

TISA, Inc. v CP Ships (UK) Ltd.

2009 NY Slip Op 30238(U)

January 26, 2009

Supreme Court, New York County

Docket Number: 115100/06

Judge: Martin Shulman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

MARTIN SHULMAN

PRESENT: J.S.C.
Justice

PART 1

Index Number : 115100/2006

TISA

vs

CP SHIPS[UK]

Sequence Number : 007

SUMMARY JUDGMENT

INDEX NO. 115100/06

MOTION DATE _____

MOTION SEQ. NO. 007

MOTION CAL. NO. _____

s motion to/for _____

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits A-D

Answering Affidavits — Exhibits A-E

Replying Affidavits — Exhibits B-T

PAPERS NUMBERED

1, 2, 3

4

5, 6

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S)

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COUNTY CLERK'S OFFICE
NEW YORK

Dated: January 26, 2009

MARTIN SHULMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 1

-----X
TISA, INC.,

Plaintiff,

-against-

Index No. 115100/06

CP SHIPS (UK) LIMITED, SHAHTAJ TEXTILE
LIMITED, HABIB BANK LIMITED,

Defendants.

-----X
MARTIN SHULMAN, J.:

Defendant Shahtaj Textile Limited ("Shahtaj") moves pursuant to CPLR 3212,
for an order granting summary judgment dismissing the complaint.

Plaintiff Tisa, Inc. ("Tisa") purchased cotton fabric from Shahtaj. This is an action seeking a refund of the contract price, alleging that as a result of the textiles being delivered prematurely, and incurring storage charges, the goods were sold as salvage pursuant to the contract of carriage in order to satisfy the carrier's lien. Shahtaj alleges that Tisa merely failed to pick up the cotton.

In support of its motion for summary judgment, Shahtaj argues that pursuant to both the Uniform Commercial Code ("UCC"), and the C. & F. shipping terms of the contract between Tisa and Shahtaj, all title and risk of loss passed to Tisa once Shahtaj delivered the goods to the shipping company and paid the cost of shipping. Even though the goods had already been sold the day before, Tisa failed to timely act on a July 26, 2006 e-mail from Shahtaj mistakenly stating that July 26, 2006 "is the last day for clearance of container." In opposition to the motion for summary judgment, Tisa

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argues that it was agreed between Tisa and Shahtaj that Tisa would not be required to take possession of the goods absent further agreement of the parties.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact from the case (*JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373 [2005]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065 [1979]). The failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient for this purpose (*Zuckerman v City of New York*, 49 NY2d 557 [1980]).

UCC § 2-320 (4) provides that: "[u]nder the term C.I.F. or C. & F. unless otherwise agreed the buyer must make payment against tender of the required documents and the seller may not tender nor the buyer demand delivery of the goods in substitution for the documents." The first official comment provides that the purpose of UCC § 2-320 is to make it clear that:

The C.I.F. contract is not a destination but a shipment contract with risk of subsequent loss or damage to the goods passing to the buyer upon shipment if the seller has properly performed all his obligations with respect to the goods. Delivery to the carrier is delivery to the buyer for purposes of risk and "title". Delivery of possession of the goods is accomplished by delivery of the bill of lading, and upon tender of the required documents the buyer must pay the agreed price without awaiting

the arrival of the goods and if they have been lost or damaged after proper shipment he must seek his remedy against the carrier or insurer. The buyer has no right of inspection prior to payment or acceptance of the documents.

In a C. & F. contract, such as is involved here, the seller "must put the goods in the possession of ... a carrier and make such a contract for their transportation as may be reasonable" unless otherwise agreed (UCC § 2-504 [a]). The reasonableness of particular transportation arrangements turns on a review of the "circumstances of the case" (UCC § 2-504 [a]; *Fertico Belgium, S.A. v Phosphate Chems. Export Ass'n, Inc.*, 100 AD2d 165, 169 [1st Dept] app dism 62 NY2d 802 [1984]).

The provisions of the UCC assigning the risk of loss are subject to the "contrary agreement" of the parties (UCC § 2-509 [4]). The Official Comment states that "[c]ontrary" is in no way used as a word of limitation and the buyer and seller are left free to readjust their rights and risks ... in any manner agreeable to them" (Official Comment 5, McKinney's Cons Laws of NY, Book 62 ½, UCC § 2-509). However, "if the parties have made a memorial of their bargain ... the law does not recognize ... their intent, unless it is expressed in, or may fairly be implied from, their writing" (4 Williston on Contracts § 600A, at 286 [3d ed]).

If Tisa intended a contrary meaning for the contract term C. & F., an express statement varying the ordinary meaning was required. The e-mails that passed between Tisa and Shahtaj are insufficient to demonstrate that the term C. & F. did not mean what it does in ordinary commercial transactions. One of the principal purposes of the code is to simplify, clarify and modernize the law governing commercial transactions (UCC § 1-102 [2] [a]). To allow a commonly used term such as C. & F. to

be varied in meaning, without an express statement of the parties of an intent to do so, does not serve that purpose (*A. M. Knitwear Corp. v All America Export-Import Corp.*, 41 NY2d 14, 21 [1976]). Contrary to Tisa's assertion, nothing in the e-mails expressly varies the C. & F. contract term. Therefore, Shahtaj's motion must be granted.

Accordingly, it is

ORDERED that the motion for summary judgment is granted and the complaint is hereby severed and dismissed as against the defendant Shahtaj Textile Limited, and the Clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that the remainder of the action shall continue.

Counsel for the remaining parties are directed to appear for a status conference on February 24, 2009 at 9:30 a.m., 111 Centre Street, Room 1127B, New York, New York. **Plaintiff's counsel is directed to notify counsel for all remaining defendants of the conference date scheduled herein.**

The foregoing is the decision and order of this court. A copy of this decision and order has been sent to counsel for Tisa and Shahtaj.

Dated: New York, New York
 January 26, 2009



Hon. Martin Shulman, J.S.C.

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