

Date of judgment: 15/07/10
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Legal area: Civil, other
Type of proceedings: First instance - single
Content indication: Cancellation of a flight to Beijing. Claim for compensation payment as referred to in Article 7(1) of Regulation (EC) no. 261/2004 of 11 February 2004. Delay or cancellation? Extraordinary circumstances? The airline (principally) argues that not a cancellation, but rather a delay was concerned and (alternatively) invokes extraordinary circumstances as referred to in Article 5(3) of the Regulation. No distinction between cancellation and delay, in the sense that in addition to passengers of cancelled flights, passengers of delayed flights can also claim compensation under Art. 7 of the Regulation if they reach their final destination three or more hours after the originally scheduled arrival. (Sturgeon ruling). No extraordinary circumstances as referred to in Article 5(3) of the Regulation. No conflict with the IATA ruling (HVJ EG 10 January 2006, case number C-344/04). Not contrary to the Montreal Convention. No reason to submit new and/or additional requests for a preliminary ruling to the European Court.

Judgment

COURT IN HAARLEM
Subdistrict section

Location Haarlem

Case/case list no.: 395168 / CV EXPL 08-10281

Date of judgment: 15 July 2010

JUDGMENT GIVEN BY THE SUBDISTRICT COURT

in the case of:

the private company with limited liability EUclaim BV
with offices in Brummen

Plaintiff

hereinafter referred to as: EUclaim

representative *ad litem*: Wiggers van Meggelen Gerechtsdeurwaarders en Incasso

and

the company under foreign law (Limited) China Southern Airlines Company Limited with offices in Guangzhou City, China and at Schiphol Airport, municipality of Haarlemmermeer

Defendant

hereinafter referred to as: China Southern Airlines

conducting legal proceedings through: *mr.* R.L.S.M. Pessers and *mr.* A.K. Sjouw

Further proceedings

The subdistrict court adopts the considerations and decisions of the case list judge of 7 March 2010, which are herewith referred to. EUclaim subsequently responded by deed to the exhibits China Southern Airlines submitted with its additional statement. In a letter dated 21 May 2010, China Southern Airlines requested to be permitted to respond to the most recent deed of EUclaim.

Facts

[XXX], [YYY] and their underage son W. [XXX] (hereinafter: the passengers) booked a tour with tour operator Kuoni including a flight from Schiphol to Beijing.

2. Based on the agreement, China Southern Airlines was to transport the passengers on 13 July 2007 at 20.55 local time from Schiphol by airplane, flight number CZ 346.

3. The passengers checked in on time, holding appropriate travel documents at the check-in desk at the airport. There, they were told that their flight would not proceed that day.

4. China Southern Airlines offered the passengers an overnight stay, telephone cards, food and beverages. The next day at 23.30 the passengers flew to Beijing with China Southern Airlines flight number CZ 346d.

Claim

EUclaim requests (in summary) that China Southern Airlines be ordered to pay € 2,157.00 (consisting of a principal sum of € 1,800.00 and € 357.00 in extrajudicial collection costs). To this end, EUclaim alleges as follows, among other things.

The passengers have assigned their claims on China Southern Airlines to EUclaim by private instrument dated 11 August 2008. The notification of assignment was sent to China Southern Airlines on 14 August 2008.

The agreement concluded between the passengers and China Southern Airlines is governed by the Regulation (EC) no. 261/2004 of the European Parliament and the Council of 11 February 2004 to establish common rules on compensation and assistance to passengers in the event of denied boarding, cancellation and long delay of flights and to repeal Regulation (EC) no. 295/91 (PbEG 2004, L 46/1) (hereinafter: the Regulation). Pursuant to Article 5 of the Regulation, China Southern Airlines must pay compensation to the passengers in compliance with Article 7 of the Regulation. This, because the flight should be regarded as cancelled, since it was conducted after the next scheduled flight and the new arrival time was 26 hours and 35 minutes later than the original arrival. Since the distance covered by the flight is 7,836 km, the compensation should be

€ 1,800.00. Because it continued its default to pay in spite of a warning, China Southern Airlines owes extrajudicial costs and statutory interest.

Defence

China Southern Airlines contests the claim. To this end, it puts forward the following, among others.

The claim of EUclaim should be declared inadmissible, since it has not been assigned in a legally valid manner. Not an assignment is concerned, but rather a collection arrangement. Therefore, the prohibition of ownership of collateral under Article 3:84(3) of the Dutch Civil Code applies to the assignment. Furthermore, in these proceedings EUclaim is protecting the rights of a minor. It has not obtained authorisation from the subdistrict judge for this as referred to in Article 1:253k in combination with 1:349 of the Dutch Civil Code, which means that this part of the claim of EUclaim should be declared inadmissible.

In the alternative, China Southern Airlines puts forward that the passengers' flight was not cancelled, but delayed. For, the passengers eventually travelled on the same flight number using their original boarding passes. The delay was caused by unexpected, unforeseeable and serious technical problems, which means that even if the flight was cancelled no right to compensation would have existed.

Assessment of the dispute

1. China Southern Airlines may not respond to the most recent instrument of EUclaim, since the instrument only contains a response to the exhibits submitted to the court earlier by China Southern Airlines.
2. The defence that the claim of EUclaim is inadmissible, because the assignment is allegedly not legally valid, does not succeed. No decision needs to be made on whether the present case concerns the assignment of a claim or an assignment for collection purposes, since at any rate a mandate is concerned, because the passengers have instructed EUclaim to collect their claim in its own name.
3. Contrary to what China Southern Airlines believes, the part of the claim of EUclaim relating to the minor is also admissible. It should be assessed whether the parents needed authorisation regarding their child for the mandate to EUclaim described above. The subdistrict judge is of the opinion that this is not the case, since it is beyond dispute that the parents booked the flight for their child and the mandate granted falls within the scope of the care and upbringing of their minor child. Therefore, the claim of EUclaim is admissible.
4. The applicability of the Regulation to the present case is not contested by the parties. EUclaim takes the view that a cancellation is concerned and therefore claims compensation on the basis of the Regulation. The principal defence conducted by China Southern Airlines is that a cancellation was not concerned here, but only a delay and alternatively, that extraordinary circumstances were concerned as referred to in Article 5 (3) of the Regulation.
5. In the joined claims Sturgeon-Condor and Bock-Air France (HVJ EG 19 November 2009 case

numbers C-402/07 and C-432/07, hereinafter referred to as: the Sturgeon ruling) it was decided that cancelled and delayed flights constitute two clearly distinguished categories of flights. Cancellation as referred to in the Regulation applies when a flight is replaced by another flight, or when a flight schedule is abandoned and the passengers of the flight join the passengers of another scheduled flight. In the rulings referred to above, it was also established that, although this does not directly follow from the text the interpretation of the Regulation means that passengers of delayed flights, in addition to passengers of cancelled flights, can be eligible for the compensation arrangement of Article 7 of the Regulation if they reach their final destination three or more hours after the originally scheduled arrival time.

6. In its further statement after the rejoinder, China Southern Airlines alleges that the Sturgeon ruling leads to lack of clarity and is in conflict with the law. China Southern Airlines therefore asks the subdistrict court to request a preliminary ruling from the European Court. The following is considered in this regard.

7. Contrary to that which is put forward by China Southern Airlines, the subdistrict court is of the opinion that the conflict with the so-called IATA ruling (HVJ EC 10 January 2006, case number C-344/04) does not exist. It is stated first and foremost that the question answered in the Sturgeon ruling, namely - in summary - whether passengers of delayed flights can, besides passengers of cancelled flights be eligible for the compensation arrangement of Article 7 of the Regulation, was not addressed in the IATA ruling and that therefore, already for this reason, there cannot be any conflict in this respect. The fact that the IATA ruling considers that Article 6 of the Regulation is clear, does not mean that the consideration of the Sturgeon ruling that - in summary - there is no objective justification for the identified difference in treatment of passengers of “delayed” and those of “cancelled” flights and that the related conclusions in the Sturgeon ruling are in conflict with the IATA ruling or are otherwise unlawful. There are no indications of conflict with the Montreal Convention either. In the IATA ruling, it was decided that the standard compensation of the Regulation should be distinguished from the individual compensation referred to in the Montreal Convention and that both types of compensation can co-exist. The Sturgeon ruling does not alter this.

8. In short, the European Court is competent to interpret the Regulation and it has done so in the Sturgeon ruling and it has, with due observance of applicable law - including in particular the principle of equality - followed earlier rulings which, like the Regulation, are based on the protection of the passenger. There are no indications of conflict with fundamental legal principles or international conventions. Therefore, the subdistrict court does not see any reason to submit any new and/or additional requests for a preliminary ruling.

9. The defence conducted by China Southern Airlines, that no cancellation, but rather a delay was concerned therefore does not succeed. No decision needs to be made on whether a cancellation or a delay was concerned, because it has been established that the passengers arrived at their final destination more than 26 hours later than the originally scheduled arrival time, which means that they can, in principle claim the compensation referred to in Article 7 of the Regulation.

10. The next question is whether the cause of the cancellation of the flight alleged by China Southern Airlines to be a technical defect, constitutes an extraordinary circumstance as referred

to in Article 5(3) of the Regulation. This article reads as follows: "An air carrier conducting a flight is not obliged to pay compensation under Article 7 if it can prove that the cancellation is caused by extraordinary circumstances which, despite taking all reasonable measures could not be prevented."

11. In the ruling of Wallentin v. Alitalia (HVJ EC of 22 December 2008 case number C-549/07), the European Court gave a preliminary ruling in this regard. In this ruling, it was decided - in summary - that a technical defect of an airplane resulting in the cancellation of the flight does not fall within the scope of the notion „extraordinary circumstances” as referred to in Article 5(3), unless this problem is caused by events which, by their nature or origin are not inherent to the normal course of business of the carrier and which are beyond its actual control.

12. In view of this ruling, the subdistrict judge is of the opinion that the appeal by China Southern Airlines to extraordinary circumstances as referred to in Article 5 (3) of the Regulation does not succeed. The technical defects put forward by China Southern Airlines are inherent to the normal course of business of China Southern Airlines and there are no indications that these are beyond its actual control.

13. All this leads to the conclusion that the principal sum claimed should be awarded. No defence has been conducted against the statutory interest and extrajudicial collection costs claimed and therefore these are also awarded.

14. The costs of these proceedings are for the account of China Southern Airlines, being the party found at fault.

Decision

Decision

The subdistrict court:

- orders China Southern Airlines to pay to EUclaim an amount of € 2,157,00 increased by statutory interest on this amount from 30 August 2007 until the day of full payment;

- orders China Southern Airlines to pay the costs of the proceedings, which for EUclaim up to and including today are estimated at the amounts specified below:

summons € 74.30

court fee € 201.00

salary of representative *ad litem* € 375.00;

- declares this judgment to have immediate effect;

- dismisses all other applications.

This judgment was pronounced in open court by *mr.* C.A. Boom on the date stated above.