IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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SUB-ZERO FREEZER CO., INC.

Plaintiff,

OPINION AND ORDER

v.

01-C-0664-C

CUNARD LINE LIMITED,

Defendant.

- -

This is a civil action in which plaintiff Sub-Zero Co., Inc. seeks to recover money it paid to defendant Cunard Line Limited for a cruise that plaintiff subsequently cancelled because of the September 11, 2001 terrorist attacks. Plaintiff asserts four state law causes of action: (1) promissory estoppel; (2) breach of contract; (3) excused performance; and (4) fraudulent inducement. Plaintiff's first, second and fourth claims rely upon oral and written representations that plaintiff characterizes as defendant's promise that it would work with plaintiff to reschedule the time or location of the cruise in the event of war or acts of terrorism. In addition, plaintiff alleges that the provision of the agreement allowing defendant to retain the entire prepayment amount of $892,000 is void and unenforceable as an unconscionable penalty. This court has jurisdiction over the state law claims by virtue of the parties' diversity of citizenship and the amount in controversy. 28 U.S.C. § 1332.

Defendant has moved to dismiss the entire suit, contending that (1) plaintiff's claims for promissory estoppel and breach of contract rely upon extrinsic evidence that is barred by the parol evidence doctrine; (2) even if the parol evidence rule does not apply, plaintiff is unable to show reasonable reliance upon the extrinsic evidence; (3) plaintiff cannot recover under the doctrines of impossibility of performance and commercial frustration; and (4) the damage provision of the space allotment agreement is valid. Because I find that plaintiff has not stated claims for which relief can be granted, defendant's motion to dismiss will be granted with respect to plaintiff's four claims of promissory estoppel, breach of contract, excused performance and fraudulent inducement. I find, however, that in alleging that the damages provision of the agreement is an unconscionable penalty, plaintiff has stated a viable claim. Accordingly, defendant's motion to dismiss plaintiff's claim regarding the damages clause will be denied.

For the sole purpose of deciding this motion to dismiss, plaintiff's allegations in the complaint are accepted as true.

ALLEGATIONS OF FACT

Plaintiff Sub-Zero Freezer Co., Inc. is a Wisconsin corporation with its principal place

of business in Madison, Wisconsin. Defendant Cunard Line Limited is a Bahamian corporation with its principal place of business in Miami, Florida.

On May 3, 1999, plaintiff signed a Space Allotment Agreement with Cunard. The agreement provided for a seven-night cruise in the Eastern Mediterranean Ocean aboard a vessel named the "Seabourn Spirit." The "Seabourn Spirit" is owned and operated by a subsidiary of defendant named Seabourn Cruise Line, a foreign corporation with its principal place of business in Miami, Florida. The trip was scheduled to depart on October 2, 2001 from Piraeus, Greece, and to disembark in Istanbul, Turkey on October 9, 2001, with intermediate ports of call in Santorini, Rhodes, Bodrum and Kusadasi.

The agreement was for the entire vessel and specified a per-night hire price of $120,000, with a base price for the cruise of $840,000. After the addition of per-passenger and beverage charges, the total price of the cruise was $892,000. As specified in Schedule V of the agreement, plaintiff prepaid the entire cruise price of $892,000. It made the last installment payment of the prepayment to defendant on July 2, 2001.

The Space Allotment Agreement includes a provision (Clause 9) relating to a default by the contractor (in this case, plaintiff), under which the entire cruise hire price becomes payable to defendant if plaintiff cancels the agreement. Clause 10 (Force Majeure) of the agreement relieves defendant of any liability for failure to perform in the event of acts of God, war, fire, acts or threats of terrorism, or order or restraint by government authorities,

among other things. Clause 26.1 is the integration clause. It incorporates into the agreement "[a]ll prior understandings and agreements heretofore entered into between [defendant] and [plaintiff] whether written or oral." Further it provides that "[n]o course of dealing between the parties shall operate as a waiver by either party . . . of any right of such party."

The cruise was arranged with the assistance of Burkhalter Travel & Cruise Shoppe, a travel agency located in Madison, Wisconsin. Before entering into the agreement, plaintiff asked defendant, through Burkhalter, how defendant would treat plaintiff in regard to refunds or rescheduling if there was an outbreak of terrorism or war at the time of the cruise. In response, defendant's director of charter sales at the time, Bruce Setoff, told Burkhalter that defendant would never put its vessels or guests in danger and would work with plaintiff to reschedule the location or dates of the cruise as necessary to assure safety and to satisfy the safety concerns of plaintiff's guests. Alternatively, Setoff said, defendant would give plaintiff a refund.

On April 29, 1999, Setoff sent a letter to plaintiff memorializing his response to plaintiff's inquiries. He stated in relevant part:

> It goes without saying that [defendant] would never go to an area where we have been officially advised not to go, as we would never place our guests, crew and vessel in harms way.
>
> If we are advised not to go to a scheduled port, we would always

> work with our charterers to move (if operationally possible) to another port for the better of all involved. As you can see, there are quite a few behind the scenes professionals who monitor all security aspects of our operation.
>
> It should be noted that a charterer may decide on their own to cancel or reschedule their cruise, *but our agreement does not allow for any release of financial responsibility unless we have been officially directed by the government and can't perform*.
>
> * * * *

(Emphasis added.)

On May 3, 1999, plaintiff signed the agreement with defendant for the cruise. Plaintiff completed the prepayment and the cruise was scheduled to occur until the intervention of the terrorist attacks destroying the World Trade Center in New York City and damaging the Pentagon in Washington, D.C. Several days after the attacks, the United States declared a "war on terrorism." The United States government mobilized substantial resources in and around the eastern Mediterranean and Middle East and elsewhere, and placed its military units on a high state of alert and battle readiness. During the scheduled time of the cruise the United States launched a major military action against Afghanistan.

In response to the September 11 attacks, the United States Department of State issued formal warnings to Americans abroad and to those who were considering traveling abroad, instructing them to exercise heightened caution and vigilance while traveling abroad and urging that Americans avoid such travel. However, the United States government did not issue any orders requiring defendant to cancel its October 2, 2001 cruise.

In the three-week period between the September 11 attacks and the scheduled cruise date, many of plaintiff's employees, guests and their spouses informed plaintiff that they would not go on the cruise because they believed it would be unsafe. Plaintiff and Burkhalter made repeated efforts to persuade defendant to work with plaintiff to reschedule the cruise dates or to refund some or all of the prepayment. Defendant refused to make any adjustment to the date or location of the cruise. In addition, defendant informed plaintiff that it would retain the entire amount of plaintiff's prepayment whether or not the cruise took place.

Plaintiff notified defendant formally before the scheduled departure date that it was cancelling the cruise and demanded that defendant mitigate its losses and provide plaintiff a return of money equal to the amount of cost savings effected by cancellation. Defendant refused to remit any refund or cost savings. Defendant relied upon clauses 9, 10, and 26.1 of the agreement to support its refusal to refund any of the money paid by plaintiff.

OPINION

A motion to dismiss under Fed. R. Civ. P. 12(b)(6) will be granted only if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations" of the complaint. Cook v. Winfrey, 141 F.3d 322, 327 (7th Cir.

1998)(citing Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)). On a motion to dismiss for failure to state a claim under Rule 12(b)(6), the court must accept as true all well-pleaded allegations of the complaint and draw all inferences in favor of the non-movant. Levenstein v. Salafasky, 164 F.3d 345, 347 (7th Cir. 1998).

Although plaintiff bases three of its causes of action on the April 29 letter from Setoff, it failed to attach the letter to the complaint. However, defendant attached the April 29 letter and the agreement to its motion to dismiss. Under Fed. R. Civ. P. 10(c), a district court may take into consideration documents incorporated by reference to the pleadings. United States v. Wood, 925 F.2d 1580, 1582 (1991).

At the outset, it is necessary to determine whether plaintiff can rely on Setoff's oral representations and April 29 letter. Defendant argues that plaintiff is attempting to amend the terms of the written agreement by the introduction of parol evidence. It asserts that under Florida law, which the parties agree is governing, the parol evidence rule bars plaintiff's breach of contract, promissory estoppel, and fraud-inducement claims.

It is well settled in Florida that when the language of a contract is clear and unambiguous, the parties' intent is to be determined "from within the four corners of the document." Burns v. Barfield, 732 So. 2d 1202, 1205 (Fla. Dist. Ct. App. 1999). In the absence of ambiguity, the language itself is the best evidence of the parties' intent. Id.; J.C. Penney Co. v. Koff, 345 So. 2d 732, 735 (Fla. Dist. Ct. App. 1977) (recognizing that courts

are allowed to consider extrinsic evidence only when confronting an ambiguous contract provision).

Plaintiff argues that the agreement is ambiguous because it lacks a *force majeure* clause addressing plaintiff's rights under the contract. In plaintiff's view, the omission of such a provision allows the introduction of consistent parol evidence. Without any provision in the agreement to outline plaintiff's right to non-performance, plaintiff argues, one cannot determine whether the parties agreed to apply common law rules, whether they failed to reach an agreement or whether they reached a specific agreement that incorporated Setoff's assurances to plaintiff. As a result, ambiguity lurks in the agreement. Plaintiff's argument is imaginative but not persuasive.

Much as plaintiff wishes it so, the lack of a clause addressing plaintiff's rights under *force majeure* does not make this contract ambiguous. Plaintiff's responsibility was to provide prepayment of the cruise costs. Plaintiff had no responsibility for providing guests for the cruise. As defendant argues, giving it the sole right to claim *force majeure* makes sense when one considers the different obligations of the parties under the agreement. Defendant is correct; plaintiff has failed to show that the agreement was ambiguous.

Plaintiff contends that even if the parol evidence rule applies, as it does in the absence of a showing of ambiguity, evidence concerning representations made by defendant before the agreement was signed is admissible under an exception to the parol evidence rule for

contemporaneous oral agreements that induce execution of a written contract. Plaintiff argues that defendant assured it both orally and in writing that defendant would work with the plaintiff to reschedule the cruise and that reliance on those assurances induced plaintiff to sign the contract.

The flaw in plaintiff's argument is that Florida law does not allow the introduction of parol evidence that relates to the same promise addressed in the written agreement. See, e.g., Linear Corp. v. Standard Hardware, 423 So. 2d 966, 968 (Fla. Dist. Ct. App. 1987) (testimony regarding contemporaneous oral agreement not admissible because alleged oral agreement related to identical subject matter in the agreement and directly contradicted express provision of the written agreement.) See also Mallard v. Ewing, 164 So. 674, 678 (Fla. 1936) (noting that contemporaneous oral agreement that induced execution of written contract must be shown by evidence that is "clear, precise and indubitable"). Any promises that defendant made regarding rescheduling were directly refuted by express provisions in the contract. Plaintiff has failed to show that the inducement exception to the parol evidence rule applies in this case. Plaintiff is bound by the terms of the contract it signed. Without the evidence extrinsic to the contract, plaintiff cannot prove promissory estoppel, breach of contract or fraudulent inducement. Therefore, defendant's motion to dismiss counts I, II and IV of the complaint will be granted.

In its third claim, plaintiff argues that its performance under the contract was excused

under the doctrines of impossibility of performance and commercial frustration. In arguing that its "performance" should be excused because of the unforeseeable attacks on September 11 and their aftermath, plaintiff misconstrues the performance that was required of it under the contract. The contract between the parties designated the duties of each party. Plaintiff's obligation was to pay the agreed-upon charter fee. The contract did not require that plaintiff's employees and guests had to embark on the cruise. Therefore, plaintiff's performance was complete when it made its last installment payment on July 2, 2001. Defendant stood ready to hold up its end of the bargain and provide the cruise.

Under Florida law, business entities are expected to cover foreseeable risks in their contract. See, e.g., Home Design Center v. County Appliances of Naples, 563 So. 2d 767, 770 (Fla. Dist. Ct. App. 1990) (holding that defense of frustration of purpose is not available for difficulties that are "basic business risks" unless substantial competent evidence establishes that risks were not foreseeable.). See also American Aviation v. Aero-Flight Serv., 712 So. 2d 809, 811 (Fla. Dist. Ct. App. 1998) (when plaintiff could have shifted business risk by contract and chose not to, it should not be allowed to accomplish same effect by claiming impossibility of performance resulting from foreseeable risk).

It is understandable that plaintiff's dealers were reluctant to cruise the eastern Mediterranean in the immediate aftermath of September 11. It does not follow, however, that plaintiff can rewrite the contract to insert provisions it failed to bargain for in the

original agreement. The agreement states clearly that defendant is entitled to the entire Cruise Hire Price if plaintiff cancelled the cruise. Plaintiff argues correctly that it was not possible to predict the September 11 attacks, but fails to acknowledge that it anticipated the possibility of war or terrorist activity. Indeed, in its briefs it talks at length about its negotiations with defendant when it had planned a cruise that was to take place just after the Gulf War began in 1991. After that experience, plaintiff can hardly argue that the possibility of war or terrorism was not foreseeable. Less foreseeable perhaps was what happened here: a terrorism attack on the United States; military retaliation without an order restraining pleasure cruises; reluctant guests; and a refusal by defendant to change the cruise dates or itinerary. That the parties might not have foreseen the exact nature of the problem, however, does not make the risk unforeseeable under the law. Plaintiff knew of the risk of war and terrorism and knew that the agreement as written provided no recourse except in certain specified circumstances.

Plaintiff argues that the doctrine of impossibility of performance applies to defendant because defendant could no longer guarantee the safe and relaxing cruise it had agreed to provide to plaintiff. However, plaintiff fails to recognize that under the agreement a "safe cruise" was defined as one that no government barred defendant from taking. Impossibility of performance applies when it has become physically impossible for one party to perform its obligations under the contract. Home Design Center, 563 So. 2d at 770. There was no

such impossibility under the agreement at issue. Both parties were able to perform their obligations under the contract.

Plaintiff cites CNA International Reinsurance Co. v. Phoenix, 678 So. 2d 378 (Fla. Dist. Ct. App. 1996), for the proposition that where the contract does not expressly negate an implied condition excusing performance under the common law, the common law doctrine governs. A close reading of the case indicates that the court was merely following the unambiguous rule that death renders a personal services contract impossible to perform. Id. at 380.

Plaintiff argues that it would be premature to grant defendant's motion to dismiss because plaintiff has not had an opportunity to flesh out its complaint. It maintains that at this stage of the proceedings, the court can only test the sufficiency of the complaint and may not judge the merits of the case. Plaintiff is correct in saying that a complaint need not include every allegation of fact necessary to the claim. Bennett v. Schmitt, 153 F.3d 516, 518 (7th Cir. 1998). However, a plaintiff may plead itself out of court, as plaintiff has done in this instance. It has alleged full payment of the cruise price, its own unwillingness to proceed with the cruise, and defendant's insistence on going ahead. These allegations negate any possibility of a finding of impossibility. Defendant's motion to dismiss count III of plaintiff's complaint (excused performance) will be granted.

The final question is whether clause 9 is an unenforceable penalty clause because it

requires plaintiff to forfeit the entire prepayment. Defendant argues that it is not because the agreement was entered by two parties of equal bargaining power and therefore, the damages clause is valid as a cancellation charge.

Under Florida law, if damages are readily ascertainable on the date the contract is signed then a cancellation provision such as the one in the parties agreement is a penalty and unenforceable. Crosby Forrest Prods. v. Byers, 623 So. 2d 565, 567 (Fla. Dist. Ct. App. 1993)(citing Hutchison v. Tompkins, 259 So. 2d 129 (Fla. 1972)). If damages are not ascertainable, then the clause is for liquidated damages and enforceable if the amount is not grossly disproportionate to the damages that might reasonably be expected to flow from the breach. Id. (citing Lefemine v. Baron, 573 So. 2d 326 (Fla. 1991)).

Although defendant argues that the agreement was executed by two parties of equal bargaining power, it does not follow necessarily that the damages provision of Clause 9 is enforceable. Florida courts will not enforce a penalty that is "disproportionate to the damages." Coleman v. B.R. Chamberlain & Sons, Inc., 766 So. 2d 427, 429 (Fla. Dist. Ct. App. 2000). On the present record I cannot say that Clause 9 of the contract is a reasonable substitute for defendant's actual damages. See id. at 430. The parties have presented no evidence about the costs incurred by defendant as a result of the plaintiff's unilateral breach of the agreement. Accordingly, defendant's motion to dismiss plaintiff's claim that the damages clause is an unenforceable penalty will be denied.

ORDER

IT IS ORDERED that the motion of defendant Cunard Line Limited to dismiss the claims of Sub Zero Freezer, Co., Inc. to rescind its agreement with defendant on the grounds of promissory estoppel, breach of contract, excused performance or fraudulent inducement is GRANTED. FURTHER, IT IS ORDERED that defendant's motion to dismiss plaintiff's

claim that the damages provision is an unenforceable penalty is DENIED.

Entered this 12th day of March, 2002.

BY THE COURT

BARBARA B. CRABB
District Judge