

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BETTY REESER, et al. : CIVIL ACTION
:
v. :
:
NCL (BAHAMAS) LTD. : NO. 05-2344

MEMORANDUM AND ORDER

McLaughlin, J.

August 17, 2005

The plaintiffs brought tort claims against the defendant, a cruise line, after one of the plaintiffs slipped and fell while aboard the defendant's cruise ship. The defendant moved for summary judgment on the ground that the plaintiffs' claims are time-barred, and the defendant moved in the alternative for a transfer of venue. The defendant relies on two parts of its contract with its passengers: a one-year time limitation on personal injury suits; and a forum selection of Dade County, Florida. The plaintiffs concede that they sued in Pennsylvania more than one year after the alleged injury. They argue that the Court should not enforce the clauses upon which the defendant relies because the contract did not provide reasonably communicative notice of those clauses. The Court agrees with the defendant that the contract provides reasonably communicative notice as to the time limitation clause. The plaintiffs' claims are dismissed as time-barred. The Court will

not consider the defendant's motion for a transfer of venue based on the contract's forum selection clause.

I. The Summary Judgment Record

On April 23, 2003, Betty and Harold Reeser purchased tickets for a cruise aboard the "Norwegian Sea," a cruise ship operated by NCL (Bahamas) Ltd. ("NCL"). The cruise took place during the week of June 22-29, 2003. Betty Reeser claims that she sustained serious injuries when she slipped on a wet floor aboard the ship on June 26, 2003. Defendant's Mem., Ex. 3 (Complaint).

On September 25, 2003, the plaintiffs' lawyer provided notice to NCL that Betty Reeser had sustained an injury aboard the "Norwegian Sea" and that she intended to make a claim. Plaintiffs' Mem., Ex. A. NCL responded on October 21, 2003, and requested certain documents and information from the plaintiffs. Plaintiffs' Mem., Ex. B. On November 11, 2003, the plaintiffs' counsel responded and enclosed an authorization for the release of Ms. Reeser's medical records from the ship. The plaintiffs' counsel also requested that NCL "forward a copy of all medical records, incident reports and other information regarding Ms. Reeser's fall as soon as possible." Plaintiffs' Mem., Ex. C. On November 21, 2003, NCL responded by forwarding a copy of Ms. Reeser's medical notes from the ship. Plaintiffs' Mem., Ex. D.

The plaintiffs claim, and the defendant does not dispute, that at no time prior to the expiration of the time limitation did NCL provide the plaintiffs' lawyer with a copy of the Passenger Ticket Contract, nor did any NCL representative explicitly mention the one-year time limitation during conversations prior to the time limit's expiration. Plaintiffs' Mem. at 3-4.

On March 23, 2005, in response to a letter from the plaintiffs' attorney, NCL informed the attorney that the Passenger Ticket Contract provided for a one-year limitation on personal injury suits, and that the period had expired in June 2004. Plaintiffs' Mem., Ex. E. On April 5, 2005, NCL faxed a copy of the Passenger Ticket Contract to the plaintiffs' attorney. Plaintiffs' Mem., Ex. F. The plaintiffs filed suit in the Court of Common Pleas of Bucks County, Pennsylvania on April 21, 2005. Defendant's Mem., Ex. 3 (Complaint).

The document containing the cruise ticket is the crux of this case. The Passenger Ticket Contract, when fully assembled, measures approximately 8.5" by 14" and is folded into four sections. The upper, perforated portion is the cruise ticket, which is presented by the passenger at departure and is retained by the crew. See Defendant's Mem., Ex. 2. Once the cruise ticket portion has been removed, the passenger is left with a sheet that measures approximately 8.5" by 11". At the top of this sheet is the passenger's copy of the cruise ticket, which

appears identical to the one collected by the crew except for indications that it is not good for passage. Defendant's Mem., Ex. 1.

The ticket contains the words "NORWEGIAN CRUISE LINE" at upper left and NCL's address at upper center. At upper right, a dark blue box with large white text reads, "Passenger Ticket Contract." At lower right there is a rectangular box that extends roughly halfway across the face of the ticket. The box is bordered in dark blue, and its background is light blue. Across the top of the box appear the words "IMPORTANT NOTICE." Just below these words, the following explanation appears:

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

Id. Below the passenger copy is a large white box with a white background. The purpose of this empty space is unclear. Just below this is a rectangular box bordered in dark blue with a white background. In this box, the following text appears: "Passengers are advised to read the terms and conditions of the Passenger Ticket Contract set forth below. Acceptance of this Passenger Ticket Contract by Passenger shall constitute the agreement of Passenger to these Terms and Conditions." Just below this box, the words "Norwegian Cruise Line" appear,

followed by a small box with a dark blue background that contains the words "Contract of Passage" in bold white type. Id.

The first five paragraphs of the contract appear just below. After the fifth paragraph, at the bottom right-hand corner of the front page, appears the instruction, "Please see reverse side for additional terms and conditions." The back of the sheet contains paragraphs six through twenty-eight. Paragraphs thirteen (time limitation) and twenty-eight (forum selection) are at issue in this case. Each paragraph is printed in small but legible dark blue text on a white background.

Paragraph thirteen reads:

13. No suit including without limitation, suits brought in rem and suits brought in personam shall be maintained against the vessel or the Carrier for delay, detention, personal injury, illness, or death of passenger unless written notice of the claim with full particulars be delivered to the Carrier or its agent at its office at the port of sailing or at the port of termination within one hundred eighty-five (185) days from the day when such delay, detention, personal injury, illness or death of the passenger occurred; and in no event shall any suit for any cause, including, without limitation, suits brought in rem and suits brought in personam be maintained against the vessel or the Carrier with respect to delay, detention, personal injury, illness or death be maintainable, unless suit shall be commenced within one (1) year from the day when the delay, detention, personal injury, illness or death of the passenger occurred, notwithstanding any provision of law of any state or country to the contrary.

Id.

II. Discussion

The parties agree that the issue of the enforceability of the contract's clauses is a question of law to be decided by the Court on summary judgment. See Marek v. Marpan Two, Inc., 817 F.2d 242, 244-45 (3d Cir.), cert. denied, 484 U.S. 852, 108 S. Ct. 155, 98 L. Ed.2d 110 (1987).

A one-year time limitation on maritime personal injury claims is implicitly authorized in a federal statute, 46 U.S.C. § 183b(a), which provides, among other things, that cruise ship operators may not contract for a limitation of less than one year for suits to recover damages for death or bodily injury. See Marek, 817 F.2d at 244. A provision contained on a cruise ticket or within a ticket booklet can bar an untimely claim if the clause is incorporated into the passenger's contract by reasonably communicative notice. Id. at 245.

Judge Friendly's opinion in Silvestri v. Italia Societa Per Azioni Di Navigazione, 388 F.2d 11 (2d Cir. 1968), set the standard for analysis in cruise ticket cases. After an extensive survey of maritime law, the Court concluded that a common element in cases in which contract terms had been enforced was that the cruise line had "done all it reasonably could to warn the passenger" that the contract's terms affected his or her legal rights. Id. at 17.

The Court of Appeals for the Third Circuit adopted a modified form of the Silvestri analysis in Marek, 817 F.2d at 245. The plaintiffs, Marek and Toombs, arranged a trip together on the defendant's cruise ship through a travel agent. They received one cruise ticket folder shortly before they boarded the ship for departure in Florida. They did not each receive a separate folder. When they boarded the ship, the crew removed one sheet from the folder, and Toombs kept the two remaining sheets and the folder. Both passengers recalled that they scanned the material on the inside of the front cover of the folder, but did not read it all, and that they glanced at the text on the outside of the back cover of the ticket folder. Marek claimed that she never read or became aware of any material printed on the inside back cover of the ticket folder. This area contained a one-year time limitation on suits. Id. at 243-44.

Marek was injured during the cruise, and she and her husband sued the cruise line more than one year later. The District Court granted the cruise line's motion for summary judgment, finding that the plaintiffs' claim was barred by the limitation clause in the passenger ticket contract. Id. at 244.

The Court of Appeals affirmed and set out a two-part analysis of "reasonable communicativeness." First, courts consider the adequacy of the "warning" language, often found on the front cover of the cruise ticket, which directs the

passenger's attention to the terms inside. Second, courts examine the terms themselves, and such physical characteristics as the location of the terms within the ticket, the size of the typeface in which they are printed, and the simplicity of the language they employ. Id. at 245.

Aside from the document itself, courts may consider "extrinsic factors" which indicate the passenger's ability to become informed of the contractual terms at stake. Among these factors are possession of the ticket booklet before departing; warnings outside the ticket itself that allude to the terms and conditions; and whether the plaintiff had a strong incentive to review and study the ticket contract after the injury occurred. Shankles v. Costa Armatori, 722 F.2d 861, 865 (1st Cir. 1983).

The Marek Court cited Silvestri, 388 F.2d at 11, as the "seminal" work on cruise ticket contracts, but ultimately it rejected that case's standard as "simply too rigid", quoting with approval from the district court decision:

[There is no] situation where, from hindsight, one could not imagine the shipowner doing some little bit more to draw attention to the limitation clause . . . Thus, even though the courts continue to use the "all it reasonably could" language, application of the standard involves notions of reasonableness and not hypothesizing some further step the shipowner could possibly have taken.

Marek, 817 F.2d at 245.

In Marek, the front of the ticket folder contained a conspicuous warning that read: "ACCEPTANCE OF THIS TICKET CONSTITUTES A CONTRACT THE TERMS AND CONDITIONS OF WHICH ARE SET FORTH INSIDE. PLEASE READ CAREFULLY." Id. at 246. This warning was "clearly printed and easily read, even when held at arm's length distance from the naked eye." Id. The first page inside the folder contained a similar warning, in even larger print. A third warning appeared at the bottom of the passenger's copy of the ticket. The limitation clause was printed inside the back cover of the folder and appeared in small type. Id.

The Court of Appeals found that the warning was conspicuous and rejected the plaintiffs' claim that the small print size of the time limitation clause rendered it unenforceable. The Court noted that "the type size in which [the time limitations] clause is printed is not the significant matter; there is both ample time and a powerful incentive to study the passage contract promptly after a loss has occurred." Id. at 247 (brackets in original).

Although the plaintiffs claimed they had not seen their tickets until they boarded the ship, the Court charged them with notice of the provisions because the plaintiffs had an opportunity to discover them. Id.

The defendants argue that the passenger contract in this case satisfies the reasonable communicativeness standard

because it contains a conspicuous warning located on the face of the ticket and the limitation clause itself is mostly consistent with those that have been enforced in other cases. The Court agrees.

The Court first considers the warning, which is printed on the face of the passenger's ticket. The box containing the warning is set off from the rest of the ticket with a contrasting color, and it is not obscured by surrounding text or other ticket elements. The warning is titled "IMPORTANT NOTICE," and its wording is clear and concise, referring explicitly to the contract's effects on "important legal rights." The words "Passenger Ticket Contract" also appear in rather large type, in another contrasting box in the upper right-hand corner of the ticket. Defendant's Mem., Ex. 1.

The plaintiffs point out that the warning alerts the passenger to the text "below," but the time limitation clause actually appears on the reverse side of the page, rather than "below," such that the warning does not provide notice of the provisions on the other side of the document, including the two at issue in this case. This argument is not persuasive in light of the instructions on the document. Several inches below the boxed warning appear five clauses of the contract, and below the fifth clause is printed the following instruction, in a typeface larger than the clauses above: "Please see reverse side for

additional terms and conditions." The remaining clauses, including the limitations clause, appear on the reverse side. This instruction provides notice of the terms on the reverse side. The warning meets the Marek standard. See Stone v. Norwegian Cruise Line, No. 01-1343, 2001 WL 877580 (E.D. Pa. May 15, 2001) (finding that a warning with identical language and layout reasonably communicated the contract terms).

The Court next turns to the contract terms themselves. The plaintiffs object to the placement of the limitation clause as paragraph thirteen of twenty-eight. This situates the clause on the back of the contract near the middle of the page. This location cuts against a finding of reasonable communicativeness. See Barbachym v. Costa Line, Inc., 713 F.2d 216, 220 (6th Cir. 1983). As the Marek Court noted, however, there is "no requirement that a time limitation provision must be the first clause" in order for it to be reasonably communicative. 817 F.2d at 247. Although the time limitation provision could have been more prominent, the standard is one of reasonableness, which means the Court does not ask whether the cruise line took every possible step to put plaintiffs on notice. The location of the term does not render it unenforceable. See Semon v. Norwegian Carribean Lines, No. 88-4019, 1989 WL 15765 at *4 (D.N.J. Feb. 23, 1989) (applying Marek and enforcing a similar time limitation clause at paragraph thirteen of twenty-eight).

Similarly, the size of the text in which terms are printed does not necessarily render terms unenforceable, provided that the text is readable. Marek, 817 F.2d at 247. Accordingly, the Court in Marek afforded no weight to the plaintiffs' claim that "[they] did not read every word that was there because the print was so small and crowded and because [they] couldn't understand most of what was printed there." Id. at 243-44. The Court finds that the terms in this case, although printed in small type, are enforceable under Marek.

The plaintiffs also object to the language of the time limitation paragraph. It contains two Latin legal terms ("in rem" and "in personam"). Although the provision could have been expressed in simpler language, the standard is one of reasonable communicativeness and the Court will not engage in "hypothesizing some further step the shipowner could possibly have taken." Id. at 245. The language suffices.

Finally, the plaintiffs claim that the extrinsic circumstances indicate a failure of NCL to notify them of the contract's limitations. First, they point to the lack of any explanation from NCL staff prior to the cruise. NCL procedures dictate that a passenger may not board a cruise ship without presenting his or her Passenger Ticket Contract at the time of boarding. Defendant's Mem., Ex. 6 at ¶12 (Declaration of Jane Kilgour). NCL presents evidence that the plaintiffs presented

their ticket, and the plaintiffs do not rebut this evidence. See Id. at ¶13; Defendant's Mem., Ex. 2 (copy of plaintiffs' ticket presented at departure). Since the plaintiffs possessed the Passenger Ticket Contract prior to boarding, they had an opportunity to read its provisions. See Marek, 817 F.2d at 247; see also Duffy v. Camelback Ski Corp., No. 92-0589, 1992 WL 151802 at *4 (E.D. Pa. June 23, 1992) ("Since the ticket must be shown to ski personnel to gain entrance to the ski lifts, there is no question that the Plaintiff was in possession of the ticket.").

The plaintiffs also object to NCL's failure to notify the plaintiffs' counsel of the contract's terms after learning of a potential claim. The plaintiffs do not support their contention that the Marek standard imposes a duty upon the cruise operator to provide such notice to counsel after the conclusion of the cruise. See Berg v. Royal Caribbean Cruises, Ltd., No. 91-4957, 1992 WL 609803 at *5 (D.N.J. Feb. 20, 1992) (applying Marek and noting that cruise line had no obligation to tell plaintiff's counsel that it intended to invoke the contract's time limitation clause).

Even if NCL did not inform the plaintiffs' counsel of the time limitation, the Court notes that NCL did point out the "rights and defenses" contained in the "passenger ticket contract" in at least two notices to plaintiffs' counsel before

the time limitation period expired. The following paragraph appeared in a letter dated October 21, 2003, addressed to the plaintiffs' lawyer and signed by NCL's Senior Claims

Representative:

This request for information and any conversations or correspondence between us should not be construed as an admission of liability and is without prejudice to the rights and defenses of Norwegian Cruise Line Limited, including the terms and conditions set forth in the passenger ticket contract of passage.

Plaintiffs' Mem., Ex. B (emphasis added). See also Plaintiffs' Mem., Ex. D (additional letter sent before time limitation's expiration containing a similar paragraph). The above language strongly suggests that the ticket contract contains limitations on legal claims. See DeNicola v. Cunard Line Limited, 642 F.2d 5, 11, n.14 (1st Cir. 1981) (emphasizing similar allusion in a cruise line's letter to plaintiff's attorney).

The defendant's Passenger Ticket Contract provides reasonably communicative notice of the time limitation provision under Marek. The plaintiffs' claims are time-barred. The Court will grant the defendant's motion for summary judgment and will not consider the defendant's motion in the alternative for a transfer of venue.

An appropriate order follows.

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NCL (BAHAMAS) LTD. d/b/a NCL, : NO. 05-2344

ORDER

AND NOW, this 17th day of August, 2005, IT IS HEREBY ORDERED that upon consideration of the Motion of Defendant NCL (Bahamas) Ltd. D/B/A/ NCL for Summary Judgment or, in the alternative, to Transfer Venue (Docket No. 6), plaintiffs' opposition, and defendant's reply thereto, IT IS HEREBY ORDERED that, for the reasons set forth in a memorandum of today's date, the defendant's motion for summary judgment is GRANTED. Judgment is hereby entered for the defendant and against the plaintiffs.

BY THE COURT:

/s/ Mary A. McLaughlin
MARY A. McLAUGHLIN, J.