IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOEL W. ADELSON, M.D,

Plaintiff,

v.

AMERICAN AIRLINES, INC., and BRITISH AIRWAYS, PLC,

Defendants.
_____/

No. C 17-00548 WHA

ORDER GRANTING LEAVE TO AMEND COMPLAINT

INTRODUCTION

In this personal injury action under Article 17 of the Montreal Convention, plaintiff moves to amend his complaint pursuant to Rule 15. For the reasons herein, plaintiff's motion is **GRANTED**.

STATEMENT

Plaintiff Joel Adelson's trip in 2016 had two legs, with a 70-minute layover between flights at Heathrow. Plaintiff arrived at Terminal 3 and proceeded directly to Terminal 5 via inter-terminal transportation. As he entered the ground floor of Terminal 5, the door slammed shut, striking plaintiff on the arm and "knocking him violently to the floor" (Dkt. No. 41-1, Exh. A at 4). Based on these allegations, Adelson asserted a single claim against defendants American Airlines, Inc., and British Airways, PLC, under Article 17 of the Montreal

Convention, formally known as the Unification of Certain Rules for International Carriage by Air, Done at Montreal, May 28, 1999, S. Treaty Doc. No. 106-45, 1999 WL 33292734.

Plaintiff's original complaint lacked sufficient allegations to establish a claim. Judgment on the pleadings was therefore granted in favor of the defendants. Plaintiff now moves to amend his complaint to correct its deficiencies.

ANALYSIS

Rule 15(a)(2) advises, "The court should freely give leave when justice so requires." In ruling on motions for leave to amend, courts consider (1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility of amendment, and (5) whether the plaintiff has previously amended their complaint. *Nunes v. Ashcroft*, 375 F.3d 805, 808 (9th Cir. 2003). Futility alone can justify denying leave to amend. *Ibid.*; *see also Ebner v. Fresh, Inc.*, 838 F.3d 958, 968 (9th Cir. 2016). The parties debate only the futility factor on the instant motion.

Plaintiff's amended complaint contends that British Airways is liable under Article 17 and American Airlines is liable under Article 39 of the Montreal Convention.

1. BRITISH AIRWAYS' LIABILITY UNDER ARTICLE 17.

Both sides agree that British Airways is a carrier governed under the Montreal Convention. Article 17 of the Montreal Convention states that a carrier shall be liable for any bodily injury "suffered by a passenger, if the accident . . . took place on board the aircraft or in the course of any of the operations of embarking or disembarking." Defendants contend that plaintiff's proposed amended complaint fails to state a claim under the Montreal Convention because it does not show that he was embarking or disembarking at the time of the alleged incident. To determine whether a passenger is embarking or disembarking, Article 17 requires consideration of (1) the activity the passenger was engaged in, (2) the passenger's location, and (3) the control of the airline over the passenger, all at the time of the accident. *Maugnie v. Compagnie Nationale Air France*, 549 F.2d 1256, 1262 (9th Cir. 1977) (citing *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 33-34 (2d Cir. 1975)).

First, plaintiff now asserts that his activity was within the scope of embarkation because he traveled directly from Terminal 3 to Terminal 5 to board his connecting flight and did not

divert from his route. In support, he states that even after his injury he proceeded directly from the point of incident to his gate, "making no stops or detours for a meal, or 'window shopping' or whatever else, except perhaps to pick up a cup of coffee" (Dkt. No. 41-1, Exh. A at 4–5). Defendants counter that plaintiff's activity was not consistent with embarkation because he did not travel directly to his gate, but rather to purchase coffee and pass through additional security.

"All allegations of material fact are taken as true and construed in the light most favorable to Plaintiffs. However, conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim." *Epstein v. Wash. Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996) (citations omitted). Even if plaintiff stopped for coffee, if he traveled the same path through the delinquent door as he would have had he walked straight through, then what difference would the coffee stop make? We cannot expect ordinary passengers to remember the layout of the airport, so he should have discovery to fill in this detail. When these alleged facts are viewed as a whole and in the light most favorable to plaintiff, it is plausible that he went directly to his gate, such that plaintiff's activity met Article 17.

Second, as to the second factor of embarkation, plaintiff's amended complaint alleges facts that reveal his location relative to his connecting flight. Plaintiff "cannot state with accuracy how far [the gate] was from the door that struck him . . . but [the gate] was something over a hundred yards [away]," and on the ground floor of Terminal 5 (Dkt. No. 41-1, Exh. A at 4–5). Defendants argue that plaintiff was nowhere near the gate, as he was over a football field away. Distance alone is insufficient to establish that plaintiff's location does not meet embarkation. In light of the fact that plaintiff traveled from Terminal 3 to Terminal 5, a plausible inference can be drawn that he was close enough to his gate to satisfy Article 17.

Third, plaintiff alleges that British Airways controlled his actions because "he [was] following explicit directions set out by [British Airways] on the most efficient and direct route to get from one [British Airways] flight to another" (Dkt. No. 41-2 at 4). Plaintiff also alleges that British Airways controls which planes go to which gates. Defendants argue that plaintiff was not under their control because "his new allegations are devoid of any contact with [British Airways]

or [American Airlines] personnel before, during, or after the alleged incident" (Dkt. No. 43 at 6). Although plaintiff did not have direct contact with personnel, it is plausible that British Airways steers passengers through Heathrow.

In summary, plaintiff is reasonably close to alleging facts that meet the three elements of embarking under the Montreal Convention. British Airways, not plaintiff, is in possession of the facts necessary to determine if plaintiff was in the process of embarkation and it would be unfair to expect plaintiff to plead facts held in secrecy by British Airways. Under the specific facts of this case, plaintiff is entitled to those secrets to prove facts and circumstances necessary to establish embarkation. The amended complaint is sustained.

2. AMERICAN AIRLINES' LIABILITY UNDER ARTICLE 39.

Plaintiff alleges that he purchased his British Airways flights with American Airlines air miles. His original complaint failed to state a claim against American Airlines because it did not allege any contract between him and the airline. Plaintiff now amends his complaint to allege that he "contracted for transportation by air with American Airlines" because he flew with British Airways "under a ticket sold and issued by American Airlines" (Dkt. No. 41-1, Exh. A at 5–6). Furthermore, plaintiff contends that American Airlines was a "contracting carrier" under Article 39 of the Montreal Convention. While plaintiff does not discuss the significance of a contracting carrier, the allegation is important because if American Airlines is a contracting carrier, it holds mutual liability with British Airways under the Montreal Convention.

Article 39 reads:

> The provisions of this Chapter apply when a person (hereinafter referred to as 'the contracting carrier') as a principal makes a contract of carriage governed by this Convention with a passenger or consignor or with a person acting on behalf of the passenger or consignor, and another person (hereinafter referred to as 'the actual contractor') performs, by virtue of authority from the contracting carrier, the whole or part of the carriage, but is not with respect to such part a successive carrier within the meaning of this Convention. Such authority shall be presumed in the absence of proof to the contrary.

Article 41 of the Montreal Convention extends mutual liability to contracting carriers for acts and omissions of the actual carrier. If British Airways, the actual carrier, is liable under Article 17 and American Airlines is a contracting carrier, American Airlines is liable for

the actions and omissions of British Airways and therefore a proper party to this action. Defendants have not put forth any argument as to why American Airlines would not constitute a contracting carrier (Dkt. No. 38 at 9–10; Dkt. No. 43).

Plaintiff has therefore corrected the deficiencies in his complaint by alleging a contract with American Airlines and stating that the airline is liable as a contracting carrier under the Montreal Convention.

CONCLUSION

For the foregoing reasons, plaintiffs' motion to amend is **GRANTED**. Defendants' requests for judicial notice is not relied upon in this order and **DENIED AS MOOT**.

IT IS SO ORDERED.

Dated: July 28, 2017.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE