

Sueta v Delta Airlines, Inc.

2021 NY Slip Op 32889(U)

October 7, 2021

Supreme Court, Queens County

Docket Number: Index No.: 701477/20

Judge: Timothy J. Dufficy

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Short Form Order

FILED

NEW YORK SUPREME COURT - QUEENS COUNTY

10/12/2021

PRESENT: HON. TIMOTHY J. DUFFICY
Justice

PART 35

8:37 AM

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JOANNE CAROLE SUETA,

COUNTY CLERK
QUEENS COUNTY

Plaintiff,

Index No.: 701477/20

Mot. Date: 4/13/21

-against-

Mot. Seq. 2

DELTA AIRLINES, INC., and "JOHN DOE",
name being fictitious and intended to be the operator
of the aircraft, owned by DELTA AIRLINES, INC.,

Defendants.

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The following papers were read on this motion by plaintiff seeking to dismiss affirmative defenses pertaining to the application of the Montreal Convention contained in defendant's Answer; the cross motion by defendant seeking to dismiss plaintiff's complaint, on the basis that it is time barred; and the cross motion by plaintiff seeking leave to serve an Amended Summons and Complaint.

PAPERS
NUMBERED

Notice of Motion-Affidavits-Exhibits.....	EF 12-18
Notices of Cross Motion-Affidavits-Exhibits.....	EF 26-32; EF35-39
Answering Affidavits-Exhibits.....	EF 34; EF 40
Reply Affidavits-Exhibits.....	EF 33; EF 41-44

Upon the foregoing papers, it is ordered that the motion and cross motions are determined, as follows:

On August 15, 2017, the plaintiff was on board an aircraft, owned by non-party, American Airlines (American), which was involved in an impact with an aircraft owned by defendant Delta Airlines, Inc. (Delta) causing her to sustain personal injuries. At the time of this occurrence, the aircrafts were on the ground at John F. Kennedy Airport (JFK). The American aircraft was bound for international travel to Ireland and the Delta aircraft was bound for domestic travel to Washington State. As a result of this occurrence, an action was commenced against Delta and "John Doe", as the operator of the aircraft on January 28, 2020. According to the Complaint, the plaintiff was a "passenger" on the

American aircraft which was in a stopped position on the taxiway of JFK, when it was impacted by the Delta aircraft.

On February 24, 2020, an Answer was interposed on behalf of Delta Air Lines, Inc. s/h/a Delta Airlines, Inc., containing the following affirmative defenses pertaining to the applicability of the Montreal Convention: as an eleventh affirmative defense, that the plaintiff's claims were preempted by the Montreal Convention; as a twelfth affirmative defense, that the plaintiff's complaint is barred by the two year statute of limitations of the Montreal Convention; as a thirteenth affirmative defense, that plaintiff's complaint is governed by the Montreal Convention; as a fourteenth affirmative defense, that Delta's liability is limited pursuant to the Montreal Convention; and as a fifteenth affirmative defense, that plaintiff's damages are limited to the Montreal Convention.

Plaintiff seeks dismissal of these affirmative defenses and partial summary judgment on liability. Plaintiff contends that the Montreal Convention does not apply to claims made by working members of the crew against airline carriers not engaged in international travel.

In support, the plaintiff submits, *inter alia*, her affidavit and an accident report from National Transportation Safety Board. In her affidavit, the plaintiff avers that she was working as a flight attendant on the American aircraft, which had been stopped on the taxiway, awaiting clearance for take-off, when the Delta aircraft struck the American aircraft in the rear. Additionally, in the statement provided by Captain Stephen David Farish (Farish), the pilot of the Delta flight, as part of the accident report, he confirmed contact between the Delta and American aircrafts.

Delta opposes the application and cross moves to dismiss the complaint on the basis that the plaintiff's claim is time barred by the two year statute of limitations which governs claims pursuant to the Montreal Convention. Delta contends that the action should have been commenced by August 15, 2019, but was not commenced until January 28, 2020. Delta further submits that in the event that plaintiff's application relating to dismissal of its affirmative defenses is granted, the branch of the motion seeking partial summary judgment should be denied, as plaintiff failed to prove that Delta is liable as a matter of law. Delta submits an affidavit from Farish, in support of its application, wherein Farish maintains that his actions surrounding the time of the occurrence were reasonable and that neither he nor Delta were negligent.

Plaintiff cross moves seeking to serve an Amended Summons and Amended Complaint, wherein the allegations that the plaintiff was a passenger are corrected to more specifically reflect that the plaintiff was on board the airline as a working member of its crew at the time of the accident. Additionally, the plaintiff seeks to substitute Farish for “John Doe” as the pilot and to correct the name of defendant Delta Airlines, Inc. to Delta Airlines, Inc.

In opposition, Delta contends that the original complaint is time barred by the applicable two year statute of limitations of the Montreal Convention; the proposed amendment can not cure such a fatal defect; and the complaint is otherwise palpably insufficient and devoid of merit.

The Montreal Convention is an international treaty which governs the uniform system of liability for international air carriers between its signatories. (*See Badar v Swissport USA, Inc.*, 492 F Supp 3d 54 [ED NY 2020]; *Ehrlich v Am. Airlines, Inc.*, 360 F 3d 366 [2d Cir 2004].) It is noted that its signatories include the United States and Ireland. The Montreal Convention unified and replaced the Warsaw Convention, but since many of its provisions remain the same, cases involving the Warsaw Convention are considered by the courts in their interpretation of equivalent provisions of the Montreal Convention. (*See Badar*, 492 F Supp 3d 54; *LAM Wholesale, LLC v United Airlines, Inc.*, 2019 US Dist LEXIS 56599 [ED NY 2019]; *Hunter v Deutsche Lufthansa AG*, 863 F Supp 2d 190 [ED NY 2012]; *Safa v Deutsche Lufthansa Aktiengesellschaft, Inc.*, 42 F Supp 3d 436 [ED NY 2014].) Like the Warsaw Convention, the Montreal Convention “applies to all international carriage of persons, baggage or cargo performed by aircraft for reward”. (Convention for International Carriage by Air art 1, May 28, 1999, reprinted in S Treaty Doc No. 106-45, 1999 UST LEXIS 175 [Montreal Convention].) As such, pursuant to its terms, the Montreal Convention would only be applicable if the plaintiff was being transported on an international flight “for reward”.

The Court shall initially consider defendant’s cross motion seeking to dismiss the action on the basis that it is time barred by the two year statute of limitations of the Montreal Convention. Although, the defendant established the applicability of the Montreal Convention to claims of passengers against aircrafts engaged in international travel, the plaintiff raised a triable issue of fact that at the time of the accident she was on board the American flight as a working member of its crew, in opposition. To the extent that the plaintiff was required to be on board the American aircraft to perform work duties

and not for the purpose of being transported internationally for “reward”, she would not qualify as a passenger under the Montreal Convention (*See Sulewski v Federal Express Corp.*, 749 F Supp 506 [ED NY 1990], *affd* 933 F2d 1991 [2d Cir 1991]; *In re Air Crash Off Long Island*, 30 F Supp 2d 631 [SD NY 1998; *see also In re Lavergne v ATIS Corp.*, 767 F Supp 2d 301 [D PR 2011].) As such, defendant’s cross motion is denied.

Furthermore, plaintiff’s cross motion seeking leave to amend the Summons and Complaint is granted. It is well settled that leave to amend pleadings shall be freely granted absent a showing of prejudice or surprise to the opposing parties, unless the amendment is palpably insufficient or patently devoid of merit. (*See CPLR 3025(b); Mirro v City of New York*, 159 AD3d 964 [2d Dept 2018]; *Kassapian v City of New York*, 155 AD3d 851 [2d Dept 2017]; *Tirpack v 125 N. 10, LLC*, 130 AD3d 917 [2d Dept 2015].) In the amended complaint, plaintiff seeks to clarify her status as a working crew member in her existing negligence cause of action. (*See Faiella v Tysens Park Apts., LLC*, 110 AD3d 1028 [2d Dept 2013].) Additionally, she seeks to substitute Farish who has been identified as the pilot of the Delta aircraft, in place and instead of “John Doe,” and to correct the name of defendant Delta Airlines, Inc. to Delta Air Lines, Inc., as referenced by defendant in its Answer.

In opposition, Delta failed to demonstrate the existence of prejudice or surprise sufficient to warrant the denial of the application. Defendant was always aware that Farish was the pilot of its aircraft at the time of the accident. Additionally, the medical record submitted by the defendant reflects that the plaintiff was working as a flight attendant. Moreover, discovery in this action is in its early stages as depositions have not yet been conducted. As the amendment is not palpably insufficient nor devoid of merit, plaintiff’s application seeking leave to serve an Amended Summons and Complaint, in its proposed form, is granted.

Lastly, plaintiff’s application seeking dismissal of the defendant’s affirmative defenses numbered “eleventh” through “fifteenth” relating to the applicability of the Montreal Convention is denied, as the Amended Complaint shall supercede the original Complaint.

Also, the branch of plaintiff’s application seeking partial summary judgment on liability is denied, as premature.

Accordingly, it is

ORDERED that the branch of plaintiff’s motion seeking dismissal of the defendant’s affirmative defenses numbered “eleventh” through “fifteenth” relating to the applicability of the Montreal Convention is denied, as the Amended Complaint shall supercede the original Complaint; and it is further

ORDERED that the branch of plaintiff’s application seeking partial summary judgment on liability is denied, as premature; and it is further

ORDERED that defendant’s cross motion is denied; and it is further

ORDERED that and plaintiff’s cross motion is granted. Plaintiff is granted leave to serve an Amended Summons and Complaint, in the proposed form, annexed to plaintiff’s cross-moving papers (see NYSCEF: DOC. NOS. 38-39) to clarify plaintiff’s status as a working crew member in her existing negligence cause of action and to amend the caption to substitute Stephen David Farish , in place and instead of “John Doe,” and to correct the name of defendant Delta Airlines, Inc. to Delta Airlines, Inc.; and it is further

ORDERED that the title of the action shall be:

**SUPREME COURT STATE OF NEW YORK
COUNTY OF QUEENS**

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JOANNE CAROLE SUETA,

Plaintiff,

-against-

**DELTA AIR LINES, INC., and STEPHEN DAVID
FARISH,**

Defendants.

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Mot. Seq. 2**

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; and it is further

ORDERED that the plaintiff shall serve and file the Amended Summons and Amended Complaint, in the form proposed in the moving papers, upon Delta Aior Lines,

Inc. and added defendant Stephen David Farish, within thirty (30) days of the date that this Order appears in the minutes of the Office of the Queens County Clerk–NYSCEF system; and it is further

ORDERED that the defendants shall serve their Answers to the Amended Complaint, within twenty (20) days from the date of service of the amended pleadings upon them; and it is further

ORDERED, that a copy of this Order with Notice of Entry be served on defendants, and the Clerk of Queens County.

The foregoing constitutes the decision and order of the Court.

Dated: October 7, 2021



TIMOTHY J. DUFFICY, J.S.C.

FILED

10/12/2021

8:37 AM

**COUNTY CLERK
QUEENS COUNTY**