

NOT FOR PUBLICATION

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

TERRENCIA MADURO,)
)
 Appellant/Plaintiff,)
)
 v.)
)
 AMERICAN AIRLINES, INC., and)
 EXECUTIVE SERVICES, INC., d/b/a)
 AMERICAN EAGLE,)
)
 Appellees/Defendants.)

S. Ct. Civ. No. 2007/029

Re: Super. Ct. Civ. No. 508/1998

2008 FEB 28 AM 11:57

SUPREME COURT

NOTICE OF ENTRY OF JUDGMENT/ORDER

TO: Justices of the Supreme Court

Judges of the Superior Court

Royette V. Russell, Esq.

Ronald E. Russell, Esq.

Daryl C. Barnes, Esq.

**Glenda L. Lake, Esq.
Acting Clerk of Supreme Court**

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Supreme Court Law Clerks

Ms. Janiese Kelly

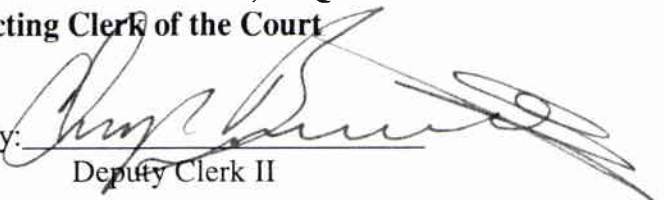
Mrs. Jacqueline Reovan

Ms. Arlene Sutton

Please take notice that on February 28, 2008, a(n) **MEMORANDUM OPINION** and an **ORDER OF THE COURT** dated February 28, 2008, was entered by the Clerk in the above-entitled matter.

Dated: February 28, 2008

GLENDALAKE, ESQ.
Acting Clerk of the Court

By: 
Deputy Clerk II

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S.Ct. Civ. No. 2007/029
Re: Super. Ct. Civ. No. 508/1998

SUPREME COURT
2008 FEB 28 AM 11:57

On Appeal from the Superior Court of the Virgin Islands

Argued: September 24, 2007
Filed: February 28, 2008

BEFORE: Rhys S. Hodge, Chief Justice; Maria M. Cabret, Associate Justice; Ivo Arlington Swan, Associate Justice.

APPEARANCES:

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MEMORANDUM OPINION

Per Curiam.

Terrencia Maduro (“Maduro”) sued American Airlines, Inc. and Executive Services, Inc., doing business as American Eagle (collectively “American”), alleging that

American is liable for damages she incurred when the airline bumped her from a flight. American denied Maduro's allegations, and for several years after American served its answer, the parties conducted virtually no discovery. American eventually moved for summary judgment. The trial court granted American's motion, and Maduro filed this appeal. For the reasons which follow, we will affirm the trial court's grant of summary judgment in favor of American.

I. BACKGROUND AND PROCEDURAL HISTORY

Maduro filed her complaint against American on July 6, 1998. In her complaint, Maduro raised the following factual allegations. On July 2, 1996, Maduro purchased a roundtrip airline ticket for travel on American from St. Croix to Aruba, with a return date of July 7, 1996. During her return trip to St. Croix from Aruba, Maduro had a layover in Puerto Rico. Maduro arrived in Puerto Rico at 9:00 a.m., and her connecting flight to St. Croix was scheduled for 11:30 a.m. Maduro went to the American service counter at the departure gate to inquire about the status of her St. Croix connection and was told that the flight should be on schedule. The American ticket agent offered to take Maduro's ticket to verify arrival of the flight. Maduro gave the agent her ticket and was told she would be called when the flight arrival was verified. Concerned that she had not heard back from the American ticket agent, Maduro went to the counter where the agent told her that she would be called shortly to retrieve her ticket. Thirty minutes later, after inquiring again, Maduro was told that although she had a confirmed ticket, she was placed on standby. Maduro was anxious to return to St. Croix due to an approaching storm and pled with the ticket agent to place her on the flight. According to Maduro's complaint, the "ticket agent became very annoyed and in a fit of anger told [her] to shut up and take

a seat. The ticket agent use [sic] the threat of not scheduling Ms. Maduro to leave on any of American Eagle's flight [sic] for the day to try to subdue Ms. Maduro." (J.A. at 17.)

In count one of her complaint, Maduro claimed the defendants were "negligent in carrying out their contractual duties by failing to ensure that their employees provide courteous, conscientious and nondiscriminatory service to all customers regardless of race, religion, sex, nationality and age." (J.A. at 17.) Maduro alleged that "Defendants' failure amounted to incompetent representation, discrimination due to race, sex and age and intentional infliction of emotional distress and other tortuous [sic] acts to be identified." (J.A. at 18.) In count two of her complaint, Maduro similarly alleged that the defendants were negligent in withholding information, failing to guarantee her equal treatment, and failing to disseminate information in a timely and courteous manner. In both counts, Maduro claimed damages for anxiety, humiliation, mental anguish, emotional distress and attorney's fees.

Maduro served American with the complaint approximately one year after she filed the action. American filed its answer on July 21, 1999, denying the material allegations in the complaint and admitting only that it did business in the Virgin Islands and was subject to Virgin Islands law. Although the parties served some requests for written discovery after American answered, the litigation laid mostly dormant until American filed its motion for summary judgment on July 7, 2006.

In support of its motion, American argued that the Warsaw Convention¹ governing international travel barred Maduro's claims. Specifically, American argued that because Maduro was allegedly injured as she was embarking on a flight in the course of international travel, her tort claims under local law were preempted by the Warsaw Convention. American further argued that, although the Warsaw Convention permits claims against carriers for bodily injury, it bars claims for purely psychological injuries. Thus, American asserted that it was entitled to summary judgment because Maduro had allegedly suffered only psychological injuries. Similarly, American asserted that even if Maduro's claims were not barred by the Warsaw Convention, it was entitled to summary judgment because the local laws governing her claims bar recovery for purely emotional injuries. Finally, American argued that the trial court should grant it summary judgment because there was no evidence in the record establishing any essential element of Maduro's claims.

Maduro responded to the motion arguing that American was not entitled to summary judgment based on the preemptive effect of the Warsaw Convention because there was insufficient evidence showing that she was embarking on her flight at the time of American's negligent conduct. Maduro further responded that even if the Warsaw Convention applied in this case, it did not bar her claims under local law. Maduro pointed to the allegations in her complaint, arguing that the allegations created genuine issues of material fact concerning each of her claims.

¹ Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (reprinted in note following 49 U.S.C. § 40105).

Addressing the motion for summary judgment, the trial court rejected American's contention that the Warsaw Convention preempted Maduro's local law claims, finding no evidence of record that Maduro was embarking on a flight when she was allegedly injured. However, the trial court agreed with American that it was entitled to summary judgment because there was no evidence in the record creating a genuine issue of material fact on Maduro's claims. On appeal, Maduro asserts that the trial court reached this conclusion only after erroneously resolving factual issues created by her complaint and the limited discovery responses in the record.

II. JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction over this appeal pursuant to title 4, section 32(a) of the Virgin Islands Code, which vests the Supreme Court with jurisdiction over "all appeals arising from final judgments, final decrees, [and] final orders of the Superior Court." On appeal, this Court exercises plenary review over the order granting summary judgment, and must apply the same test that the trial court should have utilized. *See Saldana v. Kmart Corp.* 260 F.3d 228, 231 (3d Cir. 2001). That test was succinctly set forth in *Saldana*:

Under Federal Rule of Civil Procedure 56(c), that test is whether there is a genuine issue of material fact and, if not, whether the moving party is entitled to judgment as a matter of law. In so deciding, a court must view the facts in the light most favorable to the nonmoving party and draw all inferences in that party's favor. A court should find for the moving party if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. The party opposing summary judgment may not rest upon the mere allegations or denials of the . . . pleading; its response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. [T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury

to return a verdict for that party. Such affirmative evidence—regardless of whether it is direct or circumstantial—must amount to more than a scintilla, but may amount to less (in the evaluation of the court) than a preponderance.

Id. at 231-232² (citations and internal quotation marks omitted); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986).

III. DISCUSSION

We first address American’s assertion that it is entitled to summary judgment because Maduro’s local law claims are preempted and barred by the Warsaw Convention. The Warsaw Convention, which limits the liability of air carriers on international travel,³ is an affirmative defense.⁴ *Craddock Int’l, Inc. v. W.K.P. Wilson & Son, Inc.*, 116 F.3d 1095, 1105-1106 (5th Cir. 1997) (citing *Ingraham v. United States*, 808 F.2d 1075, 1078 (5th Cir.1987) (holding that a statutory limitation of liability is an affirmative defense); *Manion v. Pan American World Airways, Inc.*, 434 N.E.2d 1060, 1062 (N.Y. 1982)). As such, American “would bear the burden of proof at trial and therefore must show that it has produced enough evidence to support the findings of fact necessary to win” on summary judgment. *El v. SE Penn. Transp. Auth.*, 479 F.3d 232, 237 (3d Cir. 2007); *see*

² The Federal Rules of Civil Procedure are applicable in the Superior Court of the Virgin Island to the extent that the Federal Rules are not inconsistent with either procedural rules promulgated under the Virgin Islands Code or the Rules of the Superior Court. *See Revised Organic Act §21(c)*, 48 U.S.C. §1611(c); Super Ct. R. 7.

³ *See Onyeanusu v. Pan Am*, 952 F.2d 788, 792 (3d Cir. 1992) (recognizing that one of the goals of the Warsaw Convention is to “limit the potential liability of air carriers”).

⁴ Because invocation of the Warsaw Convention is an affirmative defense, American was required to plead the defense in its answer. *See Fed. R. Civ. P. 8 (c)*. Although American failed to raise the defense in its answer, Maduro did not object below when American asserted the defense in its motion for summary judgment, and Maduro has likewise not raised the issue on appeal. Thus, the issue of whether American waived the affirmative defense is itself waived. *See Kleinknecht v. Gettysburg Coll.*, 989 F.2d 1360, 1374 n.10 (3d Cir. 1993).

also *Jakimas v. Hoffmann-La Roche, Inc.* 485 F.3d 770, 782 (3d Cir. 2007) (defendant has burden on summary judgment of showing it is entitled to judgment on affirmative defense).

Article 17 of the Warsaw Convention extends its substantive scope to “all passenger injuries occurring on board the aircraft or in the course of any of the operations of embarking and disembarking.” *King v. American Airlines*, 284 F.3d 352, 359 (2d Cir. 2002) (citation and internal quotation marks omitted). American contends that the Warsaw Convention applies in this case because Maduro was embarking on her flight at the time of American’s alleged misconduct. But American cites to no evidence supporting this assertion, and our review of the scant evidentiary record reveals none. Accordingly, because American failed to meet its burden of showing that there was no genuine issue of material fact that the Warsaw Convention applied in this case, it was not entitled to summary judgment on this ground.

We agree with the trial court’s conclusion that American is nevertheless entitled to summary judgment on Maduro’s complaint. Our affirmance, however, rests on different grounds than those relied on by the trial court. The trial court’s Memorandum Opinion reveals that, in its analysis, the trial court improperly accepted as true allegations in the Maduro’s complaint and assumed additional facts not alleged. Based on these facts, the trial court analyzed certain intricacies of Maduro’s various causes of action and concluded that American was entitled to summary judgment. In reality, the record contains virtually no evidence supporting any of Maduro’s claims, and she did not file any affidavits in response to American’s motion for summary judgment. Thus, the trial court’s analysis was in many respects unnecessary, and we affirm the grant of summary

judgment based solely on her failure to point to evidence supporting her claims. *See Prusky v. Reliaster Life Ins. Co.*, 445 F.3d 695, 700 n.10 (3d Cir. 2006) (“We are considering these issues because the Court of Appeals may affirm the grant of summary judgment on grounds different from those relied upon by the [trial] [c]ourt.” (citing *Maschio v. Prestige Motors*, 37 F.3d 908, 910 n. 1 (3d Cir.1994))).

As stated above, the parties conducted very little discovery during the seven years that followed American’s answer to Maduro’s complaint. The discovery responses in the record reveal an airline ticket receipt showing that Maduro purchased a ticket for the travel alleged in her complaint, but there is no evidence that Maduro actually traveled under the ticket. The only other “evidence” that is even remotely related to Maduro’s claims is her conclusory answer to Interrogatory number fourteen of American’s First Interrogatories. Interrogatory number fourteen asked Maduro to state any facts entitling her to relief. In her response, Maduro stated: “I believe I am entitled to compensation for the repeated cruel treatment I’ve received from American Eagle and for the emotional and mental abuse bestowed on me by American Eagle, which included humiliation, embarrassment and fear of losing my personal items due to [sic] hurricane.” (J.A. at 40.)

Maduro points to her response to Interrogatory number fourteen and the allegations in her complaint and argues that together they create genuine issues of material fact. Such conclusory statements, however, are insufficient to create a genuine issue of material fact.

As set forth above, Rule 56(e) provides that judgment “shall be entered” against the nonmoving party unless affidavits or other evidence “set forth specific facts showing that there is a genuine issue for trial.” The object of this provision is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit. *Cf. Anderson v. Liberty*

Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986) (“[T]he plaintiff could not rest on his allegations of a conspiracy to get to a jury without ‘any significant probative evidence tending to support the complaint’ ”), quoting *First National Bank of Ariz. v. Cities Service Co.*, 391 U.S. 253, 290, 88 S.Ct. 1575, 1593, 20 L.Ed.2d 569 (1968). Rather, the purpose of Rule 56 is to enable a party who believes there is no genuine dispute as to a specific fact essential to the other side’s case to demand at least one sworn averment of that fact before the lengthy process of litigation continues.

Lujan v. Nat’l Wildlife Fed’n, 497 U.S. 871, 888-889, 110 S.Ct. 3177, 3188-3189, 111 L.Ed.2d 695 (1990); see also *Schoch v. First Fid. Bancorporation*, 912 F.2d 654, 657 (3d Cir. 1990).

As the party bearing the burden of proof at trial,⁵ *Maduro* was required by Rule 56(e) of the Federal Rules of Civil Procedure “to go beyond the pleadings and by her own affidavits, or by the ‘depositions, answers to interrogatories, and admissions on file,’ designate ‘specific facts showing that there is a genuine issue for trial.’” *Celotex*, 477 U.S. at 324, 106 S.Ct. at 2553. The dearth of evidence in this record could not sustain even the most rudimentary of claims. By resting exclusively on the allegations in her complaint, *Maduro* plainly failed to meet her burden, and for this reason *American* is entitled to summary judgment. Because the complete lack of evidence is alone dispositive of this appeal, we render no opinion as to the legal analysis conducted by the trial court on *Maduro*’s claims.

⁵ See, generally, *Moore v. Kulicke & Soffa Indus., Inc.*, 318 F.3d 561, 566 (3d Cir. 2003) (“At the outset of a trial, the plaintiff has both the burden of production and the burden of persuasion for each element of the prima facie case.”).

IV. CONCLUSION

For the reasons stated above, we affirm the trial court's grant of summary judgment in favor of American. Although American did not meet its burden of establishing that the Warsaw Convention was applicable in this case, there is nevertheless insufficient evidence in the record to support Maduro's claims. Because Maduro failed to set forth specific facts showing there is a genuine issue for trial, American was entitled to summary judgment.

DATED this 28th day of February, 2008.

ATTEST:

GLANDA L. LAKE, ESQ.
Acting Clerk of the Court

By: 

Deputy Clerk

2/28/2008

CERTIFIED A TRUE COPY

Date: 2/28/2008

Glenda L. Lake, Esq.
Acting Clerk of the Court

BY: 

Deputy Clerk

Not For Publication

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BEFORE: Rhys S. Hodge, Chief Justice; Maria M. Cabret, Associate Justice; Ive
Arlington Swan, Associate Justice.

APPEARANCES:

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Attorneys for Appellees

ORDER OF THE COURT

AND NOW, consistent with the reasons outlined in a Memorandum Opinion of
even date, it is hereby

ORDERED that the trial court's grant of summary judgment in favor of
Appellees is **AFFIRMED**.

SO ORDERED this 28th day of February, 2008.

ATTEST:

GLENDALAKE, ESQ.
Acting Clerk of the Court

By: 

Deputy Clerk

2/28/2008

CERTIFIED A TRUE COPY

Date: 2/28/2008

Glenda L. Lake, Esq.
Acting Clerk of the Court

BY: 

Deputy Clerk

Copies to: (with accompanying Opinion)

Justices of the Panel
Judges of the Superior Court
Supreme Court Law Clerks
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CAS 2/28/08