

**Peerless Importers, Inc. v Cornerstone Sys. Inc.**

2010 NY Slip Op 30013(U)

January 5, 2010

Supreme Court, New York County

Docket Number: 113810/07

Judge: Doris Ling-Cohan

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

PRESENT: Hon. Doris Ling-Cohan  
*Justice*

PART 36

Index Number : 113810/2007  
**PEERLESS IMPORTERS**  
VS.  
**CORNERSTONE SYSTEMS**  
SEQUENCE NUMBER : 001  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for Summary judgment

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...

1, 2

Answering Affidavits – Exhibits \_\_\_\_\_

3

Replying Affidavits \_\_\_\_\_

4

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion *for summary judgment by plaintiff is denied in accordance with the attached memorandum decision.*

*(consolidated for disposition with motion seq 002)*

**FILED**

JAN 07 2010

NEW YORK  
COUNTY CLERK

HON. DORIS LING-COHAN

Dated: 1/5/10

*[Signature]*

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 36

-----X  
PEERLESS IMPORTERS, INC., now known as  
EMPIRE MERCHANTS, LLC,

Plaintiff,

-against-

CORNERSTONE SYSTEMS INC.,

Defendant.

Index No. 113810/07

Motion Seq.: 001/002

**FILED**

JAN 07 2010

NEW YORK  
COUNTY CLERK'S OFFICE

-----X  
DORIS LING-COHAN, J.:

Plaintiff Peerless Importers, Inc., now known as Empire Merchants, LLC, moves for summary judgment in its favor against defendant Cornerstone Systems, Inc. (Cornerstone) (motion seq. no. 001). Defendant separately moves for summary judgment in its favor (motion seq. no. 002). Both motions are consolidated for disposition.

**Factual Background**

Plaintiff is a wine distributor located in Brooklyn, New York. The complaint alleges that on or about January 25, 2007, a shipment of wine belonging to plaintiff was "received for shipment by defendant as a common carrier" in Sonoma, California, in good condition, but was delivered to plaintiff in a damaged and frozen condition, due to defendant's negligence. Compl ¶ 3. Plaintiff alleges that its damages exceed \$50,000.

In support of its motion for summary judgment, plaintiff submits the freight bill from defendant for the shipping of plaintiff's wine; the report of MMK International Marine

Services, Inc., which inspected the shipment on March 2, 2007, after its arrival in Brooklyn; a list identifying the damaged bottles; and a schedule of prices for wine retailers.

Plaintiff further submits Cornerstone's publicity materials which state, among other things, that "[o]ur people represent the foundation of a transportation company dedicated to offering *rock solid* logistic solutions...." Kevin T. Murtagh Reply Affirmation, Exh 3, at 1. The same publicity materials list the various "rock solid solutions" to include, among other things, intermodal services, truck services and rail car/railcar consolidation. According to plaintiff, such publicity materials indicate that Cornerstone is holding itself out as a common carrier. Plaintiff contends that, therefore, Cornerstone should be treated as a common carrier, despite the fact that it is a licensed broker.

In opposition, in an affidavit by Jonathan Ward, the Risk Manager for Cornerstone, Cornerstone asserts that it is a transportation property broker, not a common carrier, and annexes the broker's license for Cornerstone issued by Federal Highway Administration. Ward further asserts that Cornerstone "never took possession" of the wine and that the "wine was actually shipped by and in the care and custody of Fastbreak, followed by the Union Pacific Railroad, switching out to the CSX in Chicago." Jonathan Ward Aff ¶ 4. Ward also states that Cornerstone hired

and instructed Fastbreak, Union Pacific Railroad and CSX. Jonathan Ward Depo at 26, ln 8-10; 36, ln 12-14; 40, ln 12-14. Furthermore, Ward states that these companies took instructions directly from Cornerstone. *Id.*

### Discussion

The moving party on a motion for summary judgment has the burden of making a prima facie showing that it is entitled to judgment as a matter of law, giving sufficient evidence to eliminate any material issues of fact from the case. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Zuckerman v City of New York*, 49 NY2d 557 (1980). Because a motion for summary judgment is a drastic remedy, the motion should not be granted if there are any triable issues of fact. *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978).

The issue of main contention in the instant action is whether defendant is a motor carrier or a broker. Pursuant to 49 U.S.C. § 14706, common carriers, but not brokers, may be held liable for goods damaged while being transported in interstate commerce. Brokers, on the other hand, may be held liable under state law causes of action. "Whether a company is a broker or a carrier is not determined by what the company labels itself, but by how it represents itself to the world and its relationship to the shipper." *Trans-Pro Logistic, Inc. v. Coby Electronics Corp.*, 2008 WL 4163992 (EDNY) (internal citation omitted). An

entity "[m]ay be liable as a common carrier if it acts as one, even if it not licensed as such." *Tokio Marine*, 770 F Supp 426, 428 (ND Ill 1991). Because there is no rigid test to determine common carrier status, the determination is fact-sensitive, and the court looks at the specific facts to see if the defendant held itself out to the public as a common carrier. *Id.* at 428. Factors to be evaluated include: (1) the way the party's obligation is expressed in documents relating to the agreement, although the party's self-description is not always controlling; (2) the history of dealings between the parties; (3) issuance of a bill of lading, although the mere fact that a party issues one is not, in itself, dispositive; and (4) how the party made its profits. *Zima Corp. v. M. V. Roman Pazinski*, 493 F Supp 268, 273 (SDNY 1980).

Cornerstone's publicity materials submitted by plaintiff state, among other things, that "[o]ur people represent the foundation of a transportation company dedicated to offering rock solid logistic solutions...." Reply Affirmation of Kevin T. Murtagh, Ex. 3, at 1. The same publicity materials list the various "rock solid solutions" to include, among other things, intermodal services, truck services and rail car/railcar consolidation. Murtagh Reply Affirmation, Exh 3, at 3. It appears that Cornerstone was in complete control at every juncture of the transportation. On the freight bill sent to

plaintiff, which also included a line item for fuel surcharge, the only entity listed was "Cornerstone."

Defendant relies mainly on the argument that it is a federally licensed broker and that it did not take physical possession of the wine. However, these facts are not determinative of how Cornerstone represented itself.

From the submissions before the court, it is unclear whether Cornerstone is holding itself out as a company that actually carries goods from place to place (common carrier), or one that merely arranges for the transportation of goods (broker); and, thus, whether common carrier liability is triggered. Thus, genuine issues of material fact exist and both plaintiff's and defendant's motions for summary judgment are denied.

Annexed to its reply affirmation, plaintiff also submits a copy of Cornerstone's Intermodal Wine Freeze Protection Policy for Policy Year 2006-2007 (the "Policy"), signed by a representative of plaintiff, which appears to indicate that in order to obtain freeze protection insurance, the shipper must agree to have an insulating blanket to protect the shipment from freezing. The court notes that, although the document might suggest that Cornerstone had agreed to provide plaintiff with insurance coverage against freezing, such document by itself (particularly as it was submitted on reply), does not provide a sufficient basis for summary judgment. Further, the Policy

indicates that: "'Protect from Freeze' must be shown in writing on the purchase order and on the Winery bill of lading or on the dispatch sheet to Cornerstone." Murtagh Reply Affirmation, Exh 11 at 1. However, plaintiff fails to attach to its motion papers all of the requisite documents, and merely submits Cornerstone's freight bill. Moreover, while the freight bill does include a charge for a thermal blanket, it does not include the words "protect from freeze." See Daniel Kifner Aff, Exh 1. This exclusion, in addition to plaintiff's failure to submit the purchase order and bill of lading, or the dispatch sheet, renders the Policy inconclusive to determine liability at this juncture.

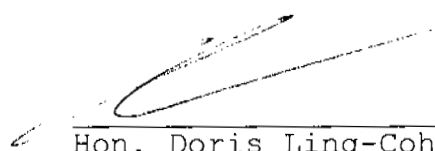
In its reply papers, plaintiff also asserts that Cornerstone has failed to comply with the court's conference orders with respect to discovery and that it should be precluded from using at trial those documents that it has not yet produced, and its answer should be stricken. Plaintiff has not, however, made a formal motion to preclude or to strike defendant's answer and such requests, particularly made in reply papers, will not be entertained by the court. See *Serradilla v Lords Corp.*, 50 AD3d 345 (1<sup>st</sup> Dept 2008). Moreover, plaintiff failed to address the within discovery issues at any of the previously held discovery compliance conferences; nor were the Part's rules with respect to discovery issues complied with.

For the foregoing reasons, it is hereby

ORDERED that plaintiff's and defendant's motions for summary judgment (motion seq. nos. 001 and 002, respectively) are denied; and it is further

ORDERED that within 30 days of entry of this order, defendant shall serve a copy of this order upon plaintiff with notice of entry.

Dated: January 7, 2010

  
\_\_\_\_\_  
Hon. Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\peerless.wpd

**FILED**  
JAN 07 2010  
NEW YORK  
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