

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THYSSEN, INC., N.A.,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	NO. 01-5136
	:	
NORFOLK SOUTHERN CORP.,	:	
NORFOLK SOUTHERN RAILWAY CO., and	:	
CONRAIL, INC.,	:	
Defendants.	:	

ORDER

AND NOW, this day of July, 2003, upon consideration of the three Motions for Summary Judgment filed on March 10, 2003 by Defendants Norfolk Southern Railway Company (“NSR”), Norfolk Southern Corporation (“NSC”), and Conrail, Inc. (“Conrail”) (**Docket Entry No.s 19, 20 and 21**), the Memorandum of Law in Opposition to the Motions for Summary Judgment of Defendants, filed by Plaintiff Thyssen, Inc., N.A. (“Thyssen”) on April 7, 2003 (Docket Entry No. 24), and the two Reply Memoranda filed on April 21, 2003 by Conrail and NSR (Docket Entry No.s 25 and 26), it is hereby ORDERED that the Motions for Summary Judgment are GRANTED for the reasons that follow.

Plaintiff Thyssen entered into a Contract¹ with Defendant NSR, pursuant to which NSR was to transport 181 steel coils, owned by Thyssen, by rail from Allenport, Pennsylvania to Bristol, Pennsylvania. See Second Amended Complaint (“Complaint”), filed August 8, 2002 (Docket Entry No. 11) at ¶ 10. The steel was loaded aboard 39 rail cars in November and December, 2000. See id. When the steel was delivered in January, 2001, it had allegedly sustained significant rust damage because it was kept in the rail cars for a period of 48 to 67 days. See id. at ¶¶ 15-16.² Thyssen initiated this action by filing a complaint on October 10, 2001. Thyssen alleges that the excessive shipment time, and the resulting damage to the steel, were caused by (1) the negligence of Defendants, and/or (2) Defendants’ breach of “the . . . terms and conditions of the bills of lading issued by Defendants,” and Thyssen seeks compensation for damages in the amount of \$344,680.85. See id. at ¶¶ 17-19.

All three Defendants have filed Motions for Summary Judgment.³ To prevail on a summary judgment motion, the moving party must show from the “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any” that “there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). When ruling on a motion for summary judgment, the court

¹ The document is entitled “Norfolk Southern Price Authority NSSQ 31593 Section 1B00,” and will be referred to hereinafter as the “Contract.” See Norfolk Southern Railway Company’s Motion for Summary Judgment (“NSR Motion”), Ex. 4.

² According to the Complaint, the “normal time frame” for rail transport should have been eight days or less. Complaint at ¶ 14.

³ Thyssen alleges that NSR and NSC were the owners and operators of the rail cars which carried the steel. See Complaint at ¶ 10. Thyssen alleges that Conrail is owned by NSR and/or NSC, and that Conrail assisted in providing delivery of the steel. See id. at ¶¶ 11-12.

must view the facts from the evidence submitted in the light most favorable to the non-moving party, and the court must take the non-movant's allegations as true. Groman v. Township of Manalapan, 47 F.3d 628, 633 (3d Cir. 1995). The movant is entitled to summary judgment if the non-moving party fails to demonstrate a dispute over facts that might affect the outcome of the suit, and fails to present sufficient evidence for a reasonable jury to find in its favor. See id.

When property transported by a common carrier is lost or damaged, the claims are controlled by the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. § 11706 (providing shipper with remedy “for the actual loss or injury to the property” caused by carrier), and the Interstate Commerce Commission regulations authorized thereunder, 49 C.F.R. §§ 1005.1-7. The Carmack Amendment “codifies the common-law rule making a carrier liable, without proof of negligence, for all damage to the goods transported by it, unless it affirmatively shows that the damage was occasioned by the shipper, acts of God, the public enemy, public authority, or the inherent vice or nature of the commodity.” Secretary of Agriculture v. United States, 350 U.S. 162, 166 n.9 (1956). Here, because Thyssen seeks damages stemming from a shipping agreement, the Carmack Amendment governs the parties' rights and liabilities, and preempts Thyssen's claims for negligence and breach of contract. See, e.g., Faust v. Clark and Reid Co., Inc., 1994 WL 675132, at *1 (E.D. Pa. 1994); Strike v. Atlas Van Lines, Inc., 102 F.Supp.2d 599, 600-01 (M.D. Pa. 2000) (Carmack Amendment preempts state law causes of action “whether contract based or tort based claims”); Cleveland v. Beltman N. Am. Co., 30 F.3d 373, 378 (2d Cir. 1994) (citing cases), *cert. denied*, 513 U.S. 1110 (1995).⁴

⁴ The principal purpose of the Carmack Amendment to the Interstate Commerce Act, which governs liability of carriers for lost or damaged goods, is to achieve national

(continued...)

Defendants' primary argument is that the Contract between Thyssen and NSR included a "condition precedent" requiring that, before a suit for freight loss or damage may be filed against NSR, Thyssen must file with NSR a claim for loss or damage within nine months of the date of delivery. Defendants further argue that the instant action is barred because this condition was not satisfied prior to the initiation of this action. The "condition precedent" relied upon by NSR is found in Section 2(b) of the Uniform Straight Bill of Lading ("USBL"), which provides:

As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier . . . within nine months after delivery of the property . . . ; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid.

NSR Motion, Ex. 6 at § 2(b).⁵ Thyssen does not dispute that, as a result of § 2(b), it was required to file a claim within nine months of the delivery of the steel. Moreover, there is no dispute as to the applicability of 49 C.F.R. § 1005.2, a regulation issued by the Interstate Commerce Commission specifying the minimum contents of a written claim for damage. See Foster Wheeler Energy Corp. v. Daily Exp., Inc., 485 F.Supp. 268, 271 (D.C. Pa. 1980). That regulation states, in pertinent part:

⁴(...continued)

uniformity in liability assigned to carriers. See Rini v. United Van Lines, Inc., 104 F.3d 502, 504 (1st Cir.), *cert. denied*, 522 U.S. 809 (1997).

⁵ The Carmack Amendment requires common carriers to issue a receipt or a bill of lading for property it receives for transportation. See 49 U.S.C. § 11706(a). Here, it is undisputed that the Contract between Thyssen and NSR incorporated the terms of the USBL. Furthermore, this provision of the USBL conforms to the mandate in the Carmack Amendment that a railroad carrier must provide a period of at least nine months for the filing of claims. See 49 U.S.C. § 11706(e).

(b) Minimum Filing Requirements. A communication in writing from a claimant, filed with a proper carrier within the time limits specified in the bill of lading or contract of carriage or transportation, and (1) containing facts sufficient to identify the baggage or shipment (or shipments) of property involved, (2) asserting liability for alleged loss, damage, injury, or delay, and (3) making claim for the payment of a specified or determinable amount of money, shall be considered as sufficient compliance with the provisions for filing claims embraced in the bill of lading or other contract of carriage.

49 C.F.R. § 1005.2(b).

In the case at bar, the evidence establishes that Thyssen has a two-step process pursuant to which it first files a “claim notification,” and then files a “claim.” See NSR Motion, Ex. 10 at 15. Pursuant to this process, Thyssen filed a claim notification with NSR shortly after the delivery date. However, Thyssen did not at any time file with NSR an actual claim for damage complying with the requirements set forth above in 49 C.F.R. § 1005.2(b).

More specifically, in early February, 2001, Thomas Burns, Thyssen’s Marine Insurance Manager,⁶ mailed a document entitled “Notification of Claim” to NSR. See NSR Motion, Ex. 9. This document identifies with specificity the property involved (the steel coils), and arguably implies that NSR may be liable for the alleged damage to the steel coils. See id. However, the document does not set forth a claim for the payment of a specified amount of money. See id. Rather, the document states that the “Estimated Amount of Claim” is “Not yet known,” and that a survey would be conducted (to evaluate the amount of the claim) at a date yet to be determined. See id.

⁶ Burns testified that it is his responsibility to file claims for damage with carriers on behalf of Thyssen. See NSR Motion, Ex. 10 at 13.

In February, 2001, in response to this “Notification of Claim,” NSC (acting on behalf of NSR) sent Thyssen a card (“NSC Acknowledgment Card”) which sets forth an assigned “CLM. NO.” (claim number), and which states as follows:

THIS ACKNOWLEDGES RECEIPT OF YOUR CLAIM(S), NOTICE(S) OR OTHER ITEM(S) LISTED ON THE REVERSE SIDE OF THIS FORM. WE WILL HANDLE ALL OF THESE ITEMS TO CONCLUSION AS PROMPTLY AS POSSIBLE.

PLEASE INCLUDE CLAIM NUMBERS ON ALL FUTURE CORRESPONDENCE AND ADDRESS SAME TO THE UNDERSIGNED. ALL CORRESPONDENCE FROM US ABOUT THESE ITEMS WILL BE SENT TO YOU BY NORFOLK SOUTHERN CORPORATION AS AGENT FOR THE PARTICULAR SUBSIDIARY RAILROAD INVOLVED IN THE TRANSPORTATION MOVEMENT RELATED TO THE ITEMS.

IF ANY ADDITIONAL INFORMATION OR DOCUMENTATION APPEARS NECESSARY FROM THE PAPERS ALREADY SENT US, WE WILL REQUEST IT BY A SEPARATE LETTER.

PLEASE NOTE THAT ANY FURTHER CLAIM FOR LOSS, DAMAGE OR DELAY TO FREIGHT – WHETHER RELATED TO THESE ITEMS OR OTHERWISE – SHOULD BE DIRECTED TO THE UNDERSIGNED, TOGETHER WITH ALL AVAILABLE PERTINENT INFORMATION AND ALL NECESSARY DOCUMENTS.

Plaintiff’s Memorandum of Law in Opposition (“Thyssen Memo”), Ex. D.

In January, February and March of 2001, surveys of the damage to the steel were conducted by a company hired by Thyssen, and in June, 2001, Thyssen received a final survey report assessing the value of the damage at \$329,128.15. NSR Motion, Ex. 12 at 12. However, following Thyssen’s receipt of the NSC Acknowledgment Card, no additional communication transpired between Thyssen and either NSR or NSC regarding the damaged steel (until the initiation of this action).

Moreover, Burns expressly acknowledged during his deposition that Thyssen did not ever file a claim for damage. See NSR Motion, Ex. 10 at 23-24.⁷

Relying upon Perini-North River Associates v. Chesapeake & O. Ry. Co., 562 F.2d 269 (3d Cir. 1977), Thyssen argues that, although it failed to file a claim for damage as required by the USBL, the “Notification of Claim” it sent to NSR, and the NSC Acknowledgment Card it received in return, are sufficient to establish that Defendants should be estopped from contending that Thyssen failed to comply with the claim filing requirements. In Perini-North River, the Court of Appeals concluded that estoppel principles may be applied in cases that arise under the Carmack Amendment when application of such principles would further the statutory purpose. See id. at 273. The Court further held that the carrier in that case was estopped from asserting the nine-month limitations period as a defense because the Court found that the carrier’s irregular conduct induced the plaintiff-consignee to believe that it did not need to file a written claim. Id. at 274.⁸

The evidence in the instant case clearly establishes that Thyssen cannot satisfy the elements of estoppel. In order for estoppel to apply, Thyssen must show (1) a representation by Defendants (2) upon which it reasonably relied (3) to its detriment. See, e.g., U.S. v. Asmar, 827 F.2d 907, 912

⁷ As further evidence that Thyssen’s “Notification of Claim” was not intended by Thyssen to be an actual claim for damage, NSR points to Burns’ deposition testimony in which he distinguishes between a “claim notification” and a “claim,” and expressly acknowledges that he filed a claim notification but never filed a claim with NSR. See NSR Motion, Ex. 10 at 24. NSR has also included in the record copies of prior claims for damage filed by Thyssen with NSR, to further emphasize the clear difference between a claim notification and an actual claim. See NSR Motion, Ex. 13.

⁸ The Court also noted that, although the carrier’s conduct may render the filing of a written claim unnecessary, actual knowledge on the part of the carrier as to the damage to the consignee’s property, without more, “cannot substitute for the written notice required by a bill of lading.” Id. at 273.

(3d Cir. 1987); Foster Wheeler Energy Corp. v. Daily Exp., Inc., 485 F.Supp. 268, 272 (D.C. Pa. 1980) (“In order for estoppel to apply, the fact finder must determine not only that there was some representation from the carrier concerning the filing of a claim, but also that the shipper relied upon the representation thereby failing to file a timely written claim.”). Here, Thyssen must show that it actually relied upon the representations in the NSC Acknowledgment Card in deciding not to file a claim for damage.

However, the evidence establishes that Thyssen did not rely upon the representations in the NSC Acknowledgment Card in deciding not to file a claim for damage. Rather, Burns’ deposition testimony definitively establishes that he never intended to file a claim for damage with NSR or NSC, and only intended to file a claim with Thyssen’s insurance company:

- Q. Well, actually, receipt of this card from Norfolk Southern did not prevent you from sending additional information to Norfolk Southern, did it?
- A. No.
- Q. Whether or not you received this card from Norfolk Southern, you were never going to file a claim with Norfolk Southern; is that correct?
-
- A. No. My intent was to send it to the insurance company.

NSR Motion, Ex. 10 at 98.⁹ Thus, Thyssen is unable to establish the elements of estoppel.

⁹ Thyssen argues that an affidavit signed by Burns approximately a month and a half after his deposition asserts that he did rely upon the NSC Acknowledgment Card in not filing a claim. See Thyssen Memo at 7. However, the carefully worded affidavit actually states only that, “[u]pon receipt of the card, it was my impression that Norfolk Southern Corporation was satisfied with the *notification* I had provided.” Thyssen Memo, Ex. H (emphasis added). The affidavit does not assert that Burns relied upon the representations in the NSC Acknowledgment Card in deciding not to file a claim for damage, nor does it contradict his deposition testimony that he had only ever intended to file a claim with Thyssen’s insurance company. The Court also notes that even if Burns’ affidavit did contradict his prior deposition testimony, the affidavit would be insufficient to establish a genuine issue of material fact. See

(continued...)

In short, Thyssen's failure to file a claim for damage satisfying the minimum filing requirements of 49 C.F.R. § 1005.2(b), and Thyssen's inability to establish the elements of a claim for estoppel, compel the conclusion as a matter of law that Thyssen is precluded from maintaining this action against Defendants to recover damage to its steel coils pursuant to the Carmack Amendment to the Interstate Commerce Act. Final judgment is therefore entered in favor of Defendants NSR, NSC and Conrail and against Plaintiff Thyssen. The Clerk of Court is directed to close this matter for statistical purposes.

BY THE COURT:

Legrome D. Davis

⁹(...continued)

Hackman v. Valley Fair, 932 F.2d 239, 241 (3d Cir. 1991) (“When, without a satisfactory explanation, a nonmovant’s affidavit contradicts earlier deposition testimony, the district court may disregard the affidavit in determining whether a genuine issue of material fact exists.”).