

Certain Underwriters at Lloyd's, London v Boxart Inc.

2025 NY Slip Op 32163(U)

May 18, 2025

Supreme Court, New York County

Docket Number: Index No. 155219/2023

Judge: David B. Cohen

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

PRESENT: HON. DAVID B. COHEN PART 58

Justice

-----X

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON,
Plaintiff,

INDEX NO. 155219/2023

MOTION DATE 01/12/2024

MOTION SEQ. NO. 002

- v -

BOXART INC., THE FORTRESS CORPORATION, THE
FORTRESS NEW YORK HOLDINGS INC., FORTRESS
JUDSON, INC.,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48

were read on this motion to/for DISMISSAL.

Defendant Boxart Inc. (Boxart) moves, pursuant to CPLR 3211(a)(1), (5), and (7), to dismiss with prejudice plaintiff's causes of action for negligence, breach of contract, negligent misrepresentation, and intentional misrepresentation, and to award Boxart its costs and fees.

I. PROCEDURAL BACKGROUND AND FACTS

Plaintiff, as subrogee of Lehmann-Art Ltd., Rashel-Art Ltd., and Jean-Pierre and Rashel Lehmann (collectively, Subrogors), commenced this subrogation action on June 9, 2023 (NYSCEF 1), and filed an amended complaint on December 4, 2023, and refiled it in corrected form on December 15, 2023 (NYSCEF 18).

Amended Complaint (NYSCEF 18)

Plaintiff alleges in the amended complaint that in 2012, defendant Boxart Inc. agreed to design, build, and deliver a custom "museum quality" crate specifically suited to protect a unique and irreplaceable artwork titled *Blow Job (Kama Sutra)*, by Jeff Koons (the Artwork).

On or about July 17, 2012, Boxart inspected the Artwork at a storage facility operated by the Fortress Defendants at 49-20 Fifth Street, Long Island City, to evaluate it so that it could design and build a new protective crate. Between July 17 and August 30, 2012, Boxart designed and built a specialty crate for the Artwork, then delivered it to the storage facility and packed the piece on site on August 30.

Boxart, through its agents, expressly and implicitly represented to the Subrogors and their agents that it had safely and adequately packed the Artwork in a custom crate measuring 37" x 34" x 27", with interior foam blocks to secure the piece. Boxart further represented that the crate was a "museum quality" container suitable for overseas travel. Plaintiff alleges that the Subrogors relied on these representations and did not inspect or repack the Artwork.

Plaintiff alleges that, after Boxart packed the Artwork on August 30, 2012, the crate sat undisturbed in Fortress's storage facility until staff opened it on June 11, 2020 and discovered the piece shattered—a total loss; because the crate was never moved in the interim, plaintiff maintains the damage could only have occurred on one (or both) of those two dates.

The Subrogors notified plaintiff of the breakage, and, on June 25, 2021, plaintiff received an 81-page forensic report (*Scientific Analysis of Fine Art Report 2034*) indicating that the Artwork's destruction resulted from external mechanical forces rather than inherent deterioration; plaintiff contends this was the earliest date on which it, or its Subrogors, could reasonably have discovered the cause of the damage.

Having paid the Subrogors the \$2,250,000 policy limit, plaintiff now sues Boxart as subrogee for negligence, breach of contract, and negligent and intentional misrepresentation.

Bill of Lading (NYSCEF 34)

Boxart submits a document titled “Bill of Lading,” dated August 30, 2012, on Boxart letterhead bearing the words “BOXART TRANSPORT. FINE ART SERVICES. CRATING. PACKING. TRANSPORT.” It lists Boxart as sender, and “Fortress – Main Location,” as recipient. The “Bill To” party is the Subrogors, Rachel and Jean-Pierre Lehmann, with an address on Green Street in New York, New York.

The order section of the form lists one item: a crate associated with the Artwork. The entry identifies the item as “1 of 1,” with crate dimensions of 37 x 34 x 27 inches, and notes its condition as “Prepped (Empty).” The instructions state, “Deliver 1 empty crate for pack on site.” A field labeled “Services” appears on the form but is blank.

Beneath, the “Terms of Agreement” state, in relevant part:

Unless a declared value is confirmed and a fee for insurance is paid, the total value of all property placed in Boxart’s possession is fixed at \$150 ... Boxart’s liability for any loss, damage or claim, including negligence, shall be limited to \$150 ... Any claim not presented in writing within 10 days of delivery shall be deemed waived.

Signature lines labelled “Released by” and “Received by” bear handwritten signatures dated August 30, 2012.

Fischer Affidavit (NYSCEF 33)

Dennis Fisher, Boxart’s principal, affirms that on August 30, 2012, Boxart issued and hand-delivered the bill of lading, a regular business record that caps Boxart’s liability at \$25.00 and requires written claims within 10 days of delivery.¹ He further states that no declared value or customer all-risk insurance was purchased for the Artwork, and attaches an invoice dated

¹ Fischer’s affidavit and Boxart’s opening memorandum mis-quoted the bill of lading as containing a \$25 cap and a 7-day notice provision; the bill itself, and Boxart’s reply, confirm the correct \$150 cap and 10-day period.

September 4, 2012, which was mailed to, and paid by, the Lehmanns without objection, confirming completion and acceptance of Boxart's work.

Invoice

Boxart submits an invoice dated September 4, 2012, bearing invoice number G019364.1 and issued to "Rachel & Jean-Pierre Lehmann Collection," attention Alisa Ochoa. The invoice references one Jeff Koons glass sculpture associated with the Lehmann Art Archives, and itemizes charges for services related to crating, packing, and transporting the sculpture.

Specifically, the invoice lists a \$150 charge for a site visit to measure the sculpture for crate construction; a \$1,030 charge to construct one "traveling crate" for packing on site; a \$175 charge for delivery of the crate; and a \$510 charge for packing the sculpture on site. The subtotal for these services is \$1,865. New York sales tax of \$165.52 is applied, bringing the total amount due to \$2,030.52. The invoice instructs payment to be made by check to Boxart, Inc. and that payment is due upon receipt.

II LEGAL STANDARD AND ANALYSIS

Pursuant to CPLR § 3211(a)(1), "[a] party may move for judgment dismissing one or more causes of action asserted against him on the grounds that ... a defense is founded upon documentary evidence[.]" Dismissal is "only warranted if documentary evidence conclusively resolves all factual issues to the asserted claims as a matter of law" (*Kolchins v Evolution Markets, Inc.*, 128 AD3d 47 [1st Dept 2015], *affd* 31 NY3d 100 [2018], *quoting Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267 [1st Dept 2004]). "To qualify as "documentary," the paper's content must be essentially undeniable and . . . , assuming the verity of [the paper] and the validity of its execution, will itself support the ground on which

the motion is based (*Amsterdam Hosp. Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 432 [1st Dept 2014] [internal citations omitted]).

CPLR 3211(a)(5) provides that a “party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . the cause of action may not be maintained because of . . . release . . . [or] statute of limitations.”

Pursuant to CPLR 3211(a)(7), the court must dismiss any cause of action where “the [plaintiff] fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery” (*Holder v Jacob*, 231 AD3d 78, 86 [1st Dept 2024] [citation omitted]). Dismissal of a complaint pursuant to CPLR 3211(a)(7) requires that the pleading be afforded a liberal construction and that “[the court] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon*, 84 NY2d at 87-88 [1994]; *Weil, Gotshal & Manges, LLP*, 10 AD3d at 271; *see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144 [2002]). “The question is whether the complaint adequately alleged facts giving rise to a cause of action” (*Sassi v Mobile Life Support Services, Inc.*, 37 NY3d 236, 239 [2021]).

In the amended complaint, plaintiff alleges that Boxart negligently designed, built, packed, and crated the Artwork, proximately causing the damage.

Boxart moves to dismiss the negligence claim on four grounds: (1) that the bill of lading releases Boxart from liability for negligence; (2) that the claim is time-barred; (3) that it is precluded under the economic loss doctrine; and (4) that plaintiff fails to adequately plead the elements of negligence.

Documentary Evidence

Plaintiff contends that Boxart's motion to dismiss fails to show a defense based on documentary evidence, arguing that the bill of lading is unauthenticated, that the signatories are unidentified agents, and that the document covers only delivery of an empty crate—not the subsequent packing. Plaintiff further argues that Fisher's affidavit lacks a proper foundation and it does not establish the basis for his personal knowledge and, in any event, is not documentary evidence.

Boxart replies that the signed bill of lading and the paid invoice together form the parties' contract and that acceptance of services and payment bind the plaintiff through its Subrogors to the bill's terms. Boxart further argues that although its opening brief misquoted the clause, the bill in fact contains a \$150 cap and a 10-day notice requirement, which plaintiff concedes it did not meet. Boxart lastly asserts that Fischer's affidavit, together with the signed bill of lading and paid invoice, constitutes sufficient evidence because it conclusively establishes a complete defense to liability.

Dismissal pursuant to CPLR 3211(a)(1) is warranted only if the documentary evidence submitted "utterly refutes plaintiff's factual allegations" (*Kolchins v Evolution Markets, Inc.*, 128 AD3d 47 [1st Dept 2015]). "Affidavits are not documentary evidence and are not appropriate proof on a CPLR 3211(a)(1) motion to dismiss" (*Johnson v Asberry*, 190 AD3d 491, 492 [1st Dept 2021]; see *U.S. Fire Ins. Co. v N. Shore Risk Mgt.*, 114 AD3d 408 [1st Dept 2014]; *Correa v Orient-Express Hotels, Inc.*, 84 AD3d 651 [1st Dept 2011]).

An unambiguous written agreement can constitute documentary evidence for purposes of a pre-answer motion to dismiss (*Seaman v Schulte Roth & Zabel LLP*, 176 AD3d 538 [1st Dept 2019]). A bill of lading is a contract of carriage that binds the shipper or its agent to its

limitations of liability (*see Arnold Exhibit & Design, Inc. v ABF Freight System, Inc.*, 245 AD2d 1067 [4th Dept 1997]; *see also Pryhuber v Maffucci Storage Corp.*, 170 AD2d 660 [2d Dept 1991]), and UCC § 7-309(b) expressly permits carriers to impose such caps where, as here, the consignor could declare a higher value.

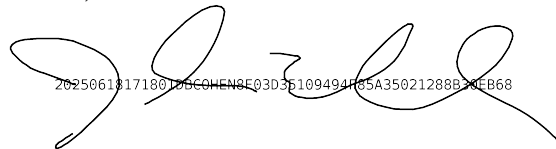
Here, the bill of lading and the invoice are authenticated business records; payment by Subrogors to Boxart without objection establishes assent even if the signatures are difficult to read (*Arnold*, 245 AD2d at 1067). Plaintiff offers only an attorney affirmation to contest authenticity, but an attorney's unsworn statement based on hearsay is insufficient (*Brodie v Bd. of Managers of Aldyn*, 226 AD3d 555 [1st Dept 2024]). Plaintiff supplies no affidavit from any person with personal knowledge—Subrogors, signatories, or otherwise—denying the document's genuineness or the signatures' validity. Consequently, the bill of lading and invoice qualify as documentary evidence and, by fixing liability at \$150 and requiring written claims within 10 days, “utterly refute” the negligence allegations and conclusively bar recovery (*see* UCC § 7-309[c]; *Pryhuber*, 170 AD2d at 660). Fisher's affidavit may authenticate the records under New York law, but as it pertains to the present motion, it does not qualify as documentary evidence (*Johnson*, 190 AD3d at 492).

Accordingly, the branch of Boxart's motion seeking dismissal of the fourth cause of action for negligence is granted. Moreover, because the bill of lading's “Terms of Agreement” broadly waives any liability beyond \$150 and deems all claims waived unless made in writing within 10 days of delivery, that contractual bar applies equally to plaintiff's remaining causes of action for breach of contract and for negligent and intentional misrepresentation. Those claims, therefore, fail for the same reason, and Boxart's motion is granted in its entirety; all causes of action are dismissed.

Accordingly, it is hereby

ORDERED that defendant Boxart, Inc.'s motion to dismiss is granted and the fourth, sixth, and seventh causes of action are severed and dismissed, and therefore all of plaintiff's claims against defendant Boxart, Inc. are severed and dismissed, and the clerk is directed to enter judgment accordingly; and it is further

ORDERED that the remaining parties appear for a preliminary conference on July 22, 2025, at 9:30 am, at 71 Thomas Street, Room 305, New York, New York.



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5/18/2025

DATE

DAVID B. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE