004).

A two-part analysis is applied in determining whether a particular forum selection clause will be enforced:

(1) [W]hether the physical characteristics of the ticket reasonably communicate the existence of the terms and conditions at issue, and (2) whether the circumstances surrounding the passenger's purchase and subsequent retention of the tickets permitted the passenger to become meaningfully informed of its contractual terms.

Golden v Celebrity Cruises Inc., 4 Misc3d at 35; *Lerner v. Karageorgis Lines, Inc.*, 66 NY2d 479 (1985).

Plaintiff does not argue that the physical characteristics of the Ticket Contract did not reasonably communicate the existence of the terms and conditions at issue. The disputed issue is whether plaintiff had an opportunity to become "meaningfully informed"

about the forum selection clause in the Ticket Contract for it to be held valid and enforceable. Whether a passenger has ample time to examine a ticket is a significant factor in determining whether a passenger will be found to have had an opportunity to become meaningfully informed of the ticket's contents. See *Ward v. Cross Sound Ferry*, 273 F3d 520, 524-5 (2d Cir 2001).

In *Shambreskis v Bridgeport & Port Jefferson Steamboat Co.*, (2008 WL 2001877 [EDNY 2008]), the court found that the plaintiff was meaningfully informed where the plaintiff purchased the ticket one hour before being injured and retained the ticket after boarding. Further, in *Ames v Celebrity Cruises, Inc.*, (1998 WL 427694 [SDNY 1998]), the court found that receiving tickets two or three days prior to the departure date and retaining the tickets after boarding, was sufficient to bind the plaintiffs to the terms and conditions contained in the ticket contract. In contrast, in *Ward*, the court determined that the plaintiff did not have a meaningful opportunity to familiarize himself with the ferry's contract terms where he received the ticket two or three minutes before boarding the ferry and was not allowed to retain the ticket. *Ward v Cross Sound Ferry*, 273 F3d at 525.

Here, Royal Caribbean has failed to conclusively establish that plaintiff was given an opportunity to become meaningfully informed of the Ticket Contract and its terms and, in particular, the forum selection clause, prior to boarding the ship, for this court to rule at this juncture that the forum selection clause is binding and warrants the dismissal of this case. See *Ward v. Cross Sound Ferry*, 273 F3d 520, 524-5 (2d Cir 2001).

Significantly, Royal Caribbean does not assert that either plaintiff, or her travel companion Meyers, received a copy of the Ticket Contract from Royal Caribbean or Sixth Star at any point prior to the cruise's sail date. While Royal Caribbean, in an affidavit lacking personal knowledge by David Banciella, Royal Caribbean's Supervisor of Guest Claims, argues that plaintiff was given a copy of the Ticket Contract at the Pier to retain, after she signed and checked-in and prior to boarding the vessel, this assertion is explicitly disputed by plaintiff.

In her affidavit in opposition, plaintiff maintains that upon arrival at the vessel and prior to boarding, she and defendant Meyers were asked for their credit card for any on-board purchases, were asked to "sign here" and "were immediately

instructed to return the entire document to the representative." Pogoda Affidavit in Opposition, ¶21. Plaintiff asserts that she and defendant Meyers "kept none of [such] paperwork...[and] [t]he check-in person returned no paperwork to either Mr. Meyers or myself". Id. According to plaintiff, she and Meyers "were given no other paperwork to keep and certainly not the ticket which was produced here" (by Royal Caribbean in support of their motion to dismiss). Id. at 22. Also, according to plaintiff, since she did not book the voyage through the Royal Caribbean website, she had no reason to view and did not view their website which Royal Caribbean claims contains a copy of the Ticket Contract.

The affidavit supplied by Royal Caribbean in support of its motion by David Banciella, merely states, vaguely and without personal knowledge of the circumstances surrounding plaintiff's check-in prior to the vessel's departure, that plaintiff "received the Ticket Contract before embarking the Vessel". Affidavit of David Banciella, ¶3. No details are supplied as to how long prior to plaintiff's boarding of the vessel the Ticket Contract was allegedly supplied to plaintiff and the particular circumstances surrounding the alleged giving of the Ticket Contract to plaintiff. Noticeably absent from Royal Caribbean's

moving papers is an assertion by someone with personal knowledge that the portion of the Ticket Contract containing the forum selection clause was in fact given to plaintiff prior to her boarding the vessel.

Further, Royal Caribbean's argument that plaintiff had an affirmative duty to explore Royal Caribbean's website to obtain a copy of the Ticket Contract and review the terms provided therein, when the voyage was not booked from Royal Caribbean's website and absent any instruction to plaintiff and Meyers to review the Royal Caribbean website in which the Ticket Contract containing a forum selection clause allegedly appears, is not supported by any case law. Also unpersuasive, and not supported by case law, is Royal Caribbean's argument that plaintiff "has offered no evidence that if she had notice of the forum selection clause, she would have cancelled her cruise". Reply Memorandum of Law, at 2.

Thus, given that it is not disputed, or claimed by Royal Caribbean that the Ticket Contract was supplied to plaintiff or Meyers at any time prior to the date the cruise sailed, and plaintiff clearly disputes Royal Caribbean's assertion that the

Ticket Contract containing the forum selection clause was given to her to retain on the day of the ship's departure and prior to her boarding the vessel, Royal Caribbean has failed to *conclusively establish* that plaintiff had ample opportunity to become "meaningfully informed" of the forum selection clause of the Ticket Contract. Therefore, dismissal on such basis at this time is denied. *Cf. Lerner v. Karageorgis Lines, Inc.*, 66 NY2d at 485 (passenger bound by ticket contract terms where ticket received four (4) months prior to the cruise and there was "no allegation that [passenger] was required to surrender [the ticket] when...boarded the vessel").

(2) Release

Royal Caribbean also seeks to dismiss based upon the Release, signed by plaintiff and Meyers on December 15, 2008, arguing that it exculpates Royal Caribbean from liability. However, 46 United States Code §30509 expressly invalidates any contract provision purporting to limit the liability of an owner of a vessel for its own negligence or the negligence of its employees or agents.¹

¹ 46 USCA § 30509, titled "Provisions limiting liability for personal injury or death", provides, in relevant part, as follows:

- (a) Prohibition.-(1) general.-The owner, master, manager or agent of a vessel transporting passengers

See *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F2d 1332 (11th Cir 1984) (in interpreting 46 USCA §183, the predecessor statute to 46 USCA §30509, the court held that a common carrier cannot disclaim liability for negligence in a contract provision, as such provisions are void as against public policy). Moreover, such an attempt to disclaim liability is not enforceable, even if a passenger received a discounted rate. See *Moore v. American Scantic Line, Inc.*, 121 F2d 767 (2nd Cir 1941) (interpreting 46 USCA §183, the predecessor statute to 46 USCA §30509). The cases cited by defendant are not applicable. Thus, Royal Caribbean has failed to conclusively establish that dismissal should be granted based upon the Release.

B. Defendant Meyers' Cross-Motion to Dismiss-
Forum Non Conveniens

CPLR §327 "permits a court to stay or dismiss...actions where it is determined that the action, although jurisdictionally sound, would be better adjudicated elsewhere." *Islamic Republic of Iran*

between ports in the United States, or between a port in the United States and a port in a foreign country, may not include in a regulation or contract a provision limiting-(A) the liability of the owner...for personal injury...caused by the negligence or fault of the owner or the owner's employees or agents...(2) Voidness.-A provision described in paragraph (1) is void".

v Pahlavi, 62 NY2d 474, 478-479, cert denied 469 US 1108 (1984). The movant challenging the forum bears the burden to demonstrate relevant private or public interest factors which militate against accepting the litigation. *Id* at 479. On such a motion, the court should consider several factors: (1) the burden on the New York courts; (2) the potential hardship to the defendant; (3) the availability of an alternative forum; (4) the parties' residencies; (5) the situs of the underlying action; and (6) the potential hardship to witnesses. *Turay v. Beam Bros. Trucking*, 61 AD3d 964, 966 (1st Dept, 2009); *Prestige Brands, Inc. v Hogan & Hartson, LLF*, 65 AD3d 1028, 1029 (2d Dept, 2009). No one single factor is dispositive. *Turay v Beam Bros. Trucking*, 61 AD3d at 966. Applying such factors herein, Meyers' motion to dismiss based upon the ground of forum non conveniens is denied.

Significantly, since this court has denied Royal Caribbean's motion to dismiss based upon the forum selection clause, it would be a waste of judicial resources to dismiss this case as against defendant Meyers based upon forum non conveniens grounds, while maintaining this action against defendant Royal Caribbean. Having two cases pending in two different states based upon the

same facts and circumstances would be a burden upon plaintiff, witnesses and the courts.

Further, since it is undisputed that both plaintiff and defendant Meyers are both New York residents, there is no hardship to Meyers to litigate this case in New York where he resides. Moreover, Meyers failed to identify specific witnesses who are located in Florida and detail how they will suffer hardship by keeping this case in New York. While plaintiff did seek some medical care in Florida, she continues to receive medical treatment in New York, and a portion of the medical treatment she received was while onboard the vessel and in Schneider Regional Medical Center, St. Thomas, United States Virgin Islands. Furthermore, although the subject accident did not occur in New York, it also did not occur in Florida. The subject accident took place on the vessel while it was on the high seas. Based upon the above consideration, the court is not persuaded that this case should be dismissed upon the basis of forum non conveniens grounds.

Conclusion


Accordingly, it is

ORDERED that Royal Caribbean's motion to dismiss and Meyer's cross-motion to dismiss are denied; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon defendants with notice of entry; and it is further

ORDERED that all discovery be expeditiously completed.

Dated: September 30, 2010


Hon. Doris Ling-Cohan, J.S.C.

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OCT 04 2010
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