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Order on Defendant's Partial Motion to Dismiss Plaintiffs' Amended Complaint (ATLANTIC SOUTHEAST AIRLINES, INC.)

Alice D. Bonner
Superior Court of Fulton County

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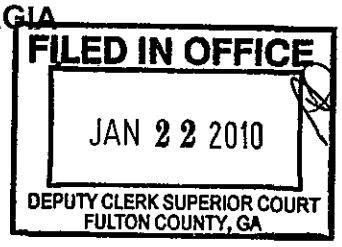
IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA



ATLANTIC SOUTHEAST AIRLINES, INC., a Georgia Corporation, and SKYWEST AIRLINES, INC., A Delaware Corporation,

Plaintiffs,

v.

DELTA AIR LINES, INC., a Delaware Corporation,

Defendant,

Civil Action File No. 2008-CV-145995

ORDER ON DEFENDANT'S PARTIAL MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

On December 10, 2009, Counsel in the above-styled case appeared before the Court to present oral argument on a partial motion to dismiss filed by Defendant Delta Air Lines, Inc. ("Delta"). After reviewing the record of the case, the briefs submitted on this Motion, and the arguments of counsel, the Court finds as follows.

In September 2005, Delta entered into individual connection agreements with Plaintiff Atlantic Southeast Airlines, Inc. (ASA) and Plaintiff SkyWest Airlines, Inc. ("SkyWest," and collectively with ASA, "the Operators"). The parties entered into a new connection agreement in December 2006 (collectively with the 2005 connection agreements, "the CAs"). The CAs establish a long-term relationship between Delta and the Operators through which the Operators provide regional flight services that connect Delta's main hubs with smaller cities and regional airports. The CAs provide for a complex compensation structure. Part of that compensation structure calls for Delta to pay the Operators for irregular operations expenses ("IROP expenses") "principally

caused" by Delta or its affiliates. IROP expenses is an airline industry term that includes payment for lodging and meals for passengers stranded by delayed or cancelled flights.

Plaintiffs allege that from the beginning of their relationship with Delta under the CAs, they charged Delta for all IROP expenses whether or not they were principally caused by Delta. Plaintiffs further allege that in December 2007, Delta announced that it had reviewed the invoices under the CAs and had found that it had been improperly charged for a majority of IROP expenses. Thereafter, Delta withheld approximately $25M from its December invoice payments to the Operators and continued to withhold payments for IROP expenses it does not believe it principally caused. Plaintiffs brought this suit to force Delta to pay all of the IROP expenses they charged to Delta. Specifically, in Count I of their Amended Complaint, the Operators allege that the parties' conduct following execution of the CAs constitutes a mutual departure from their agreement pursuant to O.C.G.A. § 13-4-4. In Count II, the Operators allege that Delta is barred from seeking reimbursement for an overpayment of IROP expenses (i.e. payments for IROP expenses that Delta did not principally cause) by the voluntary payment doctrine codified under O.C.G.A. § 13-1-13. In Counts III and IV, the Operators allege that Delta has breached the CAs by misinterpreting the term "principally caused by Delta or its affiliates" and wrongfully withholding payments it owes to them. In Count V, the Operators allege that Delta's actions constitute a breach of an express covenant of good faith and fair dealing in the CAs as well, such a covenant being implied every contract under Georgia law. In Count VI, the Operators seek a declaratory judgment that would hold (1) that they are entitled to payment of all IROP

expenses incurred under the CAs and pursuant to Delta's IROP policies unless Delta can show that the Operators principally caused the IROP expense; (2) that Delta's "proffered reasons for continuing to withhold payment for IROP Expenses incurred by the Operators and billed [to Delta] are not justified;" and (3) that the CAs remain in effect. Finally, in Counts VII and VIII, the Operators seek attorneys' fees and costs of litigation pursuant to O.C.G.A. § 13-6-11 and under an express term of the CAs. Delta has moved to dismiss Counts I, II, V, VII, and VIII in full, and Counts III and VI in part.

Granting a motion to dismiss is appropriate when a plaintiff "would not be entitled to relief under any state of facts that could be proven in support of his claim" Northeast Georgia Cancer Care, LLC v. Blue Cross & Blue Shield of Georgia, Inc., 297 Ga. App. 28, 29 (2009); see also O.C.G.A. § 9-11-12(b)(6). In ruling on such a motion, the Court must accept as true all of Plaintiffs' well-pleaded factual allegations, and draw all reasonable inferences in Plaintiffs' favor. Baker v. McIntosh County Sch. Dist., 264 Ga. App. 509, 509 (2003); Croxton v. MSC Holding, Inc., 227 Ga. App. 179, 180, (1997); Mathews v. Greiner, 130 Ga. App. 817,821(1974).The Court may also consider contracts attached to and incorporated into the pleadings. Brown v. Gadson, 288 Ga. App. 323, 326 (2007).

Contract construction is a question of law for the court. O.C.G.A. § 13-2-1; Castellana v. Conyers Toyota, Inc., 200 Ga. App. 161, 165 (1991). The Court finds that Plaintiffs' claim for breach of contract based on mutual departure is not viable because, under the CAs, a mutual departure requires a writing signed by both parties, and Plaintiffs have not alleged any such writing. Moreover, Plaintiffs have failed to allege any actions by Delta that could constitute a departure from the terms of the CAs in light

of the fact that the CAs allow Delta to audit IROP expense payments made to Plaintiffs and to seek reimbursement from Plaintiffs if any of those payments were not, in fact, principally caused by Delta. Plaintiffs acknowledge the Parties' agreed-upon reimbursement structure and even call Delta's initial IROP expense payments "provisioning payments." Moreover, the Court cannot find any allegations in the Amended Complaint that raise a reasonable inference that Delta consented to a mutual departure from the CAs including allegations that such consent is evidenced in a subsequent agreement between Delta and ASA. That agreement makes no mention of amending the Parties' agreement on payment of IROP expenses, includes a merger clause, and expressly states that "all other written terms and conditions of the (prior) Agreement shall remain in full force and effect." Finally, the Court finds that Plaintiffs' allegations regarding margin cap payments under a subsequent agreement does not evidence any departure by Delta because, again, those payments were subject to audit rights retained by Delta.

Next, the Court finds that Plaintiffs have failed to state a claim for breach of contract based on the voluntary payment doctrine. Georgia's voluntary payment doctrine provides:

> Payments of claims made through ignorance of the law or where all the facts are known and there is no misplaced confidence and no artifice, deception, or fraudulent practice used by the other party are deemed voluntary and cannot be recovered unless made under an urgent and immediate necessity therefore or to release person or property from detention or to prevent an immediate seizure of person or property. Filing a protest at the time of payment does not change the rule prescribed in this Code section.

O.C.G.A. 13-1-13. The voluntary payment doctrine does not apply in cases where payments are not final. Lewis v. Colquitt County, 71 Ga. App. 304 (1944); see also, In

re McShane, Inc., No. 02-54385-SD, 2006 WL 4667136, at *5 (Bankr. D. Md. July 27, 2006). Delta's payments to the Operators were subject to Delta's audit rights, and were not final. Accordingly, the voluntary payment doctrine does not apply to this case and Plaintiffs' claim based on that doctrine fails as a matter of law.

The Court also finds that Plaintiffs have failed to state a claim for breach of both an express and an implied covenant of good faith and fair dealing. Allegations pled by Plaintiffs in support of this claim only show that Delta exercised its audit rights under the CAs. As to Plaintiffs allegations that Delta failed to notify them of Delta's "interpretation" of the CAs, the Court finds that Delta had no such obligation and, therefore, allegations to that effect fail to state a claim for breach of the covenant of good faith and fair dealing.

The Court agrees with Delta that it is improper for Plaintiffs to plead for attorneys' fees and costs of litigation pursuant to O.C.G.A. 13-6-11 as a separate cause of action. Lamb v. Salvage Disposal Co. of Ga., 244 Ga. App. 193, 196 (2000).

The Court further agrees with Delta that Plaintiffs have failed to state a claim for attorneys' fees based on Section 12(D) of the CAs. The Court finds that Section12(D) of the CAs are unambiguous indemnification clauses meant to indemnify Plaintiffs against claims by non-parties to the CAs. Therefore, Section 12(D) of the CAs will not support a claim for attorneys' fees by Plaintiffs against Delta.

The Court finds that under the CAs, Delta only owes Plaintiffs IROP expense payments for those it "principally caused." Therefore, Plaintiffs are responsible for all other IROP expenses, i.e., all those not principally caused by Delta. However, the

Court does not foreclose the possibility that some of the IROP expenses at issue in this case may be determined to be "principally caused" by Delta.

The Court hereby **GRANTS IN PART** Defendants' Motion to Dismiss Plaintiffs' claim for a Declaratory Judgment and for breach of express contract to the extent that those claims seek to read alternative language or supplemental obligations created by prior conduct into the payment structure established by Section 3 of the CAs. The Court **DENIES IN PART** Delta's Motion to Dismiss Plaintiffs' claim for a Declaratory Judgment and for breach of express contract to the extent that those claims are based on the parties' specific payment obligation arising under the CAs.

The Court GRANTS in full the remainder of Delta's Motion to Dismiss. Accordingly, Counts I, II, V, VII, VIII of Plaintiffs' Amended Complaint are hereby DISMISSED.

SO ORDERED this 22 day of January, 2010.

Alice D. Bonner

ALICE D. BONNER, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

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