DECISION AND ORDER

FILED & ENTERED
11/21/14

To commence the statutory period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this Order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
IAS PART, WESTCHESTER COUNTY

Present: HON. MARY H. SMITH
Supreme Court Justice

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SKYWEST, INC.,

Plaintiff,

MOTION DATE: 11/14/14
INDEX NO.: 64446/12

-against-

GROUND HANDLING, INC.,

Defendants.

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The following papers numbered 1 to 17 were read on this motion by defendant for an Order pursuant to CPLR 3211, subdivision (a), paragraphs 1 and 7, and on plaintiff's "motion" (sic) to amend its complaint.[1]

Papers Numbered

Notice of Motion - Affirmation (Huang) - Exhs. (A-F) - Memorandum of Law 1-4
Notice of Motion - Affirmation (Schoenberg) - Exhs, (A-EE) - Memorandum Of Law 5-8
Answering/Replying Affirmation (Huang) - Exh. - Affidavit (Barrella) - Exh. - Affidavits (Scherer, Piper) - Memorandum of Law 9-15
Replying Letter w/ Exhs. (Schoenberg) 16-17

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[1]Properly, plaintiff's motion should have been denominated a cross-motion. See CPLR 2215.

Upon the foregoing papers, it is Ordered and adjudged that theses motions are disposed of as follows:

This is an action wherein plaintiff Skywest, Inc. ("Skywest") seeks to recover monetary damages for the costs of repair, loss of use and other damages allegedly sustained to its aircraft as a result of two separate incidents occurring, on September 12, 2009, and January 10, 2011, during ground handling services provided by defendant Ground Handling, Inc. ("GHI") on behalf of the County of Westchester at the Westchester County Airport ("Airport"). Plaintiff Skywest alleges that the September 12, 2009, incident had occurred when GHI had been moving plaintiff's aircraft from the hangar to the gate with a tug and tow bar, resulting in damages of approximately $251,781.33. While inspections and undertaken investigations indicate that the tow bar had failed, the exact cause of the incident was not determined with certainty. The January 10, 2011, incident had occurred when a "ramp"[2] at the Airport had pushed one of Skywest's aircraft into another aircraft, the ensuing collision resulting in wing damage to Skywest's aircraft in the approximate sum of $31,493.61. Defendant GHI does not dispute that the cause of this incident had been the absence of a second wing walker who should have been in place to notify the tug operator of the proximity of Skywest's aircraft to Air Wisconson's aircraft.

Plaintiff commenced this action, alleging two causes of action for negligence and gross negligence, specifically that defendant had a duty of care which it had breached with respect to the September 12, 2009, incident by its negligently having attached the tow bar to the Skywest aircraft it had been repositioning and in failing to properly have inspected

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[2]Although the complaint states "ramp," plaintiff states in its papers at bar that it should read "tug."

and observed the improperly attached tow bar and, with respect to the January 10, 2011, incident, by negligently having failed to notice that the tug had been pushing the Skywest aircraft towards another aircraft and in failing to have stopped the collision from occurring.

Presently, defendant GHI is moving to dismiss the complaint, arguing that Skywest, in exchange for its having been granted a permit to conduct scheduled commercial air service out of the Airport, had entered into a Terminal Use Agreement ("Agreement") wherein Skywest had agreed that ground services would be conducted by the County's agent, GHI, and that this Agreement expressly had shifted liability for damage to Skywest property, including its aircraft, during the providing of ground handling services to Skywest, and further had required Skywest to procure insurance covering such liability and naming the County and GHI as additional insureds thereunder.[3] GHI maintains that such Agreement is standard in the industry and properly serves to shift the risk to the airline, which normally would undertake such services itself had it the necessary personnel at the Airport. This arrangement also enables the County, as the Airport operator, to reduce its costs by obtaining monetary concessions from the ground handler, which then offers the County a lower rate, knowing that its liability to the air carriers using the Airport has been shifted and thereby reduced.

GHI argues that Skywest had never put in insurance claims under its policy for the damages claimed herein because the policy that it had procured had a high deductible in exchange for Skywest's paying a lower premium, and thus the amount of damages claimed

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[3]It appears that the original parties to this Agreement had been the County and non-party Johnson Controls World Services, Inc. which subsequently had delegated the ground servicing functions to GHI pursuant to a subcontract agreement, dated June 1, 1996.

herein exceed its deductible.[4] Defendant GHI maintains that, regardless of whether GHI had been negligent in the occurrence of either incident, Skywest is barred under the Agreement from bringing this negligence action and seeking the damages asserted herein, and that GHI therefore is entitled to dismissal.

In further support of its motion, GHI also notes that Skywest had agreed in the Agreement to "supply, repair and replace, at its sole cost and expense, all equipment necessary to provide the services contemplated by this agreement," and that at "all times that serves are being furnished hereunder, an employee or agent of [Skywest] shall be in charge, custody and control of aircraft of [Skywest] being served by the County and at no time shall the County, its elected officials, officers, employees, agents or contractors be considered a bailee of or as having care, custody or control of such aircraft." The record establishes that the failed tow bar actually had been supplied by non-party United Airlines pursuant to an agreement that it had with Skywest. Further, Skywest did not have any employee or agent in charge of its aircraft on the incident dates, or even stationed at the Airport.

Additionally, defendant GHI argues that the Agreement expressly also collectively provides in several paragraphs and Exhibits incorporated therein, including Agreement paragraphs 21(a) and 40(b), and Exhibit 6, subdivision III therein entitled "Other Additional Services", and paragraph (4), subparagraph (f), therein entitled "Indemnity and Insurance,"

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[4]It appears that GHI, as an additional insured, had put in insurance claims for coverage for these incidents under Skywest's policy but that its claims had been denied due both to untimely notice of Skywest's claims against GHI and because Skywest's policy had provided excess coverage only, and GHI had not demonstrated that it first had exhausted its coverage under its own insurance policy.

as well as sub-subparagraph v therein, that Skywest had agreed to indemnify GHI and hold the County and GHI as its agent harmless "from and against all losses, ... damages, settlements, costs, charges professional fees or other expenses or liabilities of every kind ... arising out of or relating to any and all claims, ... , demands, obligations, actions, proceedings or causes of action of every kind and character in connection with or arising directly or indirectly out of this Agreement," and that Skywest had agreed to indemnify, defend and hold harmless the County and its agents from consequential or incidental damages of any kind, and that Skywest's contractual obligation requiring it to procure insurance further demonstrates Skywest's agreement to accept the risks associated with its operations under the Agreement, and specifically the risk of damage to its aircraft during ground handling, and therefore that GHI is exculpated from liability.

Defendant GHI also argues that, while the Agreement expressly excluded indemnification for gross negligence, dismissal of the gross negligence claim nevertheless is required at bar because there simply are no facts supporting any finding that defendant GHI had engaged in willful misconduct, a requisite element of such claim.

Finally, GHI argues that the parties' waiver of subrogation clause in the Agreement serves as a total defense to plaintiff's claims.

Plaintiff opposes defendant's motion, arguing that defendant has interposed its answer and that therefore its dismissal motion upon grounds set forth in CPLR 3211, subdivision (a), paragraph 1, necessarily is untimely, and further, since defendant relies upon documents outside of the pleadings, its dismissal motion predicated upon a failure to state a cause of action properly should be treated as a summary judgment motion.

Upon a summary judgment analysis, plaintiff argues that defendant's dispositive

motion must be denied because the contractual indemnity provisions upon which defendant relies are broad and they do not unequivocally refer to and do not make unmistakably clear that they apply, as defendant contends, to first party claims. Moreover, plaintiff argues that defendant's motion must be denied because, even assuming that the contractual indemnity clause applies to first party claims, same expressly exclude claims of gross negligence, and that here there exists disputed issues of fact as to defendant's gross negligence.

Plaintiff dismisses as "nonsense" GHI's argument that the waiver of subrogation clause bars plaintiff's claims herein since Skyview had not agreed not to sue GHI for any covered claims but rather had agreed only to purchase an insurance policy with a waiver of subrogation clause running to the County. Thus plaintiff Skyview submits that while its insurer may be barred from asserting claims against GHI or its insurer as the subrogee of Skywest, nothing in the Agreement prohibits Skywest from asserting a claim directly against GHI.

Finally, addressing GHI's argument that Skywest's waiver of consequential damages indemnity clause bars Skywest's claim for damages, Skywest argues that it is not seeking consequential damages but rather out-of-pocket reimbursement for repairing the aircraft and for the loss of its use of the aircraft and the costs associated with leasing replacement aircraft, all of which plaintiff maintains are direct damages.

Plaintiff Skyview is cross-moving pursuant to CPLR 3025, subdivision (b), to amend its complaint to correct the inadvertent use of the word "ramp" with respect to the allegations surrounding the January 10, 2011, incident, and to further amplify the pleading to conform to evidence obtained during discovery and further support its cause of action

for gross negligence.

Initially, the Court finds that defendant GHI's CPLR 3211 motion is proper, as noticed. See CPLR 3211, subdivision (e).

It is well-settled that on a motion to dismiss for failure to state a cause of action, the Court initially must accept the facts alleged in the complaint as true and then determine whether those facts fit within any cognizable legal theory, irrespective of whether the plaintiff will likely prevail on the merits. See Campaign for Fiscal Equity, Inc. v. State, 86 N.Y.2d 307, 318 (1995); Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994); People v. New York City Transit Authority, 59 N.Y.2d 343, 348 (1983); Morone v. Morone, 50 N.Y.2d 481 (1980); Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 274-275 (1977); Cavanaugh v. Doherty, 243 A.D.2d 92, 98 (3rd Dept. 1989); Klondike Gold, Inc. v. Richmond Associates, 103 A.D.2d 821 (2nd Dept. 1984). The complaint must be given a liberal construction and will be deemed to allege whatever cause of action can be implied by fair and reasonable intendment. See Shields v. School of Law of Hofstra University, 77 A.D.2d 867, 868 (2nd Dept. 1980); Penato v. George, 52 A.D.2d 939 (2nd Dept. 1976). The test is whether the pleading gives notice of the transactions relied upon by the plaintiff and whether sufficient material elements of the cause of action have been asserted. The allegations in the complaint cannot be vague and conclusory." Stoianoff v. Gahona, 248 A.D.2d 525, 526 (2nd Dept. 1998).

Where extrinsic evidentiary material is considered, the Court need not assume the truthfulness of the pleaded allegations. The criterion to be applied in such a case is whether the plaintiff actually has a cause of action, not whether he has properly stated one. Guggenheimer v. Ginzburg, supra at 275; Kaufman v. International Business Machines

Corp., 97 A.D.2d 925 (3rd Dept. 1983), affd. 61 N.Y.2d 930 (1984); Rappaport v. International Playtex Corporation, 43 A.D.2d 393, 395 (3rd Dept. 1974). Thus where it has been shown that a material fact or facts as claimed by the plaintiff "have been negated beyond substantial question" by the documentary evidence or affidavits and other evidentiary submissions, and/or where the very allegations set forth in the complaint fail to support any cause of action, the complaint should be dismissed. See CPLR 3211, subd. (a), par. 1; DePaulis Holding Corp. v. Vitale, 66 A.D.3d 816, 818 (2nd Dept. 2009); Biondi v. Beekman Hill House Apartment Corp., 257 A.D.2d 76 (1st Dept. 1999), affd. 94 N.Y.2d 659 (2000); Robinson v. Robinson, 303 A.D.2d 234 (1st Dept. 2003).

Addressing defendant's dispositive motion first, as the above demonstrates, when determining a motion to dismiss pursuant to CPLR 3211 based upon a failure to state a cause of action, the Court must accept the facts pleaded as true, giving the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit into any legal cognizable theory; on a motion pursuant to CPLR 3211 based upon the documentary evidence, the documents relied upon by the defendant must conclusively establish a defense to the claims asserted as a matter of law. See Ofman v. Katz, 89 A.D.3d 909 (2nd Dept. 2011).

v. Orfino Realty Co., Inc., 40 N.Y.2d 633, 635 (1976).

Applying the foregoing principles of law to defendant GHI's dispositive motion at bar, the Court grants full dismissal of plaintiff Skywest's negligence claims. The Court finds that the Agreement in issue makes unmistakably clear through the inclusion of multiple provisions, stated in unequivocal terms of broad indemnification, that the parties had intended and had contracted to relieve GHI of liability for ordinary negligence by Skywest

with respect to its performance of ground handling duties under the contract, including the towing of its aircraft. See Hooper Assoc. v. AGS Computers, 74 N.Y.2d 487 (1989); Princetel, LLC v. Buckley, 95 A.D.3d 855 (2nd Dept. 2012); Gotham Partners, L.P. v. High River Ltd. Partnership, 76 A.D.3d 203, 206-207 (1st Dept. 2010); Sherry v. Wal-Mart Stores E., L.P., 67 A.D.3d 992 (2nd Dept. 2009).

However, while contractual provisions absolving a party of liability for ordinary negligence generally are enforceable, public policy forbids enforcement of contractual provisions for gross negligence. See Aphrodite Jewelry, Inc. v. D&W Cent. Station Alarm Co., Inc., 256 A.D.2d 288, 289 (2nd Dept. 1998); Hartford Ins. Co. v. Holmes Protection Group, 250 A.D.2d 526, 527 (1st Dept. 1998). Courts long have explained that gross negligence differs in kind, not only degree, from claims of ordinary negligence in that it is conduct that evinces a reckless disregard for the rights of others or "smacks" of intentional wrongdoing. See Soja v. Keystone Trozze, LLC, 106 A.D.3d 1168 (3rd Dept. 2013); Crystal Clear Development, LLC v. Devon Architects of New York, P.C., 97 A.D.3d 716, 719 (2nd Dept. 2012); Chan v. Counterforce Cent. Alarm Services Corp., 88 A.D.3d 758, 759 (2nd Dept. 2011).

The Court finds that plaintiff's originally pleaded gross negligence claim necessarily would fail as woefully deficient in failing to plead allegations of intentional wrongdoing and wilfulness.

The Court further has examined plaintiff's proposed amended complaint and the new allegations allegedly supporting same, and that defendant had acted with gross negligence in the occurrence of the subject 2009 incident in that GHI's tow drivers had ignored Skywest's manual and an FAA Advisory Circular which state that aircraft should

be towed at no more than a walking speed" and it had exceeded such speed, and that GHI had continued to use an oversized tug to tow Skywest's CRJ aircraft even though use of a smaller tug previously had been advised in order to safeguard against breaking tow bars after a tow bar had broken in an earlier incident. Mindful that "[t]he legal sufficiency or merits of a proposed amendment to a proposed pleading will not be examined unless the insufficiency or lack of merit is clear and free from doubt," Sample v. Levada, 8 A.D.3d 465, 467-468 (2nd Dept. 2004); see, also Shovak v. Lon Island Commercial Bank, 50 A.D.3d 1118, 1120 (2nd Dept. 2008); Benyo v. Sikorjak, 50 A.D.3d 1074 (2nd Dept. 2008), the Court finds at bar that the proposed amended complaint is still clearly deficient and fails to state a viable cause of action for gross negligence. Plaintiff's motion to amend its complaint accordingly is denied.

Even accepting as true plaintiff's proposed new factual averments in support of its gross negligence claim, those allegations still do not imply wanton and reckless conduct, or the lack of even slight care, or an intentional failure to perform a duty. See Long Is. Cent. Sta. v. New York Tel. Co., 54 A.D.2d 893 (2nd Dept. 1976). Indeed, there still is nothing in the proposed amended complaint alleging that GHI had intentionally done an act of unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and that it had done so with conscious indifference to the outcome. See Matter of New York City Asbestos Litigation, 89 N.Y.2d 955, 956 (1997).

This action is hereby dismissed.

Dated: November 21, 2014
White Plains, New York

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