AMERICAN HOME ASSURANCE CO., ET AL. v. CROWLEY AMBASSADOR, ET AL.

01-Civ. 3605

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

2003 AMC 510

February 11, 2003

JUDGES:
PETER K. LEISURE, D.J.

HEADNOTES:
BILLS OF LADING - 1951. Limitation of Value - CONTAINERS - Disclosure of Contents.

The shipping container is the COGSA package where the evidence does not permit the trial judge to determine whether the contents may reasonably be considered to be COGSA packages. While plaintiff described sets of garments as wrapped in plastic, it did not disclose the number of such sets on the bill of lading. Accordingly, ocean carrier's motion for summary judgment to limit damages to $ 500 is granted.

DEVIATION - 11. In General.

Alleged failure of ocean carrier to provide armed guard service to protect a hijacked container of garments, even if proved, would not be sufficient to establish a deviation because the Second Circuit recognizes only geographical deviation and on deck stowage as improper COGSA deviations.

COUNSEL:
Edward C. Radzik and Timothy Semenoro (Donovan Parry McDermott & Radzik), for Amer. Home.

James L. Ross and William J. Pallas (Freehill Hogan & Mahar, LLP), for Crowley Ambassador.

OPINIONBY: LEISURE

OPINION:

[*510] PETER K. LEISURE, D.J.:

Plaintiff American Home Assurance Company ("American Home") brings this action as subrogee of Leslie Fay Company, Inc. ("Leslie Fay") against defendants *Crowley Ambassador*, her engines, boilers, etc., and Crowley American Transport, Inc. (collectively "Crowley"). Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Crowley moves for partial summary judgment limiting damages to $ 500 based on the package limitation provisions of the Carriage of Goods by Sea Act ("COGSA"). For the following reasons, defendants' motion is granted.

BACKGROUND

The facts in this action are relatively straightforward and, unless otherwise noted, are not in

dispute. The following overview is derived from the submissions of the parties and, of course, does not represent findings of fact by the Court.

[*511] During the relevant time period, Leslie Fay, a clothing company, had a service contract with Crowley, a shipping company, to ship clothing and other cargo between Central America and the United States at set rates based on the size of the container. Pursuant to this agreement, Crowley was to deliver one forty-foot container n1 of garments from El Salvador to Miami, Florida under bill of lading No. SALNOM001861 dated April 30, 2002. The container, provided by Crowley, is identified in the bill of lading as a "rack." A rack, also referred to as a garment on hanger container, is a container "equipped with ropes used for hanging individual pieces of garments." The container was loaded or, in the unique parlance of the shipping industry, "stuffed" by the shipper and not by Crowley, and contained 22,355 pieces of garments. According to plaintiff, these garments were prepackaged in sets wrapped in plastic. Neither the bill of lading nor plaintiff in its submissions indicates how many packaged sets were in the container.

n1 "Containers are large metal boxes resembling truck trailers save for the absence of wheels, roughly 8' high, 8' wide and with lengths up to 40' . . ., capable of carrying hundreds of packages in the normal sense of the term." *Mitsui & Co., Ltd. v. American Export Lines, Inc.*, 1981 AMC 331, 343, 636 F.2d 807, 816 (2 Cir. 1981) (Friendly, Ct.J.). They are normally provided by the carrier and are reused many times. *Id.* They are "functionally part of the ship." *Leather's Best, Inc. v. S.S. Mormaclynx*, 1971 AMC 2383, 2403, 451 F.2d 800, 815 (2 Cir. 1971) (Friendly, Ct.J.), and are "a modern substitute for the hold of the vessel." *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 270, 1977 AMC 1037, 1053-54 (1977).

A two-truck convoy from San Bartolo, El Salvador to Santo Tomas de Casitlla, Guatemala, the intended load port, was transporting the container holding Leslie Fay's garments, along with another container not at issue, when armed bandits allegedly hijacked it. Most of the contents of the container were lost. Plaintiff is suing for the value of the unaccounted-for garments, allegedly $ 400,000.

The face of the bill of lading contains a printed caption that reads "PARTICULARS FURNISHED BY SHIPPER." Under the caption, there are several columns. The first relevant column bears the heading "NO. OF TRLS./CONTS./ PKGS/" n2 and is filled in with "1 40FT." The other relevant column, entitled "DESCRIPTION OF CARGO," includes the following information: **[*512]**

SLAC RACK STC:
2,403 PCS DRESS
9,976 PCS BLOUSE
330 PCS PANT
9,646 PCS SKIRT
22,355 PCS n3

The following was typed across the bottom of this section of the bill of lading: "SERVICE CONTRACT NO. 99-16." n4 The bottom of the bill of lading includes the following notation:

"Liability limited unless increased value declared below; all as specified in section 16: Declared value: ___"

No value was entered by the shipper. Clause 16, on the reverse side of the bill of lading, indicates that COGSA's $ 500 per package limitation applies to the shipment unless the shipper declares the value of the goods and pays a higher shipping rate.

n2 "TRLS," "CONTS," and "PKGS" are abbreviations for trailers, containers and packages, respectively.

n3 "SLAC" is short for "shippers load and count," which means that the container was "stuffed" by the shipper. "RACK," as explained *supra*, refers to a container that has ropes on which to hang garments. "STC" stands for "said to contain," which means that Crowley did not have an opportunity to examine the garments in the container. *See Orient Overseas Container Line v. Sea-Land Serv. Inc.*, 2001 AMC 1005, 1007, 122 F.Supp.2d 481, 483 (S.D.N.Y. 2000). "PCS" is an abbreviation for pieces.

n4 In its submissions in connection with this motion, plaintiff states that the service contract between Leslie Fay and Crowley is incorporated, by reference into the bill of lading. The service contract provided to the Court, however, is entitled "SERVICE CONTRACT # 9911-1001." The only reference to a service contract on the bill of lading is No. 99-16. Neither party has explained this discrepancy. In any event, it is not crucial to the determination of this motion.

The service contract under which the parties were operating indicates that armed guard service was to be provided in El Salvador to protect Leslie Fay's shipments. n5 According to Patricia Dennehy, director of international operations for Leslie Fay, it was her understanding that this meant an armed guard with a cellular phone would escort each Leslie Fay container, in addition to the normal security provided by Crowley. According to a Crowley report regarding the theft of the container, one guard was accompanying the convoy when the hijacking occurred.

n5 Leslie Fay paid an additional $ 80.00 per shipment for this service.

[*513] DISCUSSION

I. Summary Judgment Standard *

* Discussion omitted. -- Eds.

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II. COGSA n6 and Package Limitation

n6 The statutory force of COGSA only applies after cargo is loaded and before it is discharged from the ship and to shipments between ports in the United States and foreign ports. *See* 46 U.S.C. app. 1301(e); *Seguros Illimani S.A. v. M/V Popi P*, 1991 AMC 1521, 1527, 929 F.2d 89, 93 (2 Cir. 1991) (Newman, Ct.J.). In this case, the loss of the garments occurred before the container was loaded onto the ship and, therefore, COGSA does not apply *ex proprio vigore*. Parties to a bill of lading, however, can, and often do, extend the coverage of COGSA contractually to the time before and after the actual voyage. Such an extension is a valid and enforceable contract term so long as it does not conflict with applicable state law. *See Colgate Palmolive Co. v. S/S Dart Canada*, 1984 AMC 305, 308-09, 724 F.2d 313, 315-16 (2 Cir. 1983); *cf.* 46 U.S.C. app. 1312 (stating that parties can contract to apply COGSA to shipments between ports in the United States). The bill of lading in the case at bar extends COGSA in this manner and both sides assume, *sub silentio*, that the extension is valid. The Court sees no reason not to make the same assumption. *Cf. Empire Hair Processing Corp. v. S.S. Aconcagua*,

No. 91 Civ. 0501, 1992 WL 354497, at *3 (S.D.N.Y. Nov. 17, 1992) (Leisure, D.J.) (applying COGSA to post-discharge period because of contractual agreement of parties).

In 1924, industrialized nations met in Brussels to amend the Hague Rules of 1921. *See Mitsui*, 636 F.2d at 815. The participating countries "recognized the need to reconcile the desire of carriers to limit their potential liability with their vastly superior bargaining power over shippers." *Monica Textile Corp. v. S.S. Tana*, 1992 AMC 609, 612, 952 F.2d 636, 638 (2 Cir. 1991) (McLaughlin, Ct.J.). *But see Leather's Best*, 1971 AMC at 2403, 451 F.2d at 815 ("It is true . . . that the standard arguments about the economic power of the carrier and the weak bargaining position of the consignor may be simply a recitation of an ancient shibboleth, at least as applied to shipments of containers fully packed by the shipper."). To balance these concerns, the Brussels Convention adopted a per-package limitation on liability. *Monica Textile*, 1992 AMC at 612, 952 F.2d at 638. These principles were adopted by the United States in 1936 when Congress enacted COGSA. *Id.; see also Robert C. Herd & Co. v. Krawill Mach. Corp.*, 359 U.S. 297, 301, 1959 AMC 879, 882 (1959) ("The legislative history of the Act shows that it was lifted almost bodily from the Hague Rules of 1921, as amended by the Brussels Convention of 1924.").

[*514] Section 4(5) of COGSA limits the liability of carriers to $ 500 per package "unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading." 46 U.S.C. app. 1304(5). A carrier cannot limit its liability below this statutory minimum. *Id.* Unfortunately, as numerous cases in this Circuit and others have noted, the statute and its legislative history provide no definition of "package." *See, e.g., Monica Textile*, 1992 AMC at 612, 952 F.2d at 638. This absence has vexed courts and parties in far too many cases to count. *See Orient*, 2001 AMC at 1011, 122 F.Supp.2d at 486 ("If it was the COGSA drafters' purpose to avoid the pains of litigation, they must be rolling in their graves. Myriad courts have struggled with what a COGSA package is." (internal quotations omitted)); *In re Maritima Aragua, S.A.*, 1992 AMC 1603, 1607, 1992 WL 42256, at *3 (S.D.N.Y. 1992) ("This omission has led perhaps to an excess of litigation on the subject. . . . Admiralty judges, lawyers and bill of lading draftsmen have found employment in filling in the gap, or trying to."); *Empire Hair*, 1992 WL 354497, at *4 ("Courts continually have struggled to shed light on this ambiguous term as modern technology has complicated the shipping business.").

The "container revolution" has further complicated package limitation litigation. *Mitsui*, 1981 AMC at 343, 636 F.2d at 816. "It did not take long for the carriers (or their P. and I. Insurers) to realize that if they could persuade the courts to consider a container rather than smaller units stowed inside to be the 'package' for purposes of § 4(5) of COGSA," they would save enormous sums of money. *Id.; see also Allied Int'l American Eagle Trading Corp. v. S.S. Yang Ming*, 1982 AMC 820, 824, 672 F.2d 1055, 1058 (2 Cir. 1982) ("Naturally, carriers and their insurers attempted to turn this technological advance into a financial one too, by arguing that containers are 'packages' for which shippers can recover only $ 500."). Judges, however, have recognized the problems involved with these attempts, and have limited shipping companies' ability to claim that the container is the relevant package. *See Smythgreyhound v. M/V Eurygenes*, 1982 AMC 320, 323, 666 F.2d 746, 748 n.5 (2 Cir. 1981) (stating that "'a container rarely should be treated as a package'" (quoting *Croft & Scully Co. v. M/V Skulptor Vuchetich*, 1981 AMC 305, 312, 508 F.Supp. 670, 678 (S.D. Tex. 1981), *aff'd in relevant part*, 1982 AMC 1042, 664 F.2d 1277 (5 Cir. 1982))). That is not to say, however, that a container can never be deemed to be the COGSA package.

The Second Circuit has adopted two rules with regard to package limitation -- one rule for container cases and another rule for non-container cases. *Monica Textile*, 1992 AMC at 615, 952 F.2d at 640. The Court "has **[*515]** rejected any notion that container and non-container" cases were interchangeable," but rather these cases should be treated as "separate lines of authority." *Id.* A case belongs in the non-container line when neither party contends that the relevant package is the container. The instant action, however, is a container case because Crowley contends that the container is the COGSA package.

In container cases, "if the bill of lading lists the container as a package and fails to describe objects that can reasonably be understood from the description as being packages, the container must be deemed a COGSA package." *Binladen BSB Landscaping v. M.V. Nedlloyd Rotterdam*, 1985 AMC 2113, 2124, 759 F.2d 1006, 1015 (2 Cir. 1985). However, "when a bill of lading discloses on its face what is inside the container, and those contents may reasonably be considered COGSA packages, then the container is not the COGSA package." *Monica Textile*, 1992 AMC at 614, 952 F.2d at 639.

In *Binladen*, the Second Circuit noted the difference between cases like *Mitsui* in which the bill of lading "listed not only the number of containers but the number of items qualifying as packages (i.e., connoting preparation in some way-for transport), such as 'bundles,' 'cartons,' or the like," and cases in which the bill of lading does not disclose an alternate package other than the container. *Binladen*, 1985 AMC at 2122, 759 F.2d at 1013. The Court also noted that there can be circumstances in which cargo is prepared for shipment in such a way that would normally warrant treatment as a package but the failure of the shipper to so indicate on the bill of lading would preclude such treatment. n7 1985 AMC at 2123, 759 F.2d at 1014. The Court cited approvingly *Sperry Rand Corp. v. Norddeutscher Lloyd*, 1973 AMC 1392, 1398-99 (S.D.N.Y. 1973), in which the bill of lading listed one container as the number of packages and described the contents as 9,500 electric shavers. The evidence presented showed that there were actually 190 cartons, each holding 50 shavers, "stuffed" into **[*516]** the container. However, Judge Lumbard, sitting in the district court by designation, held that the container was the COGSA package because the cartons had not been disclosed on the bill of lading. *Id.*

n7 The *Binladen* Court was concerned with certainty, stating:

> When a bill of lading specifies the number of containers but does not reveal the number of packages inside, the only certain figure known to both parties is the number of containers being shipped. In such event the carrier cannot be charged with knowledge of whether the container is filled with packages, with unpackaged goods, or with some combination. The carrier should not be expected to assume the risk inherent in such uncertainty, facing liability that might vary by orders of magnitude depending on the exact packaging of goods inside a sealed container, even though this information was not revealed to it by the bill of lading.

Binladin, 1985 AMC at 2125, 759 F.2d at 1015.

In the case at bar, the bill of lading lists the container as a package and the description of the garments does not indicate anything regarding preparation for shipment. Plaintiff attempts to avoid the harsh result of limiting the recoverable damages to $ 500 by arguing that through the course of dealing between Leslie Fay and Crowley, defendants had sufficient notice of the number of packages. Therefore, American Home argues that the Court should find that there were 22,355 packages in the container because the garments were wrapped in plastic.

Even if a course of dealing between parties can substitute for a bill of lading that fails to describe adequately contents that can be considered packages, n8 such an argument is unavailing in the case at bar because, despite plaintiff's protestations to the contrary, there is no indication on the bill of lading exactly how many of these "packages" were in the container. Indeed, to date, plaintiff seems not to know how many plastic-wrapped sets there were. In her affidavit in opposition to this motion, Dennehy states that the garments were packaged in sets but she does not indicate how many of these sets there were. *See Affidavit of Patricia Dennehy, sworn to on May 1, 2002, P10 ("Each garment on hanger . . . was individually packaged in a plastic bag. A set of clothes (e.g. Blouse and skirt or blouse and pants) was individually packaged and shipped as a [garment on hanger]."). She does say that she "believed that . . . thousands of packages of garments were shipped." Id.* P12. This information is simply not

sufficient for the shipper at the time, and the Court now, to know how many packages were in the container. This is precisely the type of uncertainty that concerned the *Binladen* Court. *See supra* note 7. While the Court appreciates the reluctance of judges to deem containers the COGSA package, there is simply no other viable option in this matter under the case law that has developed in this Circuit. n9 While the alleged **[*517]** plastic wrapping of the sets certainly might have been enough for them to be deemed COGSA packages, the lack of disclosure on the bill of lading of the true number of sets is fatal to plaintiff's argument. n10

n8 The Court expresses no opinion regarding the general availability of this line of argument.

n9 In its memorandum of law, plaintiff cites to *Marcraft Clothes, Inc. v. M/V Kurobe Maru*, 1984 AMC 2876, 575 F.Supp. 239 (S.D.N.Y. 1983), a case in this district with similar facts as the case *sub judice*. In that matter, the Court held that each set of garments was a COGSA package. There are significant reasons, however, for the Court not to follow *Marcraft*. As an initial matter, this Court is not bound by the determination in *Marcraft*. *See In re Oxford Health Plans, Inc.*, 191 F.R.D. 369, 377 (S.D.N.Y. 2000) ("Principles of *stare decisis* do not require this Court to give any deference to decisions of another district judge."). Furthermore, the facts of *Marcraft* are distinguishable. In that case, the description on the bill of lading was quite clear as to the number of garment sets that were "stuffed" in the container, *see Marcraft*, 1984 AMC at 2879, 575 F.Supp. at 242 ("The bill of lading contained a description of the goods enclosed: '4,400 Sets of Men's Suits with Vest.'"), while in this case there is no indication as to the number of plastic-wrapped sets. Finally, the Second Circuit has seriously questioned whether *Marcraft* was correctly decided. In *Binladen*, Court noted that the *Marcraft* decision does not indicate what number was entered in the packages column of the bill of lading. The Circuit Court went on to say, "If the entry in the 'packages' column was '1 container,' . . . we would, absent further information, be inclined to disagree with the decision." *Binladen*, 1985 AMC at 2124, 759 F.2d at 1015 n.10. The plaintiff in the instant action states that the Second Circuit gave *Marcraft* only a "cursory glance" and "did not fully appreciate" the facts of the case. This Court, however, will not cavalierly assume that Judges Mansfield, Oakes and Newman, the three distinguished judges on the *Binladen* panel, included a passage in their decision without fully considering its import or gave only a "cursory glance" to a cited opinion.

n10 Carriers must give adequate notice to shippers of the COGSA limitation and "fair opportunity" to declare excess value in order to avail themselves of the statute's protection. *Gen. Elec. Co. v. MV Nedlloyd*, 1987 AMC 1817, 1825, 817 F.2d 1022, 1028 (2 Cir. 1987). Defendants did so in this action.

III. Deviation

The plaintiff also asserts that defendants' COGSA protection is vitiated by an alleged breach of contract. Specifically, plaintiff contends that defendants failed to provide the security agreed to in the service contract. For this proposition, plaintiff cites one case, *Oliver Straw Goods Corp. v. Osaka Shosen Kaisha*, 1931 AMC 528, 47 F.2d 878 (2 Cir. 1931). *Oliver Straw* was a pre-COGSA unreasonable deviation case, a doctrine that does not apply to the case at bar.

It is established law that an unreasonable deviation from the contract of carriage precludes a carrier from invoking COGSA's $ 500 package limitation. *Sedco, Inc. v. S.S. Strathewe*, 1986 AMC 2801, 2804, 800 F.2d 27, 30 (2 Cir. 1986); *Iligan Integrated Steel Mills, Inc. v. S.S. John Weyerhaeuser*, 1975 AMC 33, 37-39, 507 F.2d 68, 70-73 (2 Cir. 1974). In the Second Circuit, however, this doctrine has been strictly limited to geographic deviation and unauthorized on-deck stowage. n11 *Sedco*, 1986 AMC at 2806, 800 F.2d at 31; *see also Iligan*, 1975 AMC at 36-37, 507 F.2d at **[*518]** 72; *Alternative Glass Supplies v. M/V Nomzi*, 1999 AMC 1080, 1086, 1999 WL 2870, at *6 (S.D.N.Y. 1999); *Maritima Aragua*, 1992 AMC at 1606, 1992 WL 42256,

at *2 ("The Second Circuit has made it clear that the doctrine of deviation is not one to be extended."). In this case there is no evidence or allegation of geographic deviation or unauthorized on-deck stowage. As such, the doctrine does not apply and the COGSA limitation is not vitiated. n12

n11 This limitation has been influenced by the Second Circuit's observation that the doctrine is "arguably inconsistent with COGSA." *B.M.A. Indus., Ltd. v. Nigerian Star Line, Ltd.*, 1986 AMC 1662, 1665, 786 F.2d 90, 92 (2 Cir. 1986). Other circuits have also limited the applicability of the doctrine. *See, e.g., SPM Corp. v. M/V Ming Moon*, 1992 AMC 2409, 2418, 965 F.2d 1297, 1304 (3 Cir. 1992).

n12 Even if the doctrine does apply, summary judgment may still be appropriate. The service contract simply states that there will be armed guard service. According to the Crowley report, a guard was traveling with the convoy when it was hijacked. Therefore, it is not clear that defendants breached the contract. It is unnecessary for the Court, however, to decide this issue.

CONCLUSION

Based on the foregoing, defendants' motion for partial summary judgment is granted. Plaintiff's damages, if liability is proven, are limited to $ 500 in this action.