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Order on Motion to Dismiss (ATLANTIC SOUTHEAST AIRLINES, INC.)

Alice D. Bonner
Superior Court of Fulton County

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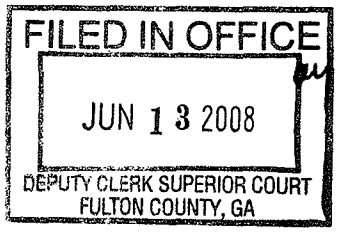
IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA



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 MOTION TO DISMISS

Counsel in the above-styled case appeared before the Court on June 5, 2008, to present oral argument on Defendant's Motion to Dismiss. After reviewing the record of the case, the briefs submitted on this Motion, and the arguments of counsel, the Court finds as follows:

FACTS:

Sky West Airlines, Inc., ("SI") purchased Atlantic Southeast Airlines ("ASA") from Delta Air Lines, Inc. ("Delta"). SI is the parent to ASA and Sky West Airlines ("SKW," collectively with SI and ASA, the "Operators"). Delta entered into individual connection agreements with ASA and SKW in September, 2005 (the "2005 CAs"). The parties entered into a new connection agreement in December 2006, expanding into new territory (the "2006 CA", collectively with the 2005 CAs, the "CAs"). In November, 2007, the parties entered into a second amendment of the CAs (the "2nd Amendment"), which provided payment reductions to Delta for synergy savings from combining ASA and SKW under SI (approx. $54M) and decreased the Operators' maximum profit cap under the CAs.

Throughout the duration of the relationship, the Operators charged Delta for all irregular procedure expenses ("IROP") incurred due to delayed flight, denied boarding, lost baggage, etc. In December 2007, Delta announced that it had reviewed the invoices under the CAs and that it had been improperly charged for the majority of IROP expenses. Thereafter, Delta withheld approximately $25M from its December invoice payments to the Operators. Plaintiffs brought this suit to force Delta to pay all IROP expenses incurred according to Delta's policies and procedures, consistent with past practices.

IROPs are defined and are assigned cost responsibility under Section 3 of the CAs, both of which contained similar payment obligation language. Under the CAs, Pass Through Costs (i.e., costs to be paid by Delta), are defined to include "passenger amenities and interrupted trip expenses...and other costs incurred by Operator due to any action or omission principally caused by Delta or an affiliate of Delta."[1] Similarly, Non-Reimbursable Costs (i.e., costs for which Delta is not responsible) are defined as"[p]assenger amenities costs and other interrupted trip expenses....incurred by Operator due to any action or omission principally caused by Operator or an affiliate of Operator."[2] In addition, the parties

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1. Section 3A(ii) of the December, 2006 CA between Delta, SKW, and ASA states,

   The 'Pass Through Costs' shall include the following variable costs for which Delta shall bear the risk of prince and volume fluctuations, <u>provided</u> that such costs shall be reconciled on a monthly basis to reflect the actual costs incurred by Operator:

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   (12) Passenger amenities costs and other interrupted trip expenses, including without limitation, denied boarding compensation, food and lodging expenses and other transportation costs incurred by Operator due to any action or omission principally caused by Delta or an affiliate of Delta.

(emphasis in original)

2. Section 3C "Non-Reimbursable Costs" states

   The parties hereby acknowledge and agree that Operator shall be solely responsible and Delta <u>shall not</u> be responsible, nor reimburse Operator, for any of the following costs:

readdress the treatment of IROP expenses in Section 3D where Delta Costs (i.e., "costs to be paid directly by Delta") are defined to include "[d]enied boarding costs" unless principally caused by an act or omission of the Operator. Finally, Section 3 outlined Delta's right to review past payments, perform audits, and set off undisputed amounts.[3]

DECLARATORY JUDGMENT:

Plaintiffs seek a declaratory judgment from the Court that "the Connection Agreements require Delta to reimburse IROP costs incurred within the requirements of Delta's IROP Policy as pass-through costs, consistent with prior experience." Plaintiffs' main argument is that the language "principally caused by" assigns IROP costs to Delta when they arise under Delta's policies and procedures, which is consistent with how the Operators billed Delta

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(3) Passenger amenities costs and other interrupted trip expenses, including without limitation denied boarding compensation, food and lodging expenses and other transportation costs incurred by Operator due to any action or omission principally caused by Operator or an affiliate of Operator."

3. Section 3(H) reads, in part:

Delta shall be entitled to review and verify Operator's invoice and accompanying estimates and calculations prior to making any advance payment pursuant to this paragraph: provided, however, any such review or payment by Delta shall not be deemed as Delta's final approval of Operator's Invoice and accompanying estimates and calculations, and such information shall still be subject to potential audit and reconciliation pursuant to this Article 3...

Section 3(I) reads, in part:

Delta's in-house finance staff and any independent consultants selected by Delta shall be entitled, following reasonable notice to Operator, to audit and inspect Operator's books and records with respect to services provided hereunder, the service levels achieved, and the determination of charges due pursuant to this Agreement for the purposes of auditing Base Compensation or Incentive Compensation due or paid hereunder.

Section3(K) reads, in part:

Delta may offset against the next scheduled payments(s) to be made pursuant to Section3(J) above the undisputed amount of any payment that Operator or an affiliate of Operators owes to Delta or an affiliate of Delta but has not made when due.

during the previous twenty-seven months of billing history between the parties. Delta, on the other hand, asks this Court to dismiss this count (and all other counts) on the grounds that the CAs clearly state that IROP costs shall be assigned to the party who "principally caused" the expense. Delta, however, acknowledges that even if the Court grants dismissal of this and all counts, the parties will have a continuing dispute over the actual payment of the disputed IROP costs.

Contract construction is a question of law for the court. O.C.G.A. § 13-2-1. "Construction of a contract is a matter of law for the court, particularly where the terms are unambiguous. It is thus a matter peculiarly well suited for adjudicated by summary judgment. Castellana v. Conyers Toyota, Inc., 200 Ga. App. 161 (1991).

After reviewing the CAs and their relevant provisions, the Court finds that the CAs assign the IROP costs according to the party whose actions or omissions "principally caused" the IROP. The Court hereby **GRANTS IN PART** Defendants' Motion to Dismiss Plaintiffs' Declaratory Judgment to the extent that it seeks to read alternative language or supplemental obligations created by prior conduct or otherwise into the payment structure established in Section 3 of the CAs. The Court **DENIES IN PART** Delta's Motion to Dismiss Plaintiffs' Declaratory Judgment to the extent that it seeks guidance from the Court with regard to the parties' specific payment obligation arising under the CAs. While the Court declines to read the requirement that all IROP costs incurred pursuant to Delta's policies and procedures shall be reimbursed as "principally caused" by Delta, the Court does not foreclose the possibility that some of those IROP expenses may be interpreted to be "principally caused" by Delta.

BREACH OF CONTRACT:

Plaintiffs claim that Delta's withholding of approximately $25 million in IROP expenses from the December, 2007, bills breached the CAs. Delta moves the Court to dismiss this count on the grounds that the CAs specifically authorize Delta to review, audit, and recalculate payments due under the agreement. Additionally, Delta highlights the language in Section 3(H) which states that any payments by Delta shall not be deemed to be "final" payments and are still subject to Delta's audit rights.

The Court finds that Delta had the right to audit the IROP expenses and recalculate its expenses under the plain language of Section 3. Thus, the remaining issue is whether the amount Delta withheld was accurate under the terms of the CAs, which the Court is unable to determine at this stage of the proceeding. Therefore, Delta's Motion to Dismiss Plaintiffs' Breach of Contract Count is hereby **DENIED**.

PROMISSORY ESTOPPEL:

In Count three of its Complaint, Plaintiffs plead, in the alternative, promissory estoppel on the grounds that Delta's payment of all of the IROP expenses, as charged to it, under the CAs created an implied promise to Plaintiffs that Delta would continue to pay all such expenses.

Delta urges the Court to dismiss this count arguing that Plaintiffs have failed to sufficiently plead the elements of promissory estoppel. Promissory estoppel claims require four elements: (1) a promise by Delta, (2) the reasonable expectation by Delta that Plaintiffs would rely upon the promise, (3) reasonable reliance by Plaintiffs on the promise, and (4) resulting injustice. O.C.G.A. § 13-3-44.

First, Delta argues that the CAs, which specifically address how IROP costs are to be allocated between the parties, extinguish any "promise" by Delta to pay all IROP costs. "When neither side disputes the existence of a valid contract, the doctrine of promissory estoppel does not apply, even when it is asserted in the alternative." American Casual Dining, L.P. v. Moe's Southwest Grill, L.L.C., 426 F.Supp.2d 1356, 1371 (N.D. Ga. 2006). Plaintiffs argue that the existence of a contract does not extinguish a promissory estoppel claim if the promise is outside of the terms of the contract. See Rental Equipment Group, LLC v. MACI, LLC, 263 Ga. App. 155 (2003); Sun-Pacific Enterprises, Inc. v. Girardot, 251 Ga. App. 1010 (2001). In this case, neither party contests the existence or validity of the CAs, which specifically allocate IROP expenses in three separate provisions. Therefore, the Court finds that Plaintiffs failed to establish the first element of a promissory estoppel claim

Second, Delta argues that the merger clause,[4] found in Section 23 of the CAs, bars Plaintiffs from arguing either that Delta reasonably expected Plaintiffs to rely upon the promise or that Plaintiffs could have reasonably relied on such a promise. Where a contract can only be modified by writing, a promisee may not reasonably rely on an oral promise, nor could it be said that the marker of the promise would reasonably expect reliance." LARKINS, GA. CONTRACTS, § 4-14 (2001, supp. 2007-2008); Gerdes v. Russell Rowe Communications, Inc., 232 Ga. App. 534, 536 (1998) (We hold that, as a matter of law, Gerdes could not reasonably rely upon the alleged oral promises ...[the] agreement specifically provided that it could be altered only in writing, and Gerdes does not dispute that this was never done. '[T]his clear and unambiguous provision served to place appellant on due notice that he could not

[4] "No amendment, modification, supplement, termination or waiver of any provision of this Agreement, and no consent to any departure by either party therefrom, shall in any event be effective unless in writing signed by authorized representatives of both parties, and then only I the specific instance and for the specific purpose given."

thereafter reasonably rely upon any words or other course of dealing to his inducement, other than a modification agreement actually reduced to writing....'"). The merger clause in the CAs prevented any reasonable reliance, or of expectation thereof, for any promise not contained in or in conflict with the terms of the CAs. Thus, the Court finds that notwithstanding the deficiencies in pleading a "promise", Plaintiffs failed to plead facts sufficient to establish reasonable reliance.

For the foregoing reasons, the Court hereby **GRANTS** Delta' Motion to Dismiss the Promissory Estoppel Claim.

MUTUAL MISTAKE:

In count four of its Complaint, Plaintiffs plead mutual mistake, in the alternative, on the grounds that the IROP provisions of the CAs do not "completely or accurately express the intent and understanding of ...[the parties] and the parties' course of dealing...."

Delta moves the Court to dismiss Plaintiffs' mutual mistake count on the grounds that Plaintiffs failed to plead sufficient facts to establish mutual mistake. O.C.G.A. §§ 23-2-22, 24. A mistake is defined as "some unintentional act, omission, or error arising from ignorance, surprise, imposition, or misplaced confidence," that is made by both parties. O.C.G.A. § 23-2-21; MAG Mutual Ins. Co. v. Gatewood, 186 Ga. App. 169, 174 (1988) ("Where reformation is sought on the ground of mutual mistake, it must, of course, be proved to be the mistake of both parties. We have examined the record in this case and find no evidence of mutual mistake."). Delta claims that there was no mistake and that the CAs completely and accurately states its intent with regard to IROP payments.

Plaintiffs argue that Delta's past payment of all of the IROP expenses, coupled with other elements such as the rate model provided in Exhibit B to the CAs, demonstrate an

alternative intent of the parties which should prevent this Court from dismissing their complaint for mutual mistake. Plaintiffs rely principally upon Yeazel v. Burger King Corporation, 241 Ga. App. 90 (1999), where the Court of Appeals reasoned that past performance was evidence of an alternative intent for purposes of pleading mutual mistake. Id. at 96-97 ("The fact that, for more than four years after it changed the use of the restaurant, BKC continued without objection to make rental payments in accordance with the original parties' understanding of the lease further suggests that BKC was aware of their intentions, and that it interpreted the amended lease in the same manner [that the there was a mistake because the minimum payment was due]."). In Yeazel, a landlord and franchisee tenant entered into a long-term commercial lease which required a minimum monthly payment of $4000 rent. The lease was amended and the language removed the minimum rental payment. Both the landlord and the tenant testified that they did not intend to remove the $4000 monthly minimum, and if the contract did so, it was a mistake. The lease was then assigned to Burger King Corporation, which paid the minimum for four years before challenging the provision in court. Id. at 90-93. The Court of Appeals found that the trial court erred in not considering parole evidence before determining the mutual mistake claim. Id. at 94-97.

In this case, however, there are no sufficiently pled facts to establish a mutual mistake. In Yeazel the past performance was combined with testimony from the two drafters that the omission was a mistake. In the instant case, Delta disclaims any mistake and argues that past performance could not be construed against it because of its review, audit, and recalculation rights in addition to the express disclaimer of "final" payments pursuant to the terms of the CAs.

For the foregoing reasons, the Court hereby **GRANTS** Delta's Motion to Dismiss Plaintiffs claim of Mutual Mistake.

UNILATERIAL MISTAKE:

In count five of its Complaint, Plaintiffs claim unilateral mistake in the negotiation of the 2nd Amendment arguing that Delta's knowledge of its IROP claims and intention to recoup those costs invalidated the synergy cost and revenue cap provisions of the 2nd Amendment.

A claim of unilateral mistake is established where there is a mistake of law or fact by one party that is accompanied by fraudulent or inequitable conduct. Caudell v. Toccoa Inn, Inc., 261 Ga. App. 209, 210 (2003) ("Equity requires that there be fraud or inequitable conduct on the part of the other party in order to set aside the sale for unilateral mistake."). Again, the alleged mistake by Plaintiffs is that Delta would continue to pay all of the IROP expenses. Plaintiffs allege that Delta's silence and non-disclosure of its intent to recoup IROP expenses after the negotiation of the 2nd Amendment constituted fraudulent or inequitable conduct. Absent a confidential relationship, silence or non-disclosure will not support a claim for fraud. See O.C.G.A. § 23-2-53; Miller v. Lomax, 266 Ga. App. 93 (2004). Confidential relationships are defined as a controlling interest or influence which can be established by the existence of a fiduciary duty or the particular circumstances of a case. O.C.G.A. § 23-2-58; Miller v. Lomax, 266 Ga. App. at 97. In this case, Delta and the Plaintiffs had an on-going business relationship in which they negotiated arms-length transactions for Plaintiffs to provide connection flight services to Delta. Nothing pled in the facts of the Complaint can give rise to the inference of a confidential relationship, which prevents any non-disclosure by Delta from rising to the level of fraud. Therefore, the Court hereby **GRANTS** Delta' Motion to Dismiss Plaintiffs' claim for Unilateral Mistake.

SO ORDERED this 13 day of June, 2008.

Alice D. Bonner

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

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