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Order on Motion for Judgment on the Pleadings (DELTA AIRLINES, INC.)

Alice D. Bonner
Superior Court of Fulton County

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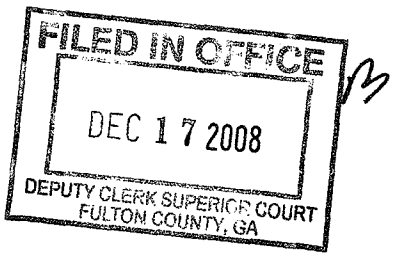
IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA



DELTA AIR LINES, INC., a Delaware Corporation,	
Plaintiffs	
v.	**Civil Action File No. 2008-CV-157739**
ATLANTIC SOUTHEAST AIRLINES, INC., a Georgia Corporation, and SKYWEST AIRLINES, INC., A Utah Corporation,	
Defendants.	

Order on Motion for Judgment on the Pleadings

On December 12, 2008, the parties appeared before the Court to present oral argument on Plaintiffs' Motion for Judgment on the Pleadings. After reviewing the briefs submitted on the motion, the record of the case, and the arguments presented by counsel, the Court finds as follows:

The central issue is whether or not Delta, and its selected contractor Seabury Group ("Seabury"), has a right to access third party contracts with General Electric, Bombardier, and Standard Aero pursuant to certain connection agreements between Delta and Defendants (collectively, the "Connection Agreements"). The Connection Agreements at issue, were already the subject of this Court's prior declaratory judgment in Atlantic Southeast Airlines et al. v. Delta Air Lines, Inc., 2008CV145995 (determining the scope of pass through costs).

In May 2008, Delta requested access to the third party contracts for itself and Pricewaterhouse Coopers, Delta's then independent consultant. In August, 2008, Delta provided Defendants with updated audit information notifying them that the Seabury Group ("Seabury") would assist in the audits. Defendants have refused Seabury access to these contracts because Seabury is a financial transportation advisor, and Defendants fear that they and General Electric, Bombardier, and Standard Aero will be competitively disadvantaged by revealing sensitive financial information to this group.[1] On September 22, 2008, Delta sent SkyWest a letter placing ASA and SkyWest on notice that Delta considered them to be in "material breach" of the Connection Agreements for failing to comply with the access and audit rights provided in the Connection Agreements.

I. Motion for Judgment on the Pleadings

A party is entitled to judgment on the pleadings when the facts of the pleadings entitle the movant to judgment as a matter of law taking "[a]ll well-pleaded material allegations by the nonmovant [to be] true, and all denials by the movant [to be] false." Hewell v. Walton County, 292 Ga. App. 510, 511 (2008) citing Harper v. Patterson, 270 Ga. App. 437, 439 (2004). Plaintiff's Motion for Judgment on the Pleadings essentially puts before the Court a question of contract interpretation. Defendants first contend that their interpretation of the Connection Agreement, which is opposite to Plaintiff's interpretation, must be taken as true under the appropriate standard of review. A motion for judgment on the pleadings, however, only requires that the Court views questions of fact in favor of the non-moving party. Contract construction, on the other hand, is a question of law for the Court. O.C.G.A. § 13-2-1; Castellana v. Conyers Toyota, Inc., 200

[1] "Seabury Group is the leading independent transportation-focused investment banking and advisory firm serving aviation, aerospace, cargo and maritime on a global basis, in three different areas: investment banking, corporate recovery/restructuring and a broad range of management consulting services." http://www.seaburygroup.com/Web/SAA/Site.nsf/ID/home

Ga. App. 161 (1991). Therefore, Defendants' interpretation of the contractual provision at issue deserves no more weight than Plaintiff's interpretation.

The parties are in dispute over the rights and obligations conferred in Article 3 of the Connection Agreements,[2] which provides that:

> Operator shall maintain complete and accurate books and records to support and document all revenues, costs and expenses related to the Aircraft and its Delta Connection Program operations hereunder in accordance with GAAP. 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 response to services provided hereunder, the service level achieved, and the determination of charges due pursuant to this Agreement for the purpose of (1) prospectively adjusting the Base Rate Costs in connection with any annual review pursuant to Section 3(j) hereof or (ii) auditing Base Compensation or Incentive Compensation due or paid hereunder, the Margin Cap Margin, and the Actual Margin.

The phrases "books and records" and "independent consultants" are not further defined in the Connection Agreements.

Defendants oppose Delta's request for it and Seabury to inspect the third party contracts on the grounds that (a) the contracts at issue are not "books and records" and (b) Seabury is not "independent."

A. Books and Records

Delta argues that the phrase "books and records" is unambiguous and has a common and well-understood meaning which should be enforced absent language defining it otherwise. See, Arbor Place, L.P., v. Encore Opportunity Fund, No. 18928, 2002 Del. Ch. Lexis 102, at 8-9 (Del. Ch. January 29, 2002). Additionally, Delta argues

[2] There are three connection agreements at issue: The Delta Connection Agreement, entered into December 18, 2006; The Amended and Restated Delta Connection Agreement, entered into September 8, 2005; and The Second Amended and Restate Delta Connection Agreement, entered into September 8, 2005. (collectively the "Connection Agreements") All three Connection Agreement contain nearly identical language at different paragraphs within Article 3 of their respective agreements and are hereinafter referred to as Article 3 of the Connection Agreement.

that the phrase "books and records" has been commonly interpreted by courts to include contracts. See, e.g., Riser v. Genuine Parts Co., 150 Ga. App. 503, 504 (1979). Delta argues that such contracts are "records" within the intended scope of the Connection Agreement because the contracts at issue directly relate to costs for which Delta must reimburse Defendants and further argues that such a distinction would render Delta's bargained-for audit rights meaningless.[3] Delta contends that the third party contracts at issue relate directly to pass-through costs for which Delta is responsible (e.g., engine maintenance and aircraft financing). To support their interpretation of the Connection Agreements, Delta relies upon cases interpreting a shareholder's right to access all books and records, including contracts, in order to protect its financial interest. See e.g., Riser v. Genuine Parts Co., 150 Ga. App. 502, 504 (1979).

Defendants argue that the phrase "books and records" is ambiguous and involves questions of law and fact not ripe for resolution at this stage of the case. See e.g., Master Mortg. Corp. v. Craven, 127 Ga. App. 367 (1972) (reversing a trial court's order granting a shareholder access to inspect corporate records and books without first determining the relevance of certain requests). Defendants additionally cite to Riser, for the proposition that a court must first review evidence to determine whether an inspection request is proper or not. 150 Ga. App. 502. In Riser, however, the Georgia Court of Appeals held that it is "recognized that requests for certain documents are to be granted as a matter of course, while more peripheral documents" are granted in the discretion of the trial judge. Id. at 505. Riser, interpreted Georgia Code Ann. § 22-613, the predecessor to O.C.G.A. § 14-2-1602, and is inapplicable to this case because it deals with certain requests for

[3] Delta's Memorandum of Law in support of its Motion states that "Defendants do not dispute that costs they incur under those contracts are passed through to Delta, but Defendants have nevertheless refused to provide those contracts to Delta."

statutorily enumerated documents by shareholders which require a showing of purpose, etc. which may be reviewed by a Judge before access is granted to the shareholder.

Defendants also rely upon Discovision Associates v. Toshiba Corp., No. 08CV3693, 2008 U.S. Dist. LEXIS 78581 *13-14 (S.D.N.Y. Oct. 7, 2008), a recent case regarding the scope of a audit provision. In Discovision, pursuant to a license agreement plaintiffs held a right to audit "records in sufficient detail to permit determination of royalties payable hereunder....such records and other documents as may be necessary to verify or determine royalties paid or payable under this agreement." Pursuant to this contractual right, Discovision requested to audit records relating to licensed products as well as access to all accounting records, manufacturing facilities and personnel. The parties did not dispute that Discovision had an audit right, but disputed the scope of that right. Id. at *3. Toshiba claimed that some of the requested information bore no relationship with the royalties due under the agreement and were not authorized audit requests. Id. at *6. The Southern District Court of New York found that questions of fact remained as to the breach of contract claim, denied the motion for summary judgment, and referred the case to a special master to determine the permissible scope of the royalty inspection. Id. at *10.

The parties in this action, like those in Discovision, do not dispute that Delta has an audit right; they dispute the scope of that right. In the instant case, however, the audit and inspection right granted under the Connection Agreements is broader than in Discovision. It includes "books and records" as opposed to records necessary to establish the royalty payments. See, Id. at *3. Additionally, Delta requests certain third party contracts that Defendants concede are relevant to pass-through costs paid by Delta under the Connection Agreement, whereas there was a dispute in Discovision regarding the relevance of the requested information to the royalty payments. See id. at *6. Defendants

instead argue that Delta can confirm applicable debits and credits (including alleged rebates) under these agreements by reviewing their general ledgers and supporting invoices.

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 (1991). First, a court must determine whether the contract is clear or ambiguous, which is a question of law. If no ambiguity exists, the court should enforce the contract according to its terms, looking only to the contract for its meaning. O.C.G.A. § 13-2-2; Glisson v. IHRA of Loganville, Inc., 289 Ga. App. 311 (2008). Accordingly, this Court finds the phrase "books and records" to be unambiguous to include not only the financial books, but all records establishing the compensation articulated in Article 3 of the Connection Agreements. This Court finds that such inspection right, without limiting language in the agreement, confers upon Delta the right to inspect the underlying third party agreements in question since there is no dispute between the parties that these agreement contribute to Delta's pass through costs paid pursuant to the Connection Agreements.

B. Independent Consultant

The parties also dispute the meaning of the word "independent" consultant. Defendants oppose Delta's selection of Seabury as its consultant because Seabury has been, is currently, and is likely to advise adverse parties of Defendants or its third party contractors in contract negotiations. Defendants fear that Seabury's review of these agreements will provide Seabury with an unfair competitive advantage in future negotiations. Delta, on the other hand, argues that Defendants have no grounds to challenge Seabury's "independence" under the terms of the contract which grant Delta the right to select "any independent consultants."

The Court finds that the language regarding an "independent consultant" refers to a non-Delta, or Delta-affiliated entity. The right to utilize "independent" consultants is not limited to those third parties approved by Defendants nor is it further defined by the contract. For these reasons, Defendants' arguments fail and the Court declines to read additional limitations into the plain language of the Connection Agreements.

C. Remaining Counts

Plaintiff sought in its Complaint, in addition to the declaratory judgment, specific performance, injunctive relief, and litigation expenses. Because Plaintiff did not move for judgment on the pleadings on nor argue these other counts, they are not addressed in this Order.

II. Confidentiality Agreement

The parties are before the Court seeking declaratory judgments as well as other equitable relief. The Court is sensitive to the confidential and proprietary information contained in the contracts in question. Pursuant to this Court's equity powers, the Court hereby **ORDERS** the parties, and their consultants, to enter into a Confidentiality Agreement within thirty (30) days of the date of this Order regarding the third party contracts at issue. O.C.G.A. § 23-1-7; Kirk v. Hasty, 239 Ga. 362 (1977); see also, Tommy McBride Realty, Inc. v. Nicholson 286 Ga. App. 135, 136-137, (2007) (holding that both parties to a contract are under an implied duty of good faith in carrying out the mutual promises of their contract.").

The Court hereby **GRANTS** Plaintiff's Motion for Judgment on the Pleadings finding for Plaintiff as addressed herein.

SO ORDERED, this 17 day of December, 2008.

Alice D. Bonner

Senior Judge Alice D. Bonner
Fulton Superior Court
Atlanta Judicial Circuit

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