Stevens Van Lines, Inc. v Don's Moving & Stor., Inc.
2009 NY Slip Op 30539(U)
March 5, 2009
Supreme Court, New York County
Docket Number: 600852/08
Judge: Louis B. York
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SCANNED ON 3/12/2009

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

PRESENT: LOUIS B. YORK, J.S.C. — Justice

PART 2

Index Number : 600852/2008
STEVENS VAN LINES, INC.,
vs.
DON'S MOVING & STORAGE, INC.,
SEQUENCE NUMBER : # 001
DISMISS COMPLAINT

INDEX NO. 600852-08

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

ere read on this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

FILED
MAR 12 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 3/5/09

LOUIS B. YORK, J.S.C.
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 2
-----------------------------------x
STEVENS VAN LINES, INC. doing business as Stevens Worldwide Van Lines,

Plaintiff,

Index No.: 600852/08

-against-

DECISION AND ORDER

DON'S MOVING & STORAGE, INC.,

Defendant.
-----------------------------------x

FILED
MAR 12 2009
COUNTY CLERK'S OFFICE
NEW YORK

YORK, J.:

BACKGROUND

Defendant moves, pursuant to CPLR 3211 (a) (1) and (a) (3), to dismiss the complaint, and plaintiff cross-moves, pursuant to CPLR 3215, to enter a default judgment against defendant.

Plaintiff agreed to move client's (consignor)'s household goods from Niskayuna, New York, to Wilmington, North Carolina. The agreement between plaintiff and consignor indicated a value of the goods at $75,000.00.

Plaintiff retained defendant to pick up consignor's goods and warehouse them at defendant's warehouse in Albany. Plaintiff subsequently contracted with defendant to ship the goods to North Carolina.

Defendant had consignor sign a bill of lading, which stated that the carrier's liability was limited to 30-cents per pound,

to a maximum liability of $2,500.00. The only parties to the bill of lading were defendant and consignor.

While the goods were in defendant's possession, they were stolen. Defendant never placed the goods in its warehouse, but kept the goods in a trailer on its lot.

Subsequent to the loss, plaintiff settled with consignor for $75,000.00, the agreed-upon value of the goods. In consideration of this settlement, consignor released both plaintiff and defendant.

Plaintiff has asserted six causes of action. Two of the causes of action are based on plaintiff being consignor's subrogee, three are based on breach of contract and duties owed to plaintiff by defendant based on the contract between them, and the last is for negligence pursuant to the Carmack Amendment to the Interstate Commerce Act.

Plaintiff agreed to extend defendant's time to answer to May 19, 2008, by written stipulation. Defendant did not answer until May 21, 2008. Defendant's counsel, at the time the answer was due, has submitted an affidavit in which he states that he contacted plaintiff's counsel before the stipulated answer date, and received verbal agreement that defendant would be allowed a brief extension.

DISCUSSION

CPLR 3211 (a), Motion to dismiss cause of action, states

that "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(1) a defense is founded upon documentary evidence; or

(3) the party asserting the action has not legal capacity to sue ...

Under CPLR 3211 (a) (1) a dismissal is permissible only when the documentary evidence conclusively establishes a defense to the asserted claims as a matter of law. ***Leon v Martinez***, 84 NY2d 83 (1994). As stated in ***Ladenberg Thalman & Co., Inc. v Tim's Amusements, Inc.***, 275 AD2d 243 (1st Dept 2000),

> The court's task is to determine only whether the facts as alleged, accepting them as true and according plaintiff every possible favorable inference, fit within any cognizable legal theory (*Leon v. Martinez*, 84 NY2d 83, 87-88 (1994). Dismissal pursuant to CPLR 3211 (a) (1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (*id.* at 88).

To defeat a pre-answer motion to dismiss pursuant to CPLR 3211 (a) (1), the opposing party need only assert facts which "fit within any cognizable legal theory." ***Bonnie & Co. Fashions, Inc. v Bankers Trust Co.***, 262 AD2d 188, 188 (1st Dept 1999). Further, if any question of fact exists with respect to the meaning and intent of the contract in question, based on the documentary evidence supplied to the motion court, a dismissal pursuant to CPLR 3211 (a) (1) is not granted. ***Khayyam v Doyle***, 231 AD2d 475 (1st Dept 1996).

In its opposition, plaintiff first contends that defendant's motion to dismiss should be denied because it does not include an affidavit of an individual with personal knowledge of the facts. However, in a motion to dismiss pursuant to CPLR 3211 (a) (1), unlike a motion for summary judgment, the court is only weighing the pleadings submitted by plaintiff, and the documents submitted by defendant. Affidavits are not considered documents to be weighed in determining motions pursuant to CPLR 3211 (a) (1) (*see* ***Berger v Temple Beth-El of Great Neck,*** 303 AD2d 346 [2d Dept 2003]), and, consequently, the court finds no merit in this argument.

Defendant's motion to dismiss, pursuant to CPLR 3211 (a) (1) is denied.

Defendant has submitted, as its supporting documentary proof, the bill of lading it had with consignor. With respect to the two causes of action asserted by plaintiff as consignor's subrogee, plaintiff's recovery would generally be limited to the limitation of liability provision appearing in the bill of lading. As a subrogee, plaintiff stands in the shoes of its subrogor. *See* ***Fed. Ins. Co. v Spectrum Ins. Brokerage Services, Inc.,*** 304 AD3d 316 (1st Dept 2003). However, if it can be evidenced that defendant's conduct was reckless, not merely negligent, that limitation of liability provision would not be enforced. ***Downstate Medical Center v Purolator Courier Corp.,***

138 Misc 2d 714 (Civ Ct Kings County 1988). Consequently, at this stage of the proceedings, before issue has been joined, it cannot be conclusively determined that plaintiff's recovery is limited to the $2,500.00 provided in the bill of lading, and even if it were, that would only warrant transferring the matter to the civil court, not dismissal of the action.

The contract that is subject of three of plaintiff's causes of action is the contract between plaintiff and defendant, not defendant and consignor. Plaintiff is asserting causes of action based on defendant's alleged breach of its agreement with plaintiff to pick up the goods from the consignor, warehouse the consignor's goods at defendant's warehouse in Albany, and then deliver the goods to its North Carolina designation. This agreement contains no limitation of liability, and plaintiff may seek any damages it can prove. Because the documentary evidence submitted by defendant does not relate to these issues, defendant's motion to dismiss these causes of action based on CPLR 3211 (a) (1) is denied.

Plaintiff's last cause of action, concerning the applicability of the Carmack Amendment to the Interstate Commerce Act (49 USC § 14706 [b]), has not been addressed by a New York court with respect to situations in which the goods' ultimate destination was interstate, but the breach occurred during its intrastate shipping phase. The Carmack Amendment would permit

recovery of the entire amount paid to the consignor. Plaintiff has not addressed this cause of action in its motion or reply, nor is this issue resolved by the bill of lading. However, several federal courts have taken the position that the parties' intent is the determinative factor in deciding whether a given shipment is intrastate or interstate. ***Roberts v Levine,*** 921 F2d 804 (8th Cir 1990); ***Atlantic Independent Union v Sunoco, Inc.*** ___ F3d ____ , 2006 US Dist Lexis 11223 (ED Pa 2004). Therefore, plaintiff has posited a viable cause of action which defendant's documents have not rebutted. Consequently, defendant's motion with respect to this cause of action is also denied.

Turning to defendant's argument with respect to plaintiff's lack of capacity to sue, CPLR 3211 (a) (3) encompasses situations in which the plaintiff cannot legally maintain an action on his or her own behalf. *See* ***Monson v Israeli,*** 35 AD3d 680 (2d Dept 2006).

Defendant's motion to dismiss, pursuant to CPLR 3211 (a) (3), is denied, since, as stated above, plaintiff is asserting its own claims under its contract with defendant, as well as claims as subrogee of the consignor.

Defendant also asserts that the claim must be dismissed because plaintiff has failed to join a necessary party, i.e., consignor.

CPLR 1001 (a) states, in sum and substance, that persons who

should be joined are "parties to the action or who might be inequitably affected by a judgment in the action ... ." However, since consignor has already settled his claim for the loss of his goods with plaintiff, and has released both plaintiff and defendant from any further liability, consignor's rights would not be affected by this lawsuit, and therefore he is not considered a necessary party to this action. *See generally* ***Joanne S. v Carey,*** 115 AD2d 448 (1st Dept 1986).

Plaintiff's cross-motion to enter a default judgment against defendant is also denied.

Since defendant's attorney has averred that plaintiff's attorney orally agreed to a short extension of time in which to answer, it would be inappropriate to enter a default against defendant. ***Mandell v Blackman-Hoffman Co., Inc.,*** 92 AD2d 885 (2d Dept 1983). Since defendant did answer only two days late, it is apparent that defendant never intended to abandon its defense, and, under the circumstances, the court is justified in exercising its discretion in denying plaintiff's crossmotion. ***Simpson v Apertivo,*** 97 AD2d 710 (1st Dept 1983).

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that defendant's motion to dismiss the complaint is denied; and it is further

ORDERED that plaintiff's cross motion to enter a default

judgment against defendant is denied; and it is further

ORDERED that defendant is directed to serve an answer to the complaint within 15 days after service of a copy of this order with notice of entry.

Dated: 3/5/09

ENTER:

Louis B. York, J.S.C.

LOUIS B. YORK
J.S.C.

FILED
MAR 12 2009
COUNTY CLERK'S OFFICE
NEW YORK