

The Apparel Corp. (Far E.) v H.J.M. Intl. Inc.
2013 NY Slip Op 33209(U)
January 29, 2013
Sup Ct, NY County
Docket Number: 653361/11
Judge: Charles E. Ramos
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: CE Ramos
Justice

PART 53

Index Number: 653361/2011
APPAREL CORPORATION (FAR
vs.
HJM INT'L CORP. D/B/A
SEQUENCE NUMBER: 003
REARGUMENT/RECONSIDERATION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). _____
Answering Affidavits — Exhibits _____	No(s). _____
Replying Affidavits _____	No(s). _____

Upon the foregoing papers, it is ordered that this motion is

*is decided in accordance with
accompanying memorandum decision and order.*

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

Dated: 1/29/13

Charles E. Ramos, J.S.C.

CHARLES E. RAMOS

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

-----x
THE APPAREL CORPORATION (FAR EAST),

Plaintiff,

Index No. 653361/11

-against-

H.J.M. INTERNATIONAL INC., EAGLE EXPRESS
LINES, INC., UNITED CARGO SYSTEMS, INC. and
ASIA CARGO CONTAINER LINE INC.,

Defendants.

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CHARLES E. RAMOS, J.S.C.:

In motion sequence 003, defendant H.J.M. International, Inc. ("HJM") moves for leave to reargue this Court's decision and order ("Order"), dated June 7, 2012, pursuant to CPLR 2221 (d). Upon reargument, HJM seeks the dismissal of the first, second, and fourth causes of action of the complaint of plaintiff The Apparel Corporation (Far East) ("Apparel"), pursuant to CPLR 3212 and alternatively, pursuant to CPLR 3211 (a) (2), (5) (7), (8), and (10).

In the Order, the Court denied HJM's motion for summary judgment on the ground that it was premature as issue has not yet been joined. The Court also denied the remainder of the motion noticed under CPLR 3211 on the ground that factual issues remained as to whether HJM was the freight forwarder involved in several of the challenged transactions, which could not be resolved on a pre-answer motion to dismiss.

The Court grants leave to reargue, and upon reargument,

adheres to its prior determination. This decision shall stand in the place and stead of the prior Order.

Background

Apparel is a Philippine company, based out of Manila. In the second amended complaint, Apparel alleges that HJM, acting individually or jointly or as an agent of Eagle Express Lines, Inc. ("Eagle Express") and/or United Cargo Systems, Inc. ("United Cargo") and/or Asia Cargo Container Line Inc. ("Asia Cargo"), acted as freight forwarders with respect to cargo of ladies' undergarments described in eight Bills of Lading. Apparel was the shipper, owner and claims to be the party entitled to immediate possession of the cargo, and lawful holder of the original Bills of Lading.

In or about September through October 2008, HJM was allegedly contacted by non-party Donna L'Oren, LLC ("DL Group") and/or Jump Shot Sportswear, Inc., the purchaser of the cargo described in the Bills of Lading, to arrange shipment of lingerie from Manila, Philippines to Los Angeles, California. Arrangements were made for the shipment of the cargo under Bill of Lading No. HJMNLX10749L ("HJM Bill of Lading"). The HJM Bill of Lading states that the port of loading was Manila, Philippines, the place of delivery was Los Angeles, CA, and the shipment was for a purchase order, P.O. No. 17772. The cargo was loaded on board on or about October 26, 2008, and arrived in Los

Angeles on or about November 8, 2008.

Apparel commenced this action for breach of contract and negligence arising out of defendants' alleged improper release of the cargo without securing the original Bills of Lading, at the inducement of the ultimate purchaser of the cargo, the DL Group, who failed to remit payment. Apparel's breach of contract claims are asserted under alternate theories of third-party beneficiary as to a contract between DL Group and HJM, implied contract, and violation of a bailment agreement.

Discussion

In support of its motion to reargue, HJM asserts that the Court misapplied the law and facts in not dismissing the first and second causes of action because HJM was not involved in shipping the cargo, and misapplied the facts with respect to the second and fourth causes of action because the negligence claims are time-barred.

HJM asserts that its release of one shipment of cargo was proper and authorized by Apparel, and the remaining seven shipments were not shipped by HJM but by another freight forwarder, and thus, was HJM cannot be held liable for the release of the cargo described in the corresponding Bills of Lading. HJM alleged that MLMEX8080880 was shipped and released by freight forwarder Asia Cargo; MLLAX8080905 was shipped and

released by United Cargo; MEX08087390 was shipped and released by Pacific Air Express, Inc.; MLMEX8091014 was shipped and released by Asia Cargo; and EEMNMX10618F, EELI1112, and EEMNMX10751F were shipped and released by Eagle Express.

Apparel contests HJM's assertions, and in opposition to the underlying motion, submitted email correspondence between DL Group's principal, Ira Horowitz, and Apparel dated September 9, 2008 ("Changeover Email"). The Changeover Email purportedly demonstrates that the DL Group changed its designated freight forwarder from United Cargo to HJM, and states:

"Please arrange all shipments through the below forwarder instead of the freight forwarder information we had previously sent to you:

HJM International Hong Kong

...

HJM International Shanghai Ltd.

...

Please do not contact UCS for anymore for bookings.
All bookings going forward are to be done through HJM."

Based on the Changeover Email and related correspondence, Apparel represented by affidavit testimony that prior to September 9, 2008, DL Group's nominated freight forwarder was United Cargo whose local agent in Manila was Asia Cargo. After September 9, 2008, HJM was designated as DL Group's nominated freight forwarder, with Eagle Express acting as HJM's local agent in Manila. Accordingly, Apparel asserted that HJM arranged all

post-September 9, 2008 shipments with Eagle Express, and on this basis is directly responsible for the shipment and improper premature release of the cargo in Bills of Lading Nos. EEMNMX10618F, EELI1112, EEMNMX10751F, and HJMNLX10749L.

Although the affidavit that HJM submitted in support of its underlying motion alleged that HJM was not involved in delivering seven of the eight shipments at issue, this fact is disputed by Apparel and appears to be contradicted by the Changeover Email and other documents. Consequently, issues of fact remain that cannot be resolved by the Court in a pre-answer motion to dismiss. Further, Apparel's allegations that DL Group changed its freight forwarder to HJM set forth cognizable claims against HJM, which are not wholly unsubstantiated, as HJM claims, in light of the submission of the Changeover Email.

Finally, while a court may consider a defendant's affidavit on a pre-answer motion to dismiss, unless it conclusively establishes that the plaintiff has no cause of action, it cannot support an order of dismissal (*Skillgames, LLC v Brody*, 1 AD3d 247, 251 [1st Dept 2003]). Here, the affidavit of HJM's president did not conclusively establish that Apparel has no causes of action, it merely disputes some of the factual allegations of the complaint.

HJM's underlying motion to dismiss the fourth cause of action for negligence is also denied. CPLR 214(4) establishes a

three-year statute of limitations for "an action to recover damages for an injury to property except as provided in section 214-c."

Factual issues remain concerning the date of shipment of cargo for Bills of Lading Nos. EEMNMX10618F, EELI1112, EEMNMX10751F, and HJMN LX10749, in addition to the relationship between Eagle Express, one of the designated freight forwarders, and HJM. The documentary evidence submitted by HJM does not resolve all the factual issues as a matter of law and does not conclusively and definitively dispose of the Apparel's claim as asserted against HJM.

Accordingly, it is hereby

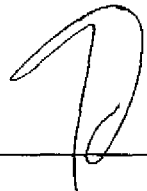
ORDERED that plaintiff's motion for leave to reargue is granted, and upon reargument, it is hereby

ORDERED that defendant's motion to dismiss is denied, and it is further

ORDERED that defendants shall serve an answer to the complaint within twenty days after service of a copy of this order with notice of entry.

Dated: January 29, 2013

ENTER:



T. S. C.
CHARLES E. RAMOS