

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 1:18-cv-23756-KMM

DIANN HAYES,

Plaintiffs,

v.

ROYAL CARIBBEAN CRUISES LTD.,
a Liberian corporation,

Defendant.

DEFENDANT ROYAL CARIBBEAN CRUISE LINE, LTD'S
MOTION TO DISMISS PLAINTIFF'S COMPLAINT
AND/OR FOR FINAL SUMMARY JUDGMENT¹

Defendant, ROYAL CARIBBEAN CRUISES LTD. ("RCCL" or "Defendant"), by and through its undersigned counsel, and pursuant to Rule 12 of the Federal Rules of Civil Procedure and the Local Rules for the U.S. District Court for the Southern District of Florida, hereby files its Motion to Dismiss and/or for Final Summary Judgment, with incorporated Memorandum of Law, stating as follows:

¹ "A document attached to a motion to dismiss may be considered without converting the motion into a motion for summary judgment if that document is central to the claim and its authenticity is undisputed." *Racca v. Celebrity Cruises, Inc.*, 606 F. Supp. 2d 1373, 1375 (S.D. Fla. 2009), citing *Horsley v. Feldt*, 304 F.3d 1125, 1134 (11th Cir. 2002). The cruise passenger ticket contract is central to a claim related to an injury sustained onboard a cruise and its provisions may be considered in deciding the motion to dismiss. *Racca*, 606 F. Supp. 2d at 1375. Should this Court determine that the Plaintiff's ticket contract cannot be considered on a motion to dismiss, Defendant respectfully requests that this Court convert the motion to dismiss into a motion for summary judgment and consider the Affidavit of Jillian Studders and state court docket printout attached as exhibits hereto.

STATEMENT OF MATERIAL FACTS

1. Plaintiff alleges that on or about May 23, 2017 she suffered physical injuries as the result of a fall incident while cruising onboard the *Majesty of the Seas*. (Complaint, [D.E. 1] at ¶¶ 15-16).

2. Plaintiff was a fare paying passenger on the *Majesty of the Seas* on or about May 23, 2017. (*Id.* at ¶¶ 10-12).

3. RCCL was the operator of the *Majesty of the Seas* on or about May 23, 2017. (*Id.* at ¶ 9).

4. This Court properly has personal jurisdiction over RCCL. (*Id.* at ¶¶ 5, 7).

5. This Court enjoys federal subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 1333. (*Id.* at ¶ 2).

6. Venue is proper in the U.S. District Court for the Southern District of Florida pursuant to the applicable passenger ticket contract. (*Id.* at ¶¶ 3, 6).

7. Plaintiff failed to attach a copy of her passenger ticket contract for the subject cruise voyage to the Complaint; however, the Complaint contains multiple references to the passenger ticket contract. (*Id.* at ¶¶ 3, 6, 12). RCCL attaches hereto the Guest Ticket Booklet containing the Cruise/CruiseTour Ticket Contract that was provided to Plaintiff in connection with her May 2017 cruise vacation as **Exhibit “A.”**

8. Prior to embarkation, all passengers are provided with a Guest Ticket Booklet, which contains the Cruise/Cruisetour Ticket Contract (“passenger ticket contract”). (*See* Affidavit of Jillian Studders, attached as **Exhibit “B”** at ¶ 4).

9. The passenger ticket contract was further available for viewing by Plaintiff on RCCL’s websites www.rccl.com and www.royalcaribbean.com. (**Exhibit “B”** at ¶ 8).

10. Plaintiff's claims are governed by the terms and conditions of the passenger ticket contract. The passenger ticket contract contains a forum selection clause requiring personal injury lawsuits to be filed in the United States District Court for the Southern District of Florida. (Exhibit "A" at p. 15, ¶ 9).

11. Paragraph 9a. of the passenger ticket contract states:

9. FORUM SELECTION CLAUSE FOR ALL LAWSUITS; CLASS ACTION WAIVER:

a) EXCEPT AS PROVIDED IN SECTION 10 (b) WITH REGARD TO CLAIMS OTHER THAN FOR PERSONAL INJURY, ILLNESS OR DEATH OF A PASSENGER, IT IS AGREED BY AND BETWEEN PASSENGER AND CARRIER THAT ALL DISPUTES AND MATTERS WHATSOEVER ARISING UNDER, IN CONNECTION WITH OR INCIDENT TO THIS AGREEMENT, PASSENGER'S CRUISE, CRUISE TOUR, LAND TOUR OR TRANSPORT, SHALL BE LITIGATED, IF AT ALL, IN AND BEFORE THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA LOCATED IN MIAMI-DADE COUNTY, FLORIDA, U.S.A. ...

(*Id.* at p. 15, ¶ 9).

12. The passenger ticket contract also contains a contractual limitation requiring any personal injury action to be commenced within one (1) year of the date of injury. (*Id.* at p. 15, ¶ 10(a)).

13. Paragraph 10 of the passenger ticket contract states:

10. NOTICE OF CLAIMS AND COMMENCEMENT OF SUIT OR ARBITRATION; SECURITY:

a. TIME LIMITS FOR PERSONAL INJURY/ILLNESS/DEATH CLAIMS: NO SUIT SHALL BE MAINTAINABLE AGAINST CARRIER, THE VESSEL OR THE TRANSPORT FOR PERSONAL INJURY, ILLNESS OR DEATH OF ANY PASSENGER UNLESS WRITTEN NOTICE OF THE CLAIM, WITH FULL PARTICULARS, SHALL BE DELIVERED TO CARRIER AT ITS PRINCIPAL OFFICE WITHIN SIX (6) MONTHS FROM THE DATE OF THE INJURY, ILLNESS OR DEATH AND SUIT IS COMMENCED (FILED) WITHIN ONE (1) YEAR FROM THE DATE OF SUCH INJURY, ILLNESS OR DEATH AND PROCESS SERVED WITHIN 120 DAYS AFTER FILING, NOTWITHSTANDING ANY PROVISION OF LAW OF ANY STATE OR COUNTRY TO THE CONTRARY.

(*Id.* at p. 15, ¶ 10).

14. Furthermore, the first paragraph of the passenger ticket contract contains language in bold print which specifically directs passengers' attention to important limitations and rights contained within the contract, as follows:

**IMPORTANT NOTICE TO GUESTS
YOUR CRUISE/CRUISE TOUR TICKET CONTRACT CONTAINS
IMPORTANT LIMITATIONS ON THE RIGHTS OF PASSENGERS. IT IS
IMPORTANT THAT YOU CAREFULLY READ ALL TERMS OF THIS
CONTRACT, PAYING PARTICULAR ATTENTION TO SECTION 3 AND
SECTIONS 9 THROUGH 11, WHICH LIMIT OUR LIABILITY AND
YOUR RIGHT TO SUE, AND RETAIN IT FOR FUTURE REFERENCE.**

(Id. at p. 13).

15. The same notice stated in the first paragraph of the passenger ticket contract is also printed on the front page of the Guest Ticket Booklet, along with language advising passengers that the passenger ticket contract is contained within the Guest Ticket Booklet.

(Id. at p. 1).

16. Under the clearly-stated and communicated terms of the passenger ticket contract, Plaintiff was required to file suit in this Court by no later than May 23, 2018. Plaintiff filed her Complaint [DE 1] on September 13, 2018.

17. Despite the forum selection clause in the passenger ticket contract, Plaintiff filed a complaint against RCCL in Florida state court on May 9, 2018. RCCL timely moved to dismiss Plaintiff's state court Complaint on June 11, 2018 based on Plaintiff's failure to file in the correct forum as specified in the passenger ticket contract's forum selection clause. The Docket Sheet for the state court matter initiated by Plaintiff is attached hereto for reference as **Exhibit "C."**

18. Rather than immediately filing suit in this Court after RCCL filed its motion to dismiss in state court, Plaintiff waited until September 13, 2018 to file the Complaint [DE 1]—

nearly four (4) months after the limitations period expired and more than three (3) months after RCCL filed its motion to dismiss in state court.

MEMORANDUM OF LAW

I. Legal Standard

When deciding a motion to dismiss, the Court is “limited to the four corners of the operative complaint and any documents referred to therein[.]” *In re Fontainebleau Las Vegas Contract Litigation*, 716 F. Supp. 2d 1237, 1246 (S.D. Fla. 2010) (citing *Griffin Industries, Inc. v. Irvin*, 496 F.3d 1189, 1199 (11th Cir. 2007)). Here, the passenger ticket contract is referenced in Plaintiff’s Complaint and is central to a claim related to an injury sustained onboard a cruise ship; therefore, its provisions may be considered in deciding a motion to dismiss. *Racca*, 606 F. Supp. 2d at 1375. On a motion to dismiss, the court must accept all factual allegations within the complaint as true and construe the complaint in the light most favorable to the plaintiff. *Miccosukee Tribe of Indians of Florida v. U.S.*, 656 F. Supp. 2d 1375, 1378 (S.D. Fla. 2009) (citing *SEC v. ESM Group, Inc.*, 835 F.2d 270, 272 (11th Cir. 1988)).

Summary judgment shall be entered if the record, including pleadings, documents, and declarations or affidavits, 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. Fed. R. Civ. P. 56; *see also Herzog v. Castle Rock Entertainment*, 193 F.3d 1241, 1246-47 (11th Cir. 1999). A “genuine issue” exists where the evidence before the court is of such a nature that a reasonable jury could return a verdict in favor of the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-52 (1986).

II. Applicable Law

The law governing suits involving passengers against cruise lines is the general maritime law of the United States. See generally, THOMAS J. SCHOENBAUM, 1 ADMIRALTY AND MARITIME LAW §3-5 (2d ed. 1994); *Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318 (11th Cir. 1989); *Beard v. Norwegian Caribbean Lines*, 900 F.2d 71 (6th Cir. 1990); see also, *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959); *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953). A cause of action involving a maritime contract is governed exclusively by general maritime law. *The Moses Taylor*, 71 U.S. 411 (1867); *Milanovich v. Costa Crociere, S.P.A.*, 954 F.2d 763, 766 (D.C.Cir. 1992); *Vavoules v. Kloster Cruise Limited*, 822 F.Supp. 979, 982 (E.D.N.Y. 1993); *Lubick v. Travel Services*, 573 F.Supp. 904, 906 (D.V.I. 1983). Further, the validity of a provision contained in a passenger ticket contract is to be interpreted by the general maritime law of the United States, not the law of the state in which an action is brought. *McQuillan v. "Italia" Societa Per Axione di Navigacione*, 386 F. Supp. 462, 468 (S.D.N.Y. 1974), *aff'd without opinion*, 516 F.2d 896 (2d Cir. 1975).

III. The Terms and Conditions of the Passenger Ticket Contract Issued to Plaintiffs are Enforceable and Bar This Action.

The provisions of Plaintiff's passenger ticket contract dictate that any lawsuit for personal injuries **must** be filed in the United States District Court for the Southern District of Florida within one year of the injury. Plaintiff's Complaint advances one negligence claim against RCCL seeking recovery for personal injuries relating to an alleged fall incident occurring on or about May 23, 2017. Plaintiff failed to file her Complaint in the correct venue within one year of the date of the alleged incident. Plaintiff's failure to abide by the contractual terms of the passenger ticket contract mandate that this matter be dismissed.

A . Passengers Need Not Read the Cruise Line Ticket to be Subject to Its Conditions.

The provisions of the passenger ticket contract issued to Plaintiff by RCCL are binding and enforceable whether or not Plaintiff read or even retained her cruise line ticket contract. *See Carpenter v. Klosters Rederi A/S*, 604 F.2d 11, 13 (5th Cir. 1979); *Strauss v. Norwegian Lines, Inc.*, 613 F.Supp. 5, 8 (E.D. Pa. 1984); *see also, Miller v. Lykes Bros. Steamship Co.*, 467 F.2d 464, 465 (5th Cir. 1972). It is immaterial whether the passengers in question have actual knowledge of the provisions in the cruise line ticket contract prior to sailing. *DeNicola v. Cunard Line, Ltd.*, 642 F.2d 5, 11 (1st Cir. 1981). In fact, passengers are bound by the terms of a cruise line ticket contract even when they have *never* opened the ticket envelope. *Geller v. Holland America Line*, 298 F.2d 618, 619 (2d Cir. 1962), *cert. denied*, 370 U.S. 909 (1962). Furthermore, passengers are bound by a cruise line ticket contract even where the particular ticket page with the limitation language in question is missing from the ticket booklet. *Kendall v. American Hawaii Cruises*, 704 F. Supp. 1010, 1017 (D. Haw. 1989). Finally, it is noteworthy that provisions in a cruise line ticket contract written in English have been held binding on a passenger who could not read English. *Horvath v. Cunard Steamship Co., Ltd.*, 103 F. Supp. 356 (D.N.Y. 1952).

The relevant inquiry is not whether a passenger read his or her ticket, but rather, whether the passenger *had the opportunity* to read the ticket. *Barkin v. Norwegian Caribbean Lines*, 1988 A.M.C. 645, 650 (D.Mass. 1987); *Kendall*, 704 F. Supp. at 1016. In following this doctrine, courts have even gone so far as to enforce the terms of a ticket contract where the passenger's ticket contract was destroyed in the same ship fire that caused the passenger plaintiff's loss. *Morak v. Costa Armatori*, 1982 A.M.C. 1859, 1863 (E.D.N.Y. 1981). In this regard, the First Circuit has held:

Although a passenger may almost never read all of the fine print on a ticket upon purchase, or as pleasure reading in the berth the first night at sea, the same passenger might very well be expected to consult the multifarious terms and conditions of the ticket contract in the event of an accident resulting in a loss or injury.

Shankles v. Costa Armatori, S.P.A., 722 F.2d 861, 865 (1st Cir. 1983). There is a “powerful incentive” to study the cruise line ticket contract after an alleged wrong has occurred. *Sullivan v. Home Lines*, 1986 A.M.C. 1617, 1619 (D. Conn. 1985). Thus, even if Plaintiff should attempt to argue that she was unaware of the forum selection and time limitation provisions contained in the passenger ticket contract, the argument would fail as a matter of law, and the Court should still dismiss the Complaint with prejudice.

B. The Terms of Plaintiffs’ Ticket Contract Were Reasonably Communicated.

In order for a time limitation clause to be binding, the cruise line ticket contract need only “reasonably communicate” its provisions to passengers. *Milanovich*, 954 F.2d at 768l; *Nash v. Kloster Cruise A/S*, 901 F.2d 1565, 1567 (11th Cir. 1990); *see also, Dempsey v. Norwegian Cruise Line*, 972 F.2d 998 (9th Cir. 1992). Whether provisions of a passenger ticket contract are “reasonably communicated” is a question of law to be determined by the court. *Id.* at 999 (citing *Deiro v. American Airlines, Inc.*, 816 F.2d 1360, 1364 (9th Cir. 1987)). Some physical characteristics which the courts have examined to determine “reasonableness” include: the size of type used, conspicuousness and clarity of notice on the face of the ticket, and the ease with which a passenger can read the provisions in question. *Deiro*, 816 F.2d at 1364.

In *Tone v. Carnival Cruise Lines, Inc.*, 1993 WL 437650 at *2 (E.D. Pa. Oct. 28, 1993) (citing *Hodes v. S.N.C. Achille Lines*, 858 F.2d 905 (3d Cir. 1988)), the court specifically reiterated the established principals of long-standing federal maritime cases upholding passage contracts if same meet a practical standard of “reasonable communicativeness.” *Tone*, 1993 WL

437650 at *2. The two prong test for reasonable communicativeness, as enunciated by *Tone* is: (1) examination of the warning language on the ticket directing the passenger to read the contract terms in the ticket, and (2) examination of the contract terms themselves looking at such physical characteristics as the location of the terms within the ticket, the size of the terms, the size of the typeface, and the simplicity of the language employed. *Id.* (citing *Hodes*, 858 F.2d at 905).

The language contained on the first page of the Plaintiff's passenger ticket contract, separately set out in bold type provided notice to Plaintiff that the passenger ticket contract contained limitations on her rights. Furthermore, the subject language specifically directed Plaintiff to the time limitation provisions contained in Paragraph 10 and other paragraphs within the passenger ticket contract which "limit [RCCL's] liability and your right to sue." (Exhibit "A" at p. 15). The front page of the Guest Ticket Booklet also directs passengers to the fact that the booklet contains the passenger ticket contract and that passengers should read it because its terms affect their rights as against RCCL. (*Id.* at p. 1). The relevant terms of the passenger ticket contract were reasonably communicated to Plaintiff and are enforceable.

C. Contractual Time Limitation Provisions in Cruise Line Tickets Are Enforceable and Binding.

It is well-settled that contractual time limitation clauses in cruise line ticket contracts are enforceable. The validity of a provision contained within a passenger ticket contract is decided under general maritime law. *McQuillan*, 386 F. Supp. at 468.

The evaluation of time limitations to file passenger lawsuit is a legal determination suitable for disposition by the Court. *Nash*, 901 F.2d at 1567; *DeNicola v. Cunard Line, Ltd.*, 642 F.2d at 11. One-year limitation clauses in passage contracts have been repeatedly enforced by courts. *Petrey v. Cunard Line*, 1993 U.S. App. LEXIS 29733, *5 (4th Cir. Nov. 16, 1993); *Smith v. Carnival Corp.*, 2008 U.S. Dist. LEXIS 85573 (S.D. Fla. Oct. 22, 2008). *See also*

Sorgenfrei v. Carnival Corp., 727 F. Supp. 2d 1354 (S.D. Fla. 2010), quoting *Nash*, 901 F.2d at 1566 (“Courts will enforce such a [time] limitation if the cruise ticket provided the passenger with reasonably adequate notice that the limit existed and formed part of the passenger contract.”) In fact, Congress has specifically authorized cruise lines to shorten the limitation period for providing notice of suits and for filing suits through provisions in passage contracts. *See*, 46 U.S.C. § 30508(b).

46 U.S.C. § 30508(b) states, in pertinent part:

(b) Minimum time limits. The owner, master, manager, or agent of a vessel transporting passengers or property between ports in the United States, or between a port in the United States and a port in a foreign country, may not limit by regulation, contract, or otherwise the period for—

(1) giving notice of, or filing a claim for, personal injury or death to less than 6 months after the date of the injury or death; or

(2) bringing a civil action for personal injury or death to less than one year after the date of the injury or death.

RCCL’s passenger ticket contract specifically complies with this statutory authority and stipulates that any suit for personal injury must be filed in the United States District Court for the Southern District of Florida in Miami within one (1) year. Such limitations provisions in cruise ship ticket contracts are enforceable and federal courts have routinely upheld similar contractual provisions, including those in the passenger ticket contract at issue here. *See Bailey v. Carnival Cruise Lines, Inc.*, 774 F.2d 1577 (11th Cir. Fla. 1985); *Jimenez v. Peninsular & Oriental Steam Navigation Co.*, 974 F.2d 221 (1st Cir. P.R. 1992); *Veverka v. Royal Caribbean Cruises, Ltd.*, 2015 U.S. Dist. LEXIS 33163 (D. N.J. March 18, 2015), *aff’d by*, 2016 U.S. App. LEXIS 8806 (3d Cir. May 13, 2016); *Borton v. Carnival Corp.*, 2009 U.S. Dist. LEXIS 129585 (S.D. Fla. June 23, 2009); *Kendall*, 704 F. Supp. 1010; *Holland v. Norwegian Cruise Line*, 1991 AMC 877 (N.D. Cal. 1990); *Marek v. Marpan Two, Inc.*, 817 F.2d 242 (3d Cir. Pa. 1987).

Plaintiff clearly failed to comply with the contractual time limitation in the passenger ticket contract. Plaintiff's Complaint alleges that the incident resulting in her injuries occurred on May 23, 2017. Pursuant to the time limitation provision in the passenger ticket contract, Plaintiff was required to file suit in this Court by May 23, 2018. Plaintiff filed her Complaint in this Court on September 13, 2018—nearly one (1) year and four (4) months after the incident. Therefore, Plaintiff's Complaint should be dismissed with prejudice.

D. Equitable Tolling is an Extraordinary Remedy which should be Granted Sparingly and Has No Application Here.

RCCL anticipates Plaintiff may argue that equitable tolling should be applied to circumvent the terms of the passenger ticket contract. Equitable tolling is an extraordinary remedy that is available only when “a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence.” *Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir. 1999). The plaintiff bears the heavy burden of proving that equitable tolling is warranted. *Booth v. Carnival Corp.*, 522 F.3d 1148, 1150 (11th Cir. 2008); *Ross v. Buckeye Cellulose Corp.*, 980 F.2d 648 (11th Cir. 1993). A court will toll a statute of limitations if it finds that an inequitable event prevented a plaintiff from filing a timely action. *See, e.g., Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 151 (U.S. 1984); *Booth*, 522 F.3d at 1150. A plaintiff is not entitled to equitable tolling where he or she does not bring suit in a timely fashion despite knowing or being in a position reasonably to know that the limitations period is running. *Psurny v. Royal Caribbean Cruises, Ltd.*, 926 F. Supp. 2d 1325, 1329 (S.D. Fla. 2013) (citing *Justice v. United States*, 6 F.3d 1474, 1479 (11th Cir. 1993)).

Plaintiff may argue that equitable tolling should be applied because she pursued her claim in the state court. Plaintiff passengers facing similar procedural quandaries often rely on *Booth* for the proposition that filing in state court within the limitations period is sufficient to meet the

burden to show that equitable tolling should apply if the action is later properly filed in federal court after a contractual limitations period has expired. However, *Booth* was decided on very specific factual findings and does not stand for the proposition that equitable tolling is appropriate anytime a plaintiff timely files a complaint in the wrong court. *See Crist v. Carnival Corp.*, 410 Fed. Appx. 197 (11th Cir. 2010) (not selected for publication).

In *Booth*, the personal representative of the estate of a passenger subject to an identical forum selection clause and contractual one-year time limitation as the Plaintiff here, filed suit in Miami-Dade County state court. Carnival requested two extensions of time to respond to the complaint which placed the response well after the one-year limitations period had expired. *Id.* at 988. When Carnival finally responded to the complaint, it did not initially raise the defense of improper venue. *Id.* The plaintiff thereafter filed a parallel suit in federal court to preserve the claim and Carnival moved, in an amended answer, to dismiss the state court complaint for improper venue. *Id.* The Eleventh Circuit Court of Appeals held that because the plaintiff was misled by the defendant's actions to believe that the defense of improper venue had been waived and because the plaintiff had exercised every available avenue to pursue and preserve his claims, equitable tolling was appropriate. *Id.* at 1153.

Contrastingly, in *Psurny*, passenger plaintiffs filed suit in state court contrary to the forum selection clause in the passenger ticket contract but prior to the expiry of the one-year limitations period. *Id.* at 1327. The cruise line moved to dismiss the state court action based on the forum selection clause. The plaintiffs then properly filed suit in federal court nearly two months after the contractual limitations period had expired. *Id.* at 1327-28. In considering whether equitable tolling should have been used to excuse the plaintiffs' failure to timely file suit, the court relied on *Crist* and found that mistakenly filing in the incorrect forum did not rise

to the level of an inequitable event even though the plaintiffs filed suit in the correct forum two months later. *Id.* at 1329-30. The court noted that there was no inequitable conduct on the part of the cruise line to cause the plaintiffs to believe that they could properly file suit in state court. *Id.* at 1330.

In another closely analogous case, *Borton v. Carnival Corp.*, 2009 U.S. Dist. LEXIS 129585 (S.D. Fla. June 23, 2009), the plaintiff passenger was subject to a nearly identical federal forum selection clause and a one-year contractual time limitation to file suit. Instead, the plaintiff passenger filed suit in Miami-Dade County, Florida state court one day prior to the expiry of the one-year contractual time limit. *Id.* at *6. One month after Carnival timely moved to dismiss for improper venue, the plaintiff passenger filed another complaint in the United States District Court for the Southern District—after the one-year time limitation had expired. *7-8. The plaintiff passenger argued that the doctrine of equitable tolling should apply because, although she filed a defective pleading during the limitations period, she exercised due diligence in preserving her rights by filing thereafter, albeit untimely, in the proper forum. *Id.* at *8. The court in *Borton* held that the facts of the case did not warrant the “extraordinary remedy” applied by the *Booth* court. *Id.* at *19. The court noted:

It is not the responsibility of the Court to remedy a plaintiff’s disregard for procedural limitations by which plaintiff has bound herself contractually. Rather, it is the Court’s duty to enforce the terms of an otherwise fair and reasonable contract between parties. While the outcome may be regrettable, it is not inequitable.

Id. at *20-21. (citations omitted).

Here, there is no inequitable conduct on the part of RCCL to justify equitable tolling. RCCL has done nothing to mislead Plaintiff into believing that it has waived the defense of improper venue or that Plaintiff otherwise correctly filed suit in state court. In fact, RCCL

timely asserted filed a motion to dismiss the state court action based on an improper venue defense. Conversely, Plaintiff has failed to properly and diligently pursue her claim. Rather, she waited almost four months after the time limitation expired, and more than three months after RCCL filed its motion to dismiss in state court, to file suit in this Court. Plaintiff cannot meet the heavy burden to establish that equitable tolling should apply and, importantly, Plaintiff has not pursued her claim diligently enough to allow equitable tolling to be available at all. Plaintiff failed to file suit in this Court within the time limitations period clearly set forth under the terms of the passenger ticket contract and equitable tolling does not apply; therefore, Plaintiff's Complaint must be dismissed with prejudice.

WHEREFORE, Defendant, ROYAL CARIBBEAN CRUISES LTD., respectfully requests that this Honorable Court to dismiss Plaintiff's Complaint with prejudice and provide any further relief it deems just and proper.

Respectfully submitted,

ROYAL CARIBBEAN CRUISES, LTD.
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By: /s/ Nicholas A. Applin
Nicholas A. Applin
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of October, 2018, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I ALSO CERTIFY that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to electronically receive Notices of Electronic Filing.

/s/ Nicholas A. Applin
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SERVICE LIST

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