

with Defendant. Plaintiffs were then informed that the luggage would arrive the following day; the luggage did not arrive.

Plaintiffs contend they advised an agent of Defendant that Plaintiff Bannister needed clothing to participate in a convention. According to Plaintiffs, the agent “told Plaintiff Bannister to purchase items to replace the lost items,” and “that Plaintiff Bannister would not be limited to the disclaimer on the baggage ticket as to the amount of coverage.”

Plaintiffs allege that as a result of his communications with Defendant and its agents, he purchased replacement items of clothing in the amount of \$8,377.02.

On July 3, 2017, Plaintiffs initiated a civil action against Defendant in the Lexington County Court of Common Pleas, asserting claims for breach of contract and negligence, both arising from the July 7, 2014, flight. Specifically, Plaintiffs contend Defendant breached the terms of the contract in failing to transport Plaintiff Bannister’s luggage from the departure city to the destination city. Plaintiffs further contend that Defendant was negligent in failing to transport Plaintiff Bannister’s luggage to Las Vegas, Nevada.

On April 6, 2018, Defendant moved for summary judgment, arguing Plaintiffs’ claims sound in contract and Defendant owed Plaintiffs no duty of care outside of the contract. The contract is formed at the purchasing of a ticket, when the passenger agrees to the terms of the contract of carriage. Within this contract, a cap on damages is provided in the amount of \$3,400.00 for lost, stolen, or damaged luggage. Defendant therefore asserted Plaintiffs’ claim for negligence failed as a matter of law. Additionally, Defendant argued that the conspicuous terms of the contract provided for a cap on damages of \$3,400.00. By order filed June 20, 2018, the Court granted Defendant’s motion with regard to the negligence cause of action. The Court

further found that Plaintiffs' recoverable damages were limited by the language of the contract to \$3,400.00.

Defendant subsequently filed a motion to compel or enforce settlement in the amount of \$3,400.00 pursuant to the ruling on Defendant's motion for summary judgment. Subsequent to the filing of Defendant's motion, Plaintiffs filed a motion to amend the complaint, purporting to amend the complaint to add a cause of action for conversion.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendant's supporting memorandum of law represents that, in accordance with the Order on Defendant's summary judgment limiting damages to \$3,400.00, counsel for Defendant has extended verbal settlement offers to Plaintiffs in that amount. It appears that Plaintiffs have rejected the verbal offers of \$3,400.00.

During the September 10, 2018, hearing, counsel for Defendant argued that damages were limited to \$3,400.00 pursuant to the prior Order. While counsel acknowledged the unusual nature of the motion to compel settlement, defense counsel requested the enforcement of a \$3,400.00 settlement in light of the Court's order on summary judgment as well as the purposed settlement offers made to Plaintiffs.

In response, counsel for Plaintiffs argued that there were two ticketed passengers and that the \$3,400.00 cap was per ticketed passenger. In response, counsel for Defendant asserted that Plaintiffs' counsel previously relayed that Plaintiff Virginia Ricker did not incur any lost items. The Court finds Plaintiffs have adduced no evidence establishing that ticketed passenger Virginia Ricker incurred any damages in this case.

Further opposing Defendant's motion, Plaintiffs argued that in light of the Court's ruling on summary judgment, the Court should permit Plaintiffs to amend the complaint to assert a

cause of action for conversion. Plaintiffs contend that leave should be freely given to amend the complaint and that the new cause of action was based on the same allegations previously asserted in the original complaint.

In opposition to Plaintiffs' motion to amend the complaint, Defendant's counsel argued that justice does not so require the amendment of the complaint. The motion to amend was filed over two months after the order on summary judgment; the cause of action was known to Plaintiffs at the time this action was commenced; and Plaintiffs are merely seeking to avoid the consequences of the Court's ruling regarding capped damages. Counsel for Defendant further maintained that Plaintiffs' motion to amend the complaint was filed three days prior to the hearing and was, therefore, untimely.

The Court held the record open for ten (10) days following the hearing for the parties to submit any additional supporting documentation. During this ten (10) day period, defense counsel requested the Court construe the Motion to Compel Settlement as a request for entry of judgment in the amount of \$3,400.00 in favor of Plaintiffs, pursuant to Rule 54 of the South Carolina Rules of Civil Procedure.

Counsel for Plaintiffs further submitted a memorandum in support of their motion to amend the complaint, reasserting the arguments made at the hearing. Defendant submitted a memorandum of law in opposition of the motion to amend the complaint. Defendant avers that Plaintiffs' motion should be denied on the following grounds: (1) delay in bringing the new cause of action; and (2) no separate claim for conversion rests against Defendant where the same duties are controlled by contract. *

Motion to Amend Complaint

Rule 15(a) of the South Carolina Rules of Civil Procedure provides:

A party may amend his pleading once as a matter of course at any time before or within 30 days after a responsive pleading is served or, if the pleading is one to which no responsive pleading is required and the action has not been placed upon the trial roster, he may so amend it at any time within 30 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given **when justice so requires and does not prejudice any other party.**

“It is well established that a motion to amend is addressed to the circuit court’s sound discretion[.]” Holland ex rel. Knox v. Morbark, Inc., 407 S.C. 227, 235, 754 S.E.2d 714, 719 (Ct. App. 2014) (citing Foggie v. CSX Transp., Inc., 313 S.C. 98, 102, 431 S.E.2d 587, 590 (1993)). However, an amendment must be denied where the defendant would be prejudiced. Prejudice occurs when the proposed amended complaint states a new claim that would require the defendant to introduce additional or different evidence to prevail in the amended action. Holland ex rel. Knox, 407 S.C. at 235, 754 S.E.2d at 719.; see also Brown v. North Carolina Div. of Motor Vehicles, 155 N.C. App. 436, 573 S.E.2d 246 (Ct. App. 2002) (“Although the trial court is not required to make specific findings to support its denial of a motion to amend, reasons that would justify a denial include: undue delay, bad faith, undue prejudice, futility of amendment and repeated failure to cure defects through previous amendments.”); San Martin v. Dadeland Dodge, Inc., 508 So.2d 497 (Dist. Ct. App. Fl. 1987) (upholding denial of motion to amend complaint where “plaintiff, in the exercise of due diligence, should have been aware of the alleged basis for the proposed fraud count long before he sought to amend his complaint[.]”).

A motion to amend a complaint can also be denied where there was undue delay in bringing the amendment. See Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry, 403 S.C. 623, 632, 743 S.E.2d 808, 813 (2013) (finding circuit court did not err in denying plaintiff's motion to add a cause of action for violation of the South Carolina Unfair Trade Practices Act to its complaint because amendment did not occur until three years after filing of complaint and undertaking of extensive discovery, particularly when there were not significant factual developments that warranted the untimely amendment); see also House Healers Restorations, Inc. v. Ball, 112 N.C.App. 783, 437 S.E.2d 383 (Ct. App. N.C. 1993) ("If a counterclaim is omitted through 'oversight, inadvertence, or excusable neglect,' or if 'justice requires,' leave of Court *may* be granted to add the counterclaim through amendment.").

Plaintiffs' motion to amend was filed nearly fourteen (14) months after the action was commenced and only after summary judgment was granted on other claims. While Defendant served Plaintiffs with discovery requests, Plaintiffs have failed to serve Defendant with any discovery. Plaintiffs' new cause of action for conversion therefore does not arise from any evidence or materials unknown to Plaintiffs at the time the action was commenced or newly discovered facts. Accordingly, due to Plaintiffs' undue delay in bringing the cause of action, the Court finds Plaintiffs' motion to amend must be denied.

Further, a court has the authority to deny a motion for leave to amend the complaint if it would be futile. Where a cause of action cannot proceed, an amendment to the Complaint is "futile" and must be denied. See generally Health promotion Specialists, LLC v. South Carolina Bd. Of Dentistry, 403 S.C. 623, 743 S.E.2d 808 (2013) (Even if the motion had been timely, [the court] found the amendments involving civil conspiracy would be "futile" as the Board would be immune from suit for claims involving the commission of intentional torts under the TCA.").

A conversion claim lies against a contracting party independent of a breach of contract claim so long as the plaintiff alleges a breach of a duty owed separately from the obligations created by contract. See generally Kyle v. Apollomax, LLC, 987 F. Supp. 2d 519 (D. Del 2013); Lesti v. Wells Fargo Bank, N.A., 960 F. Supp. 2d 1311 (M.D. Fla. 2013). In determining whether a conversion claim is barred as duplicative of a breach of contract claim, courts have looked to the facts upon which the claims are based and the alleged injuries for which damages are sought. See Ellington Credit Fund, Ltd. V. Select Portfolio Servicing, Inc., 837 F. Supp. 2d 162 (S.D.N.Y. 2011) (applying New York law). Courts have rejected a claim for conversion where the claim is predicated on a mere breach of contract. See e.g., Cusano v. Klein, 280 F. Supp. 2d 1035 (C.D. Cal. 2003).

The Court finds that Plaintiffs' proposed amendment to add a cause of action for conversion is futile. Plaintiffs' amendment seeks to assert a tort cause of action, ostensibly as another ground for recovery of damages outside the \$3,400.00 cap specified in the contract. However, the prior Order on summary judgment has already provided that the damages are capped pursuant to the clear and unambiguous language of the contract. Additionally, Plaintiffs have failed to establish any additional duty owed separate and independent from the duties owed or provided for in the contract. Because the Court finds that there rests no independent cause of action for conversion separate from the breach of contract cause of action, the Court denies Plaintiffs' motion to amend on this alternative ground.

Motion to Compel Settlement

As an initial matter, the Court notes the entry of the prior Order regarding Defendant's motion for summary judgment and that the Court has already ruled damages are capped at \$3,400.00 pursuant to the clear and unambiguous language of the contract. This ruling is the law

of the case and this Court has no authority to overrule such Order and will not issue any ruling inconsistent therewith.

It is apparent that Defendant has attempted to resolve this matter for the capped damages. Plaintiffs have rejected such offer. The Court further notes, however, that because Plaintiffs have rejected such offer, there has been no agreement to settlement. This Court cannot compel or enforce settlement where there has been no initial agreement to settle.

However, this Court finds that Defendant has been a good faith effort to resolve this matter in light of the prior order capping damages to \$3,400.00 and has in fact, offered to take judgment against it in that amount. It is apparent that the full value of Plaintiffs' claim is \$3,400.00. Pursuant to the clear and unambiguous language of the contract, Plaintiffs cannot recover more than \$3,400.00. Pursuant to Rule 54 of the South Carolina Rules of Civil Procedure, the Court hereby enters judgment in favor of Plaintiffs for \$3,400.00. The Court directs entry of judgment for all claims as to all parties.

IT IS ORDERED that Defendant's motion to compel settlement is denied; Plaintiffs' motion to amend complaint is denied; and the Court enters a final judgment in favor of Plaintiffs for \$3,400.00 as to all of Plaintiffs' claims.

AND IT IS SO ORDERED.

JUDGE CLIFTON NEWMAN
PRESIDING JUDGE, ELEVENTH JUDICIAL CIRCUIT

Columbia, South Carolina
January _____, 2019



Lexington Common Pleas

Case Caption: Melvin Bannister , plaintiff, et al VS Delta Air Lines Inc

Case Number: 2017CP3202349

Type: Order/Judgment and Form 4

So Ordered

s/ Clifton B. Newman, 2127