Ind No. 6592-2003

SHORT FORM ORDER

Supreme Court - State of New York
IAS PART 12 - SUFFOLK COUNTY

MOTION DATE: 10-19-06
ADJ. DATE: 01-11-07
MOT. SEQ: 012-MD
013-MG
014-MD

P R E S E N T :
Hon. MARTIN J. KERINS
J.S.C.

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EDELWEISS (USA) INC.,

Plaintiff(s),

- against -

VENGROFF WILLIAMS & ASSOCIATES, INC, and DAVID JEFFREY GOLD, ESQ.,

Defendant(s).

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KINGSLEY & KINGSLEY, ESQS.
Attorneys for Plaintiff
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Hicksville, NY 11801

COHEN & KRASSNER, ESQS.
Attorneys for Defendant:
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AGUS & PARTNERS P.C.
Attorneys for Defendant
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Upon the following papers numbered 1 to 51 read on this motion for summary judgment, 19-35; 41-45 ; Notice of Motion/ Order to Show Cause and supporting papers 11-16 ; Notice of Cross Motion and supporting papers 19-35; 41-45; Answering Affidavits and supporting papers 17-18; 36-40; 46-48 ; Replying Affidavits and supporting papers 49-51 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion(012) by defendant, David J. Gold, Esq., for partial summary judgment is denied; and it is further

ORDERED that the cross-motion (013) by plaintiff, Edelweiss Inc., against the defendants, Vengroff Williams & Assoc. and David J. Gold, Esq., is granted.

ORDERED that the cross-motion (014) by defendant, Vengroff Williams & Assoc., for dismissal of the complaint or alternatively for partial summary judgment is denied. As noted in the

prior decision of this court (Loughlin, J.) Vengroff was the agency retained by plaintiff that thereafter delegated collection or necessary litigation to co-defendant, David Gold, Esq.

ORDERED that an Inquest regarding the assessment of damages is scheduled for Friday, June 8, 2007 at 9:30 am at the courthouse located at 210 Center Drive, Riverhead, New York 11901. Plaintiff is directed to file a note of issue and certificate of readiness pursuant to 22 NYCRR § 202.21, together with the submission of all appropriate calendar fees and place the matter on the Court's Inquest Calendar forthwith; and it is further

ORDERED that plaintiff shall serve a copy of this Order with Notice of Entry within thirty (30) days of the date herein upon defendants, Vengroff Williams & Associates, Inc. and David Jeffrey Gold, Esq.

This is an action for negligence and legal malpractice for the untimely commencement of a law suit under the U.S. Carriage of Goods by Sea Act, 46 U.S. C. App. (COGSA). The facts of the underlying action required application of federal maritime law. The facts are as follows: The plaintiff sold frozen poultry to a purchaser in Russia, MPK Prodservice, and arranged to have the product carried by boat, in three shipments, from the United States to Russia in 2001, by Orient Overseas Container Line Limited (hereafter OOCL), a common carrier of goods for hire by sea. Plaintiff delivered the shipment to OOCL's boats in the United States and, in turn, OOCL tendered plaintiff an original bill of lading, in triplicate, for each of the three shipments. Apparently, OOCL released seven shipping containers comprising the three shipments without requiring surrender of the original ocean bills of lading held by plaintiff.

After efforts to recover from OOCL for an apparent misdelivery proved unsuccessful, the plaintiff retained defendant Vengroff, as a collection agency. In turn, Vengroff retained the defendant attorney, David J. Gold. It is undisputed that for several reasons Mr. Gold's efforts were unsuccessful. The attorney originally filed an action in the Supreme Court, New York County in 2002. At this point the one year statute of limitations under COGSA had already expired. The action was then removed to the federal court by the carrier. A subsequent motion by the carrier to dismiss the suit as untimely was granted.

In a prior decision this Court (Loughlin, J.) held for plaintiff on its summary judgment motion. In reversing that decision, the Appellate Division found that the bills of lading referred to two of the shipments as "straight" bills of lading, in that they identified the Russian purchaser as the consignee of the poultry. The Court found that the record on appeal in regard to the third bill of lading presented two versions. One version was a "straight" bill of lading, and the other was an "order" bill of lading, the latter identifying the consignee as the "order of shipper", i.e., the plaintiff. The plaintiff never received payment for the poultry from the purchaser. Therefore, plaintiff never presented or surrendered bills of lading to OOCL when the three poultry shipments were unloaded in Russia. Nonetheless, OOCL released the poultry.

In reversing the order of this Court (Loughlin, J.) which had granted the plaintiff's motion for summary judgment, the Second Department agreed with this Court that plaintiff had made a *prima facie* showing on the issue of liability by the defendants. However, the Court also found that defendants had raised triable issues of fact with respect to whether disputed bills of lading were non-negotiable within the meaning of the federal Pomerene Bills of Lading Act (49 USC §80103[b][1], and therefore, whether OOCL was obligated to release the poultry to the Russian purchaser irrespective of whether that purchaser presented and surrendered documents of title.

After the Appellate Division's reversal, the defendants were granted leave to conduct additional discovery. Plaintiff presented documentation regarding the business relationship between plaintiff and MPK Prodservice, its customer in Russia, prior to the claim of loss for the misdelivery of the seven containers. It also presented its president, Helena Lenawati, for a deposition. Its freight forwarder, Rimar Consultants, Inc., by Richard Maddelena, was also deposed by defendant Gold. Both of these witnesses identified the original bills of lading issued by OOCL. These original bills are numbered OOLU14722110 - dated January 10, 2001; OOLU14782370-dated January 31, 2001; and OOLU14782380 - dated January 24, 2001.

Significantly, both Lenawati and Maddelena identified the copies attached to an Affidavit of Richard Ng, OOCL's witness in the underlying action. Both witnesses, as well as the affidavit of plaintiff's vice-president, Frank Massani, demonstrate that these unsigned bills of lading were mere billing copies for the freight payment due OOCL on the three shipments. They were not the operative original signed ocean bills of lading that needed to be surrendered or accomplished, in order to obtain delivery of the seven containers in Russia.

A bill of lading is an instrument by which goods may be transferred from seller to buyer when a direct transfer is impossible and the goods must be shipped by a carrier. A bill of lading describes the goods shipped, sets forth the identity of the shipper (or consignor) and the buyer (or consignee), and directs the carrier to deliver the freight to a certain location or person. Bills of lading are contracts between shippers and carriers that spell out the carrier's obligation to deliver specific goods to specific people or places.

Plaintiff has demonstrated that OOCL contractually undertook the responsibility to require both negotiable and non-negotiable bills of lading to be accomplished or surrendered to the carrier in order to obtain delivery of the cargo. It is clear that "accomplished" is synonymous with "surrender for delivery" to prevent a bill of lading from getting into the hands of an insolvent buyer. Where a bill of lading contains a clause similar to the ones here, such provision results in liability on a carrier who delivers the goods without insisting on the production and surrender of the bill of lading where the shipper suffered a loss as a result. Such liability arises, not from a statute, but from the obligation which the carrier assumes under the bill of lading (*see,* COGSA §1305; ***Porky Prods. v. Nippon Express U.S.A., Inc.,*** 1 F. Supp. 2d 227 (D.N.Y. 1997; *aff'd,* 152 F.3d 920 [2nd Cir. 1998).

Plaintiff notes that OOCL's original bill of lading terms required surrender of the original bills of lading to the carrier to obtain delivery of the cargo. In that regard the form of the bills of lading state: "In witness whereof 3 original bills of lading have been signed, one of which being accomplished, the other(s) to be void." Further, plaintiff argues that it retained the original bills of lading because it had not been paid for the goods shipped; it never authorized OOCL to deliver the goods without presentation of an original bill of lading; and did not take any action that would lead OOCL to misdeliver the goods. They further note that the bills of lading state on their face that the original bills were to be released at New York. Accordingly, plaintiff argues that OOCL was in breach of contract when it released the goods without the original bills of lading being presented or surrendered. This was in violation of the unambiguous terms of the bill of lading contract between the parties.

Defendant, David J. Gold, asserts that plaintiff was aware that OOCL's practice was not to deliver cargo against original documents in Russia. Defendant argues that this was demonstrated through the testimony of Richard Madalena of Rimar Consultants, the company that created the bills of lading. However, as noted, previously, such contention is irrelevant.

A court's duty in a case involving a contractual dispute is to determine the intent of the parties and to give effect to their intentions as expressed in the agreement. Clearly, what this carrier usually did is of no import. Here, without question, the carrier assumed responsibility and liability greater than required by the statute. The bills of lading were unambiguous in their terms. In this regard, the Pomerene Act does not prohibit the bill of lading issuer from contractually increasing its responsibilities to cargo.

The claim by defendant, Gold, that the monetary limitation under COGSA of $500 per container is without merit. Here, the bills of lading note the number of cases carried in each container. Therefore, the $500.00 per package limitation applies to each of the cases within ech of the containers.

Clearly, multiple summary judgment motions in the same action should be discouraged in the absence of newly discovered evidence or other sufficient cause (***Villatoro v Ambassador Apts., Inc.,*** 2 AD3d 436; ***LaFreniere v Capital Disk Trans. Auth.,*** 105 AD2d 517). The present motions are based on a claim of new evidence and theories developed during discovery or theories developed as a result of the decision of the Appellate Division, Second Department on this case (27 AD3d 688).

Plaintiff claims being unable to discover whether the intended purchaser, MPK Prodservice or someone else received the shipments. Apparently, OOCL has never relayed to plaintiff the circumstances of the shipments and to whom they were delivered. Even an affidavit by OOCL's Claims Manager, Richard Ng, filed in support of a dismissal of the underlying federal action, does not indicate the customers to whom the containers were delivered.

In light of the foregoing, the plaintiff's motion is granted. Plaintiff has demonstrated that counsel failed to exercise skills common to an ordinary member of the legal community, and but for such failure the plaintiff would not have been damaged (***Kleeman v Rheingold,*** 81 NY2d 270). In the instant dispute, the plaintiff made a prima facie showing that, had the collection action been commenced against OOCL within the limitations period contained in COGSA, the plaintiff would have prevailed as to liability.

The cross-motion by defendant, Gold, is denied. The cross-motion by defendant, Vengroff, for summary judgment against plaintiff is denied. Defendant, Gold, was on retainer with Vengroff. The dispute between these parties regarding fees should not have prejudiced plaintiff. In fact, it delayed the filing of plaintiff's action. Gold eventually agreed to provide legal services. However, he filed untimely suit in state rather than federal court. Plaintiff had an enforceable claim under the Maritime Law, which, but for the lapse of limitations period, was assured payment.

Dated: March 29, 2007
RIVERHEAD ,NY

Martin J. Kerins, J. S. C.

FINAL DISPOSITION_____ NON-FINAL DISPOSITION_✓_