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

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SMIC GROUP, INC. and SUZHOU INDUSTRIAL PARK, RONWI GARMENTS CO., LTD.

Plaintiffs,

-against-

GREAT JOY TRADING LIMITED, GREAT JOY TRADING GROUP INC, Yong Xun Jiang a/k/a JASON JIANG AKA JEFF JIANG, JENSON LOGISTICS, INC., John Doe, Jane Doe, COMPANY ABC, COMPANY XYZ, Sarah Johnson a/k/a SARAH JIANG, SBF INDUSTRIES, LTD., LAGOOYA CORP., REAL MAYA DESIGN, INC., CLICHE, INC., SARAH JOHNSON, INC., Havre Benard, HARVE BENARD VENTURES, LLC, BEYOND PRODUCTIONS, LLC, HOUSE OF DEREON, INC., EFASHION SOLUTIONS LLC, BEYONCE, INC., JENSON LOGISTICS, INC., DYNAMIC WORLDWIDE LOGISTICS (SHANGHAI) LIMITED, GABRIEL MANUFACTURING CO. INC., VINTAGE DENIM, LLC,

Defendants.

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MOTION DATE Sept. 3, 2013
MOTION SEQ. NO. 009

DECISION & ORDER

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Papers considered in review of this motion for summary judgment:

Papers	**Numbered**
Notice of Motion-Affidavits-Exhibits	1
Opposition	2
Reply	3

ELLEN M. COIN, J.:

This is a manufacturer's action for non-payment for four shipments of clothing delivered in August, October, and November

of 2010. In addition to claims against the purchasers, plaintiff has included parties along the entire shipment chain. The instant summary judgment motion is brought by non-purchaser defendants Jenson Logistics, Inc. ("Jenson") and Dynamic Worldwide Logistics (Shanghai) Limited ("Dynamic") (collectively, the "Shipping Defendants").

Statement of Facts

Plaintiff Suzhou Industrial Park Ronwi Garments Co., Ltd ("Ronwi") is a Chinese corporation. (First Am. Compl. at ¶ 2). Plaintiff SMIC Group is a New York corporation. (*Id.* at ¶ 1). Ronwi manufactured and sold at least fourteen shipments of clothing to co-defendants Great Joy Limited, Great Joy Trading Group Inc. and Yong Xun Jiang ("Great Joy defendants") under a "Supplier Agreement." (*Id.* at ¶ 25). The goods were shipped from Shanghai, China, to California. (*Id.* at ¶ 25-29). Plaintiffs allege that the Great Joy defendants failed to pay the balance outstanding for the four shipments. (*Id.* at ¶ 31-32).

Jenson acted as the Non-Vessel Operating Common Carrier, or Ocean Transportation Intermediary, for the shipments. (Affidavit of Shin Liu sworn to Sept. 3, 2013, ¶ 3). Jenson used Dynamic as its agent in China for the shipments. (Liu Aff. ¶ 8). Jenson issued bills of lading for each shipment containing Ronwi's name

as the shipper, Great Joy as the consignee, SMIC Group as the immediate consignee/notify party, and Jenson as the destination agent (Ex. E to Liu Aff.). The bills of lading used for all fourteen shipments are two-sided documents. The front is a form into which information about the shipment, shipper, and other parties is input. The back of the document contains its terms and conditions.

Plaintiffs sued Jenson and Dynamic, alleging improper delivery of these four shipments to the Great Joy defendants. (First Am. Compl. at ¶ 72). Plaintiffs claim they were harmed because the Shipping Defendants failed to obtain the original bills of lading from the Great Joy defendants prior to releasing the merchandise to them, in violation of given instructions. (*Id.*).

The Claims

The amended complaint asserts the following causes of action against Jenson and Dynamic: the Second Cause of Action for breach of express contract, the Third Cause of Action for breach of implied contract, the Seventh Cause of Action for breach of the implied covenant of good faith and fair dealing, and the Ninth Cause of Action for negligence.

Legal Arguments

Shipping Defendants argue that plaintiffs' claims are barred by the one-year period of limitation specified in the Carriage of Goods by Sea Act ("COGSA") against Jenson on the first shipment and against Dynamic on all four shipments.

Shipping Defendants also argue that the bills of lading were non-negotiable and the goods were deliverable to the party listed as consignee on the documents without any preconditions. They also argue that the bills of lading served as contracts for the shipments, to which plaintiffs were bound, and therefore a claim for implied contract cannot stand. Finally, they challenge the negligence claim as duplicative of the contract claim.

Plaintiffs argue in opposition that they are not parties to the bills of lading contracts and therefore the contractual terms and COGSA do not apply to them. They sue instead as intended beneficiaries. Thus, they contend that the relevant statutes of limitations are three years for negligence claims and six years for contract claims. They also urge that they explicitly requested that Shipping Defendants not release the cargo until payment was cleared.

Analysis

Standard for Summary Judgment

A summary judgment "motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party" and "denied if any party shall show facts sufficient to require a trial of any issue of fact." (CPLR 3212[b]). The movant "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [citing *Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]]).

Bills of Lading

A bill of lading serves as a contract for shipment between a shipper of goods and a common carrier. "Bills of lading 'bind the shipper and all carriers,' and '[e]ach term has in effect the force of statute of which all effected must take notice.'" (*NYMET Indus. Solutions, Inc. v Maersk, Inc.*, 818 F Supp 2d 511, 513 [ED NY 2011] [citations omitted]).

Ronwi entered into at least fourteen shipments with these same parties. The bills of lading define Ronwi as subject to their terms in Paragraph 1: "(E) Merchant includes the shipper, consignor, consignee, owner and receiver of the Goods and the holder of this Bill of Lading." (Liu Aff. ¶ 4[1]). Plaintiffs concede that Ronwi was a party to the bills of lading. (*See* Affirmation of Heng Wang dated Sept. 30, 2013, ¶ 6).

Applicability of COGSA

The Carriage of Goods by Sea Act ("COGSA"), the United States enactment of the Hague Rules, allocates the risk of loss for cargo damaged during international transportation under contracts evidenced by bills of lading. (*Stolt Tank Containers, Inc. v Evergreen Marine Corp.*, 962 F2d 276, 279 [2d Cir 1992]).

Each shipment here originated in Shanghai, China, and was carried by ocean transport to Los Angeles, California. There are four bills of lading attached to those shipments. Regardless of whether COGSA applies by operation of law to these shipments, the bills of lading specifically incorporate the terms of COGSA in paragraph 2: "[i]f this Bill of Lading covers Goods moving to or from ports of the United States in foreign trade, then carriage of such goods shall be subject to the provisions of the United States Carriage of Goods by Sea Act, 1936, 46 U.S.C. P

1300-1315 as amended (hereinafter 'U.S. COGSA'). The terms of which shall be incorporated herein." (Liu Aff. ¶ 4[2]). Thus, the contract's stated choice of law requires that COGSA apply to the instant bills of lading. (*See, e.g., Sony Computer Entertainment Inc. v Nippon Exp. U.S.A. (Illinois), Inc.*, 313 F Supp 2d 333, 336-37 [SD NY 2004] [contract can choose COGSA to control]; *Colgate Palmolive Co. v S/S Dart Canada*, 724 F2d 313, 315 [2d Cir 1983] [parties can contract to extend COGSA "beyond its normal parameters"]; *U.S. v Ultramar Shipping Co., Inc.*, 685 F Supp 887, 890 [SD NY 1988]).

Additionally, non-parties to bills of lading are subject to the liability limitations of COGSA. (*See In re M/V Rickmers Genoa Litig.*, 643 F Supp 2d 553, 558-59 [SD NY 2009] [citing *Stolt Tank Containers, Inc. v Evergreen Marine Corp.*, 962 F2d 276, 279-80 [2d Cir 1992] ["all shippers, even non-party shippers to bills of lading – that is, shippers who do not directly contract with carriers but rather rely on common carriers or NVOCC's to accomplish intermediate delivery of their goods to ocean carriers–are, or should be, aware of the COGSA § 4(5) liability limitation rule"]).

Liability of Defendant Jenson

Statute of Limitations

COGSA contains a period of limitations for bringing suit for shipments that fall within its purview. It provides: "the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered." (46 USC § 30701[3(6)]; *E.g. Unilever (Raw Materials) Ltd. v M/T Stolt Boel*, 77 FRD 384, 386-87 [SD NY 1977]; *American Hoesch, Inc. v S.S. Aubade*, 316 F Supp 1193, 1194 [D SC 1970]).

The first shipment at issue, labeled "purchase order #434-V, SMIC invoice #USA01100809," was delivered on or about August 26, 2010. This action was commenced against Jenson on October 26, 2011. (First Am. Compl. At ¶ 26). Therefore, all claims based on this first delivery are barred by the statute of limitations.

Implied Contract Claim

"A cause of action predicated on a theory of implied contract or quasi-contract is not viable where there is an express agreement that governs the subject matter underlying the action." (*Scott v Fields*, 92 AD3d 666, 669 [2d Dept 2012]

[citing *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388-89 [1987]]). The existence of an express contract regarding the same subject matter precludes an implied contract claim. (*Id.*).

Here, the express contracts are in the form of the bills of lading regarding the exact same shipments in both the Second and Third Causes of Action. Thus, the Third Cause of Action for breach of implied contract must be dismissed.

Implied Covenant

Plaintiffs' claim for breach of the implied covenant of good faith and fair dealing duplicates their claim for breach of contract. (*Sebastian Holdings, Inc. v Deutsche Bank, A.G.*, 108 AD3d 433, 434 [1st Dept 2013]).

Negligence Claim

Shipping Defendants argue that negligence is not a viable cause of action because the claim is based on the parties' contracts. This is generally the rule, unless there exists a duty independent of the contract. (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d at 389 ["It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated"]; *New York Univ. v*

Continental Ins. Co., 87 NY2d 308, 316 [1995]; *OP Solutions, Inc. v Crowell & Moring, LLP*, 72 AD3d 622, 622 [1st Dept 2010].

Plaintiffs argue that (1) Shipping Defendants failed to perform their contractual duties properly, and (2) an independent duty of care existed because plaintiffs explicitly requested that defendant Jenson only release shipments to co-defendants after it obtained original bills of lading.

Plaintiffs' evidence of an independent duty of care consists of an alleged email exchange and Xiaodon Yuan's understanding or translation of that exchange. (Ex. F to Wang Aff.; Depo. Xiaodon Yuan 142:22-143:22, Ex. D to Wang Aff.). These emails are written mostly in Chinese and plaintiffs fail to offer a translation for the Court. Evidence which has not been translated is inadmissible, and a translation without an affidavit of the translator's qualifications and accuracy is similarly barred. (CPLR 2101[b]; *501 Fifth Ave. Co. LLC v Alvona LLC*, 110 AD3d 494, 494 [1st Dept 2013]; *Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47, 54 [2d Dept 2011]; *Martinez v 123-16 Liberty Ave. Realty Corp.*, 47 AD3d 901, 902 [2d Dept 2008]). Thus, the negligence claim must be dismissed.

Express Contract Claims - Proper Delivery

Shipping Defendants argue that plaintiffs' express contract

claims are not viable because there is a presumption of proper delivery under COGSA, and notice of any defect was given too late. Shipping Defendants rely on COGSA's provisions, which state in relevant part, "[u]nless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading" and "[i]f the loss or damage is not apparent, the notice must be given within three days of the delivery." (46 USC § 30701[3(6)]).

However, the notice requirement applies to damage or loss of the goods themselves and not to financial damage due to non-payment. The issue of notice of defect is inapplicable here.

Shipping Defendants also argue that delivery was proper because the bills of lading were non-negotiable and obtaining the original bills of lading was not a requirement for proper delivery. A bill of lading is "straight" or "non-negotiable" when it states that the goods are to be delivered to a consignee. (*Quanzhou Joerga Fashion Co., Inc. v Brooks Fitch*

Apparel Group, LLC, 2012 WL 4767180, *6 [SD NY 2012]; 49 USC § 80103[b]). A "negotiable" bill of lading states that the goods are to be delivered "to the order of" a consignee, and does not contain on its face an agreement with the supplier that the bill is not negotiable. (*Id.*; 49 USC § 80103[a]).

Surrender of the original bill of lading is not required if the bill of lading is non-negotiable and where such a condition is not specifically demanded by the shipper. (*Quanzhou Joerga Fashion Co., Inc.*, 2012 WL 4767180, *6; *Gubelman v Panama R. Co.*, 192 AD 165, 168 [1st Dept 1920]). The carrier of a non-negotiable bill of lading "needs concern itself only with the identity of the person to whom it delivers the goods; surrender of the bills of lading not being required." (*Lunsford v Farrell Shipping Lines, Inc.*, 1991 WL 150596, *7 [SD NY 1991] ["[a] carrier which has issued a non-negotiable bill of lading normally discharges its duty by delivering the goods to the named consignee; the consignee need not produce the bill or even be in possession of it; the piece of paper on which the contract of carriage is written is of no importance in itself." [citing Gilmore and Black, The Law of Admiralty §§ 3-4 [2d ed 1975]; *Pere Marquette R. Co. v Chicago & E.I. Ry. Co.*, 255 F 40, 41-42 [7th Cir. 1918]).

Here, the bills of lading were non-negotiable since Great Joy Trading Company was listed in the box labeled "Consigned to." The Great Joy Trading Company is thus clearly demarcated as the party to whom the merchandise was to be delivered. Therefore, Shipping Defendants were entitled to deliver the goods to the Great Joy Trading Company, with no requirement that they obtain the original bills of lading from them.

Plaintiffs argue that "[d]ue to Great Joy's failure to make payments, Plaintiffs instructed Jenson and Dynamic not to release the merchandise unless they were shown the original Bill of Lading." (First Am. Compl. at ¶ 71; Ex. F to Sakal Aff.; Depo. Xiaodon Yuan 142:22-143:22). This argument lends further weight to the Shipping Defendants' contention of proper performance on the contracts as originally written, for had such a provision been included in the original contracts, a subsequent request would appear unnecessary or at least redundant.

It does, however, raise the question as to whether such instructions were in fact made and whether they were ignored to plaintiffs' detriment. (*E.g. Lunsford v Farrell Shipping Lines, Inc.*, 1991 WL 150596, *10 [SD NY 1991] [dismissing claim where plaintiff's "unsupported statement" that carrier breached

contract in failing to obtain original bill of lading because they "knew or should have known" that payment first was required was insufficient]; *Gubelman v Panama R. Co.*, 192 AD at 168 ["carrier was justified in delivering the goods to the consignee named in the bill of lading . . . as it had not received a notification that such delivery should not be made until the advance made by plaintiff had been paid"] [citations omitted]; *Intl Dictating & Telephone Equip., Inc. v Randy Intl Ltd.*, 225 AD2d 362, 362 [1st Dept 1996]; *Brooklyn Overall Export Co. Ltd. v Amerford Intl Corp.*, 83 AD2d 598, 599 [2d Dept 1981]).

Although, as submitted, the emails and purported translation are inadmissible, if they speak to what the Yuan deposition testimony outlines, the email outlining the request was sent on November 13, 2010 and acknowledged by Jenson in an email sent on November 15, 2010. (Depo. Xiaodon Yuan 142:22-143:22; Ex. F to Wang Aff.). The shipment dates at issue in 2010 are August 3, October 16, October 29, and November 10. (First Am. Compl. at ¶ 26-29). The delivery dates at issue in 2010 are August 26, October 29, November 10, and November 23. Plaintiffs' emailed request and Shipping Defendants' alleged confirmation are dated after all four shipments at issue had been shipped, when only one shipment, the last, remained to be

delivered.

It is a question of fact whether the request was thus made and confirmed and whether Shipping Defendants' employees engaged in releasing the cargo to Great Joy were sufficiently aware of the new instruction prior to the release of the final shipment. Thus, only the final shipment in the complaint may form the basis of plaintiffs' breach of contract claim against Jenson.

Liability of Defendant Dynamic

Dynamic argues that because it is Jenson's agent, it cannot be held liable for services rendered in this role. Clauses limiting liability for subcontractors and agents are regularly upheld. (*See, e.g., St. Paul Travelers Ins. Co. v M/V Madame Butterfly*, 700 F Supp 2d 496, 509 [SD NY 2010]). Parties are permitted to extend the provisions of a contract, including COGSA's terms, to third parties such as agents. (*Carle & Montanari, Inc. v American Export Isbrandtsen Lines, Inc.*, 275 F Supp 76, 78 [SD NY 1967] ["The parties to a bill of lading may extend a contractual benefit to a third party by clearly expressing their intent to do so"]).

In the terms and conditions of the bills of lading, there is an explicit provision immunizing subcontractors. (*Id.* at 5). Paragraph 5 states:

> "(B) Merchant warrants that no claim shall be made against any Subcontractor (as defined in Article 1(J), or Subcontractor, of Ocean Carrier, . . . that imposed or attempts to impose upon any of them or any vessel owned or operated by any of them any liability in connection with the Goods, and if any such claims should be nonetheless made, to indemnify the Ocean Carrier against all consequences of such claims. (C) Without prejudice to the foregoing, every Subcontractor (and Subcontractor's Subcontractor) shall have the benefit of all provisions of this Bill of Lading for the benefit of the Ocean Carrier as if such provisions were expressly for the Subcontractor's benefit. In entering into this contract the Ocean Carrier, to the extent of those provisions, does so not only on its own behalf of such Subcontractors."

Agency is generally a question of fact that requires a showing that the purported agent worked for the benefit of the principal, and that the principal maintained control. (*Deep Blue Ventures, Inc. v Manfra, Tordella & Brookes, Inc.*, 6 Misc 3d 727, 731-32 [Sup Ct, New York County 2004]).

Shipping Defendants state that Dynamic's role was as Jenson's agent in China. Plaintiffs themselves sued Jenson first, and only amended their complaint later to include Dynamic. Importantly, only Jenson's name appears on each bill of lading. (*Id.; see Art Fin. Partners, LLC v Christie's Inc.*, 58 AD3d 469, 470 [1st Dept 2009] [citations omitted]). Plaintiffs provide no evidence that Dynamic is not an agent of Jenson's, other than some slightly inconsistent language from a

deposition. (*See* Liu Depo. at 16:16-17:23).

Alternatively, the claims against Dynamic are time-barred. The bills of lading include a precise marker of when a claim is considered "brought" in paragraph 25[B]: "Suit should not be considered to have been 'brought' within the time specified unless process shall have been served and jurisdiction obtained over the Ocean Carrier within such time." (Liu Aff. ¶ 4). Dynamic was not named a defendant or served process until approximately December 28, 2011. (First Am. Compl.). This date falls outside the one year statute of limitations for all four shipments.

In accordance with the foregoing, it is hereby

ORDERED that the motion of defendants Jenson Logistics, Inc. and Dynamic Worldwide Logistics (Shanghai) Limited for summary judgment dismissing the complaint is granted, except as to so much of the Second Cause of Action as alleges breach of express contract against defendant Jenson Logistics, Inc. for the fourth shipment at issue, for which summary judgment is denied; and it is further

ORDERED that the Clerk of Court shall sever and dismiss all claims and cross-claims as against defendant Dynamic

Worldwide Logistics (Shanghai) Limited.

This constitutes the decision and order of the Court.

Dated: April 17, 2014

ENTER:

Ellen M. Coin, A.J.S.C.