IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX: CHRISTIANSTED JURISDICTION

BARBARA GIBBS, Plaintiff, vs. PRINAIR OF PUERTO RICO, Defendant.	CIVIL NO. 482/1979 ACTION FOR PERSONAL AND PROPERTY DAMAGES

G. LUZ A. JAMES, ESQUIRE
P.O. Box 3279
Christiansted, St. Croix
U.S. Virgin Islands 00820
(809) 773-0801
(Attorney for Plaintiff)

MICHAEL STEWART McLAURIN, ESQUIRE
P.O. Box 1410
Kingshill St. Croix
U.S. Virgin Islands 00850
(809) 773-2091
(Attorney for Defendant)

PETERSEN, Judge

MEMORANDUM OPINION
July 12, 1982

The Court here decides what damages are properly awarded to an airline passenger whose luggage is never delivered to the destination indicated on her ticket and whose property is wholly lost. Ms. Barbara Gibbs, the Plaintiff, seeks compensation for the purchase of replacement goods necessitated by such loss as well as for the consequential damages based on loss of business opportunity directly resultant therefrom. The Court finds that Ms. Gibbs is entitled to adequate compensation for the replacement of her property, and conversely, that she is not entitled to consequential damages for any loss of business opportunity due to Defendant's negligence in the transportation of her baggage and its contents.

I. FACTUAL BACKGROUND

On September 19, 1978, Plaintiff was a passenger on Defendant's regularly scheduled flight, Prinair #404 (PQ404) from San Juan, Puerto Rico to St. Croix, Virgin Islands, and accordingly delivered to Defendant one large parcel, containing beauty supplies and a facial machine for transportation, as baggage. Defendant accepted said baggage for such purpose and issued claim check #08-19-69 as evidence of ownership. Plaintiff paid Fifty ($50.00) Dollars for the excess weight of the baggage, but did not pay any additional amount to insure the extra value of the contents. Plaintiff's parcel failed to arrive in St. Croix and was never located by Prinair. Efforts to settle Ms. Gibbs subsequent claim were unsuccessful, and on the 21st day of June, 1979, Ms. Gibbs filed the instant action in the Territorial Court seeking Ten Thousand ($10,000.00) Dollars in compensatory and consequential damages.

Prinair defended on the grounds that the applicable tariff limitation was set at One Hundred ($100.00) Dollars per passenger and that Ms. Gibbs failed to declare and pay for the value of that portion of her baggage which was in excess of One Hundred ($100.00) Dollars.

A bench trial on the merits was held on March 10, 1981, during which Plaintiff asserted that Prinair failed to continuously display a statement of limitation of liability in a conspicuous public place at the Prinair station in the San Juan Airport, as required by C.A.B. Tariff, 14 CFR Section 221-17b (a).1/

1/ 14 CFR Section 221 176(a), NOTICE OF LIMITED LIABILITY for BAGGAGE, provides in pertinent part:

Each air carrier and foreign air carrier which, to any extent, avails itself of limitations on liability for loss of, damage to, or delay in deliver of baggage shall cause to be displayed continuously in a conspicuous public place at each desk, station and position in the United States which is

Plaintiff's assertion went unchallenged by Defendant at trial. In addition, Plaintiff asserted that the baggage claim stub, which has a limitation of liability statement printed on the reverse of the baggage claim number, was attached to the airline ticket by a staple and in such a manner as to display the claim number and to obscure the limitation of liability statement. This assertion also went unchallenged by Defendant.

According to the applicable regulations 14 CFR Section 221 175(a)(b), there is a requirement that in order to effectively limit liability for negligent losses by the carrier, the limitation of liability statement must be clearly indicated at both the airline station and upon each ticket and/or stub issued in the United States or in a foreign country by any foreign or domestic air carrier <u>which, to any extent, avails itself of limitations of liability for loss of, damage to, or delay in delivery of baggage to its destination</u> 14 CFR Section 221 176(b)(d). (Emphasis Supplied).

In light of Defendant's failure to offer in evidence testimony to establish that a sign limiting liability for loss of baggage was posted at the Prinair airport station, as well

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1/ cont'd. in the charge of a person employed exclusively by it or by it jointly with another person, or by any agent employed by such air carrier or foreign air carrier to sell tickets to passengers or accept baggage for checking, a sign which shall have printed thereon the following statement:

> NOTICE OF LIMITED LIABILITY FOR BAGGAGE
> Liability for loss, delay, or damage to baggage is limited as follows unless a higher value is declared and an extra charge is paid: (1) For most international travel (including domestic portions of international journeys) to approximately $9.07 per pound for checked baggage and $400.00 per passenger for unchecked baggage; (2) for travel wholly between U.S. points, to $750.00 per passenger on most carriers.

(modified, effective August 7, 1978 by Correction No. 1086 issued by the C.A.B. on June 23, 1978, Rule 370(A)(1) which reduces the limited liability from $750.00 to $100.00 for each fare paying passenger on Prinair (unless passenger elects to pay for higher liability as above mentioned).

as Ms. Gibbs uncontested assertions that she neither saw such a sign nor was her attention called to any such sign and/or regulation, it cannot be said that Prinair complied with the requirements delineated in 14 CRF Section 221 176 and thus has voided its option to invoke the limitation of liability pursuant thereto.

In attempting to establish the binding nature of the limitation of liability as per the tariffs submitted by Prinair pursuant to the Federal Aviation Act of 1958, 49 USCS Section 1301 et.seq., Defendant relies upon Tishman and Lipp, Inc. v. Delta Airlines, nc., (1969 CA 2 NY) 413 F2d 1401 and Vogelsang v. Delta Airlines, Inc. (1962 CA 2 NY) 302 F2d 709 cert. den. 371 U.S. 829, 83 S.Ct. 46 and asserts that these cases are controlling on the issue that the limitation of liability statement is binding regardless of passengers and shippers knowledge thereof. These cases can be distinguished from cases where adequate notice was not posted in violation of the applicable Federal Regulations.

A provision of limited liability is enforceable only if adequate notice thereof has been given to the passenger so that he may protect himself by declaring full value and paying a higher rate for his baggage. Lisi v. Alitalia Linee Aeree Italiane Sp.A. 370 F.2d 508 (1966) @204. Nonwithstanding the tariff, a carrier may not exclude or exonerate itself from liability in this fashion without bringing home knowledge by, or serving proper notice to, the passengers of the provision to that effect when the contract for transportation was made. Robert v. Pan Am World Airways 337 N.Y.S. 2d 891; The Majestic 166 U.S. 375, 384-386, 17 S.Ct. 597, 41 L.Ed. 1039, Maibrunn v. Hamburg S.S. Co., DCNY, 117 F.Supp 344.

The applicable Federal Regulations and the relevant case law indicate that notice must be made conspicuously, unambiguously and concisely, and must state that carrier would not be responsible for loss, delay or damage, employing language that directs a passengers' attention to the importance of making a declaration of value. Plaintiffs uncontested assertions that there was no adequate notice clearly indicates that the regulations approving a limitation of liability were not complied with by the Defendant when Plaintiff checked her baggage at the airport station. As was stated in Flying Tiger Line, Inc. v. U.S. 170 F.Supp. 422 @424 "...(W)e think that the shipper is entitled...to have his attention called, in understandable language, to this important waiver of what would, at least in this country, be his rights in the absence of a waiver..." Based on the foregoing analysis, it is the determination of this Court that the limitation of liability claimed in the instant action by Defendant/Airline is without force or effect.

II. COMPENSATORY AND CONSEQUENTIAL DAMAGES

In order to establish a measure of damages in this case, the Court is guided by the Restatement of the Law of Contracts 2d Section 347 Comment (a) which states in relevant part:

> a. Expectation Damages Contract Damages are ordinarily based on the injured party's expectation interest and are intended to give (her) the benefit of the bargain by awarding (her) a sum of money that will, to the extent possible, put (her) in as good a position as (she) would have been in had the contract been performed.

Based on this prescription, the Court finds that the correct measure of damages in this case is the replacement value of the chattels in question as established by Plaintiff's Exhibit #4, which estimates the cost to repurchase the goods which has been misplaced due to Defendant's breach. Accordingly, the sum of Fifty Five Hundred Seventy Nine Dollars ($5,579.95) Dollars and Ninety Five Cents constitutes the correct measure of damages to be applied given the circumstances as heretofore established.

Conversely, Plaintiff's claim for damages that arose as a result of lost profits based on the duration of the unavailability of her business-related equipment must be denied due to the uncertainty of the measure of damages arising as a direct result therefrom. Restatement of Contracts 2d. Section 348 Comment (B) indicates that:

> b. Breach that delays the use of property. If the breach is one that prevents for a period of time the use of property from which profits would have been made, the loss in value to the injured party is based on the profits that he would have made during that period. If those profits cannot be proved with reasonable certainty (Section 352), two other bases for recovery are possible. One is the fair rental value of the property during the period of delay. Damages based on fair rental value include an element of profit since the fair rental value of property depends on what it would command on the market and this turns on the profit that would be derived from its use. For this reason, uncertainty as to profits may result in uncertainty in fair rental value. Another possible basis for recovery, as a last resort, is the interest on the value of the property that has been made unproductive by the breach, if that value can be shown with reasonable certainty. Although these two other bases will ordinarily give a smaller recovery than loss in value, it is always open to the party in breach to show that this is not so and to hold the injured party to a smaller recovery based on loss in value to him.

It has not been established either at the trial or in the related documents and court papers that there is an accurate measure of lost profits, rental value or interest in the value of the property subject to the breach, thus damages based on these alternative remedies must be denied.

Eileen R. Petersen

EILEEN R. PETERSEN
Judge