Not Reported in F.Supp.2d, 2007 WL 2441066 (C.D.Cal.)
(Cite as: 2007 WL 2441066 (C.D.Cal.))

United States District Court,
C.D. California.
Yona **WIPRANIK**
v.
AIR CANADA, et al.

No. CV 06-3763 AHM (AJWx).
May 15, 2007.

Daniel J. Cheren, Cheren & Associates, Encino, CA, for Yona **Wipranik**.

Cory A. Baskin, Mitchell J. Popham, Sheela H. Shah, Lord Bissell & Brook, Los Angeles, CA, for Air Canada, et al.

A. HOWARD MATZ, U.S. District Judge.

***1** Plaintiff, Yona **Wipranik**, has sued Air Canada for a burn injury she sustained during a flight from Toronto to Tel Aviv. At issue is whether this injury was caused by an "accident" under the Warsaw Convention. Defendant has moved for summary judgment on this issue. Plaintiff opposed the motion for summary judgment and filed a cross motion for summary adjudication. For the following reasons, the Court GRANTS partial summary adjudication to Plaintiff.

I. Defendant's Motion for Summary Judgment

A. Background

Defendant moved for summary judgment solely on the basis that the cause of **Wipranik's** injury was not an "accident" under the Warsaw Convention. In support of their motion, Defendants submitted the following statement of undisputed facts:

1. Plaintiff Yona **Wipranik** ("**Wipranik**") filed a suit for damages stemming from injuries allegedly suffered by her on June 23, 2004 while aboard an Air Canada flight from Toronto, Canada to Tel Aviv, Israel (the "Subject Flight").

2. Plaintiff filed a lawsuit in June 2006 against Air Canada.

3. Plaintiff's Complaint alleges that she suffered second and third degree burns from tea that spilled on her lap and legs.

4. In her Complaint, Plaintiff brings claims against Air Canada under Article 17 of the Warsaw Convention and Article 21.1 of the Montreal Convention.

5. Plaintiff flew on Air Canada from Los Angeles to Toronto and took a connecting Air Canada flight from Toronto to Tel Aviv.

6. During the Subject Flight, she was seated in an aisle seat in the economy class section of the plane. Plaintiff's son, Doron, was seated to her right and the aisle was to her left. There were two other passengers seated next to Doron to his right, in that row. Lennie Nourafchan was seated across the aisle to the left of Plaintiff

7. The Subject Flight was crowded.

8. Plaintiff did not request and did not receive the hot tea when the flight attendants made their first pass through the cabin with the beverage cart.

9. Shortly after the flight attendants made their first pass through the cabin with the beverage cart, Plaintiff left her seat and went to the galley behind her seat to ask for hot tea.

10. A flight attendant prepared the tea, poured it directly out of the tea machine into a basic Styrofoam cup and then handed it to Plaintiff.

11. After Plaintiff returned to her seat, she unhooked the tray (attached to the seat in front of her) and placed the cup in the middle of the tray.

12. Plaintiff does not recall whether there was a cupholder on the tray.

13. Plaintiff did not see anything out of the ordinary about the tray prior to placing the tea on the tray.

14. Shortly after Plaintiff placed the cup of tea on the tray, the passenger in front of Plaintiff moved in his or her seat which caused the cup of tea to slide off the tray and on to Plaintiff's lap.

15. Forty minutes passed from the time the aircraft took off until the time of the occurrence.

***2** 16. No tea was spilled on the tray or Plaintiff's seat.

17. Plaintiff inspected the tray after the fact and it did not seem stable but that it would "not do anything unless someone moves it."

18. It was the "movement [that] shook [the tray] and ma[d]e it tilt."

19. Plaintiff was the only one who saw the incident actually happen.

20. Plaintiff was treated for her injuries at the Hadassah Ein Kerem University Hospital in Jerusalem.

21. Since the occurrence, Plaintiff saw a doctor twice in Israel regarding injuries allegedly sustained from the occurrence.

22. Since medical expenses are socialized in Israel, Plaintiff has no medical expenses or damages resulting from the occurrence.

23. Plaintiff never saw another doctor once she returned to the United States for the alleged injuries that she suffered from the occurrence.

24. Plaintiff was not employed at the time of the occurrence and has suffered no loss of income as a result of the occurrence.

B. Legal Standard

Federal Rule of Civil Procedure 56(c) provides for summary judgment when "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 judgment as a matter of law." The moving party bears the initial burden of demonstrating the absence of a "genuine issue of material fact for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A fact is material if it could affect the outcome of the suit under the governing substantive law. *Id.* at 248. The burden then shifts to the nonmoving party to establish, beyond the pleadings, that there is a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

"When the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case." *C.A.R. Transp. Brokerage Co., Inc. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir.2000) (citations omitted). In contrast, when the non-moving party bears the burden of proving the claim or defense, the moving party can meet its burden by pointing out the absence of evidence from the non-moving party. The moving party need not disprove the other party's case. *See Celotex*, 477 U.S. at 325. Thus, "[s]ummary judgment for a defendant is appropriate when the plaintiff 'fails to make a showing sufficient to establish the existence of an element essential to [his] case, and on which [he] will bear the burden of proof at trial.' " *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 805-06, 119 S.Ct. 1597, 143 L.Ed.2d 966 (1999) (*citing Celotex*, 477 U.S. at 322).

When the moving party meets its burden, the "adverse party may not rest upon the mere allega-

tions or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ.P. 56(e). Summary judgment will be entered against the non-moving party if that party does not present such specific facts. *Id.* Only admissible evidence may be considered in deciding a motion for summary judgment. *Id.; Beyene v. Coleman Sec. Serv., Inc.*, 854 F.2d 1179, 1181 (9th Cir.1988).

***3** "[I]n ruling on a motion for summary judgment, the nonmoving party's evidence 'is to be believed, and all justifiable inferences are to be drawn in [that party's] favor.' " *Hunt v. Cromartie*, 526 U.S. 541, 552, 119 S.Ct. 1545, 143 L.Ed.2d 731 (1999) (quoting *Anderson*, 477 U.S. at 255). But the non-moving party must come forward with more than "the mere existence of a scintilla of evidence" *Anderson*, 477 U.S. at 252. Thus, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (citation omitted).

Simply because the facts are undisputed does not make summary judgment appropriate. Instead, where divergent ultimate inferences may reasonably be drawn from the undisputed facts, summary judgment is improper. *Braxton-Secret v. A.H. Robins Co.*, 769 F.2d 528, 531 (9th Cir.1985).

C. Analysis

Wipranik contends that Air Canada is liable to her for injuries caused by the tea that spilled on her thigh during the flight from Toronto to Tel Aviv. She claims that Air Canada is liable under both the Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934) ("Warsaw Convention") and the later-enacted Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, *reprinted in* S. Treaty Doc. No. 106-45 (2000) ("Montreal Convention"). (Compl.¶¶ 6, 9). In their moving papers, the parties only deal with the resolution of Plaintiff's claims under the Warsaw Convention. Accordingly, the Court will not address the potential applicability of the Montreal Convention.

1. The Warsaw Convention

The Warsaw Convention is a multilateral treaty that was adopted in 1929. Most countries with international air transportation routes, including Canada, the United States, and Israel, are signatories. The Warsaw Convention sets forth the circumstances pursuant to which an air carrier can be held liable for injuries to its passengers or their baggage. *See Air France v. Saks*, 470 U.S. 392, 397, 105 S.Ct. 1338, 84 L.Ed.2d 289 (1985). Article 17, which governs the liability of air carriers to their passengers, states:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking,

In this case, there is no question that Plaintiff sustained injury on board the aircraft. The only issue is whether her injury was caused by an "accident" within the meaning of Article 17 of the Warsaw Convention.

2. Meaning of "Accident"

As noted above, the sole issue in Defendant's motion is whether **Wipranik's** injury was caused by an "accident" under the Warsaw Convention. The Supreme Court has defined "accident" under the Warsaw Convention as "an unexpected or unusual event or happening that is external to the passenger." *Saks*, 470 U.S. at 405. In determining whether an "accident" has occurred within the meaning of the Warsaw Convention, courts must decide whether the *cause* of the injury was unexpected or unusual. *Id.* at 399-400. "But when the in-

jury indisputably results from the passenger's own internal reaction to the usual, normal and expected operation of the aircraft, it has not been caused by an accident ...” *Id.* at 406. The Court has further counseled that “[t]his definition [of “accident”] should be flexibly applied after assessment of all the circumstances surrounding the passenger's injuries.” *Saks,* 470 U.S. at 405.

***4** In *Saks,* the Supreme Court determined that no accident occurred when the passenger lost her hearing in one ear after feeling pain during the aircraft's descent. 470 U.S. at 406. The Court found that the passenger's injury occurred without any showing that the pressurization system had not operated in a normal manner. *Id.* Rather, the Court determined that the passenger's injury was caused by her internal reaction to the normal operations of the aircraft and therefore did not constitute an accident. *Id. See also, Padilla v. Olympic Airways,* 765 F.Supp. 835 (E.D.N.Y.1991) (no accident occurred when the passenger consumed eight to ten beers and then fell and injured himself on the way to the lavatory); *Gotz v. Delta Airlines,* 12 F.Supp.2d 199, 201 (D.Mass.1998) (finding that no accident occurred where passenger tore rotator cuffs after he hyperextended his arms to avoid hitting another passenger who suddenly stood up to retrieve something from the overhead bin while Gotz was attempting to stow a heavy bag).[FN1]

> FN1. Although *Gotz* is a case from the District of Massachusetts, Defendant urges this Court to follow it as “controlling” precedent. (Def. Mot. at 11; Def. Reply at 4). *Gotz* is not binding on this Court. Moreover, *Gotz* expanded the definition of “accident” to require the cause of an injury to be not only an unusual or unexpected event but also the result of a malfunction or abnormality in the aircraft's operation. 12 F.Supp.2d at 210-02. Such an expanded definition has already been rejected by the Ninth Circuit. *See Gezzi v. British Airways PLC,* 991 F.2d 603, 605 n. 4 (9th Cir.1993). In light of the differences between *Gotz* and the law in this Circuit, *Gotz* has little, if any, persuasive value. It is certainly far from “controlling.”

In the Ninth Circuit, courts have interpreted “accident” to encompass the following events:

1. Passenger died from asthmatic attack after flight crew refused to move him away from smoking section of the plane even though the crew was told the passenger was asthmatic and was having difficulty breathing. *See Husain v. Olympic Airways,* 316 F.3d 829 (9th Cir.2002), *aff'd* 540 U.S. 644, 124 S.Ct. 1221, 157 L.Ed.2d 1146 (2003).

2. A passenger died several days after airline personnel took her carry-on bag and lost it, despite the fact that the airline had been told the bag contained a breathing device and medication and needed to remain with the passenger at all times. *See Prescod v. AMR, Inc.,* 383 F.3d 861867-69 (9th Cir.2004).

3. Passenger's injuries after he slipped on landing stairs were caused by two “accidents”: water on the stairs, and the flight attendant's refusal to assist plaintiff down the staircase. *See Gezzi v. British Airways, PLC,* 991 F.2d 603, 604 (9th Cir.1993) (per curiam).

4. Passenger's toe injured after another passenger, struggling with putting her luggage in overhead bin, tripped and stepped on his foot. *See Kwon v. Singapore Airlines,* 356 F.Supp.2d 1041, 1044-45 (N.D.Cal.2003) (Zimmerman, J.) (“The stowing of luggage by people who are too short to comfortably reach the overhead compartment, which is provided by the airline as an amenity for passengers, and the inability of passengers to move during boarding when the aisle is being blocked in front by a passenger stowing luggage and in back by other passengers trying to get to their seats are hallmarks of air travel”).

See also Maxwell v. Aer Lingus, Ltd., 122 f. Supp.2d 210, 212-13 (D.Mass.2000) (court held that an accident occurred when the passenger was injured by a fellow passenger's bag of liquor bottles that fell from the overhead bin); *Waxman v. C.I.S. Mexicana de Aviacion S.A.*, 13 F.Supp.2d. 508, 512 (S.D.N.Y.1998) (court held that an accident occurred when the passenger was stuck in the leg by a hypodermic needle protruding from the seat in front of him); *Diaz Lugo v. Am. Airlines, Inc.* 686 F.Supp. 373, 375 (D.P.R.1988) (Court held that an accident occurred when the passenger suffered burns from hot coffee that spilled in her lap after flight attendant place the coffee on her tray table and did not alert her that it was there. "The coffee spill was an unusual or unexpected event external to Figueroa and, thus, an Article 17 'accident.' When a person boards a plane, he does not expect that a cup of coffee will spill over his lap. The usual operation of an airplane does not require passengers to be spilled with hot coffee.").

3. Application of Article 17 to this Case

***5** Under *Saks*, Plaintiff must show that her injury was caused by (1) an external event; (2) that was unusual or unexpected; and (3) took place during the operation of the aircraft. There is no dispute that plaintiff was injured during the operation of the aircraft (that is, during flight). The slide of the tea off of the tray table and its fall onto Plaintiff's lap were events "external" to Plaintiff. Moreover, those events were unusual and unexpected. Although it may be common for an airline seat to shake when its occupant moves around, it is not common for beverages placed on the tray table behind that seat to be so jolted by the movement that they fall onto another passenger. It is the failure of the tray table to hold beverages securely despite passenger movement in the seat in front that is *unexpected.*

For the foregoing reasons, I DENY Defendant's motion for summary judgment.

II. Wipranik's Cross-Motion for Summary Adjudication

Wipranik moved for summary adjudication not only as to the meaning of accident but also as to Defendant's liability for her injuries. The relevant facts are stated in Part LA, *supra.* In its opposition to Plaintiff's cross-motion, Defendant does not raise any genuine dispute of material fact.

A. The Meaning of "Accident"

For the reasons stated in Part I.C, *supra*, the Court GRANTS Plaintiff's motion for summary adjudication at to whether her injury was caused by an "accident" under the Warsaw Convention.

B. Contributory Negligence

The only issue remaining is whether Plaintiff's own negligence contributed, in whole or in part, to cause her injury. Article 21 of the Warsaw Convention limits liability for an "accident" based on Plaintiff's contributory negligence. Article 21 states:

> If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability.

Negligence under Article 21 is in the nature of comparative negligence, rather than a traditional contributory negligence standard. *See Husain v. Olympic Airways*, 116 F.Supp.2d 1121, 1141 (N.D.Cal.2000), aff'd, 316 F.3d 829 (9th Cir.2002), aff'd 540 U.S. 644, 124 S.Ct. 1221, 157 L.Ed.2d 1146 (2003).

At the hearing on this motion, Defendant argued that, it will show at trial that Plaintiff's own negligence was the only cause of her burn injury. The only "fact" Defendant has proffered in support of this notion is the putative testimony of James Kent, a certified medical investigator. Defendant did not submit or file a declaration of Kent or any deposition testimony he may have given. Indeed, it was Plaintiff who submitted Kent's expert report. Moreover, Defendant's contention at the hearing is in stark contrast to the statement of undisputed facts

that it submitted and that this Court adopted. (*See* Part I.A, *supra*). Defendant's own statement of undisputed facts does not mention Plaintiff spilling any tea on herself before placing the cup on the tray and the only cause of the accident the statement contains is that the movement of the passenger in front of Plaintiff caused the tea to slide off the tray table and onto Plaintiff's lap. (*See* SUF ¶ 14).

***6** In addition, even Kent's report does not support Defendant's theory that Plaintiff was the sole cause of her injury. Rather, in his report, Kent merely opined that it was "more probable than not that Plaintiff spilled tea onto herself" while she was "attempting to sit down ...." Kent may have meant to suggest that no tea spilled onto Plaintiff from the tray, but he certainly did not say so.

Defendant has not presented sufficient evidence to create a genuine issue of material fact as to whether Plaintiff was wholly responsible for her injury. Accordingly, the Court GRANTS summary adjudication to Plaintiff that Defendant is liable for her injury, at least in part.

As Plaintiff conceded at the hearing, however, Kent's report creates a genuine issue as to whether Plaintiff herself contributed to her injury by her own negligence. How much (if any) of Plaintiff's injury and any corresponding reduction in the amount of damages she is awarded are questions that must be resolved by the jury. Accordingly, complete summary judgment for Plaintiff is not appropriate.

IT IS SO ORDERED.[FN2]

FN2. This Order is not intended for publication. No hearing is necessary. Fed.R.Civ.P.78;L.R.7-15.

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