



container. Upon receiving the wine at the consolidation point, the consolidator/freight forwarder books the container with an ocean carrier for transport to the United States and arranges for the delivery of the loaded container to the Italian port where it begins its journey.

Mr. Faggi first learned about Gori in 1999, when he attended a wine show in Verona, Italy. Statement of Material Facts at ¶ 4. Mr. Faggi considered Gori “one of the major consolidator(s) and freight forwarder(s) when it comes to wine,” and therefore chose Gori to act as consolidator/freight forwarder for Ca’ de Be’s wine shipments. Faggi Dep. at 24:21-24. In Ca’ de Be’s dealings with Gori, Mr. Faggi used Gori’s New Jersey office. Statement of Material Facts at ¶ 4. The general practice between Ca’ de Be’ and Gori was that Mr. Faggi would line up his wine shipments with the wineries and then inform Gori of the details of the shipment by sending, either via facsimile or electronic mail, copies of the purchase orders. Statement of Material Facts at ¶ 5. Mr. Faggi then would inform the wine suppliers that Gori would act as consolidator and freight forwarder, and Gori and the suppliers would coordinate to deliver the wine to the consolidation point. Statement of Material Facts at ¶ 5. Gori would then book the shipment with an ocean carrier and place the shipment into the shipping container. The container would be transported to the port and loaded onto a steamship sailing for the United States. Statement of Material Facts at ¶ 5.

The parties agree that wine is a temperature sensitive commodity, and that, depending on the season, there are different types of containers in which wine is shipped to prevent it from becoming too warm or too cold. Statement of Material Facts at ¶ 6. For the shipment in question, which was shipped from Italy on August 7, 2001, the following were the container

options available to Ca' de Be': (1) an uninsulated ocean container with no temperature protection, known as a "dry container"; (2) an insulated container with a refrigeration unit that is not in use, called a "non-operating reefer"; and (3) an insulated container with an operating refrigeration unit, known as a "reefer container." Statement of Material Facts at ¶ 8. Based on the season and industry standards, Mr. Faggi chose to ship the wine in a reefer container.

Pursuant to the parties' agreement, Gori arranged for the shipment that is the subject of this dispute, comprised of 1,588 cases of wine, with Zim Israel Navigation Company, Limited ("Zim Israel"). The shipment was placed on the vessel Nord Eagle and was shipped on or about August 7, 2001. Statement of Material Facts at ¶ 11. The carriage of the wine was performed pursuant a Zim Israel Sea Waybill on which Gori was named as the "Shipper" and Ca' de Be' was named as the consignee. Zim Israel was not named as a party in this action. Defendant Zim American's only responsibilities with respect to the carriage was to prepare manifests and collect freights. Zim American was not a party named anywhere on the Sea Waybill.

The shipment arrived in the Port of New York on approximately August 20, 2001. Statement of Material Facts at ¶ 11. The wine remained in the container until August 27, 2001, when the wine was transported by truck via a trucking firm Ca' de Be' hired, William Parker Associates. Statement of Material Facts at ¶ 11. William Parker Associates delivered the shipment to Ca' de Be's Philadelphia facility on the same day, whereupon it was discovered that the wine was frozen solid and appeared to have been frozen for some time. Statement of Material Facts at ¶ 14. The wine was ruined and later sold at a salvage auction for \$10,000.

The dispute in this case centers around whether Mr. Faggi was aware that Ca' de Be' needed to buy separate insurance, in addition to that provided by Gori, to protect the shipment for damages due to temperature damage. Ca' de Be' asserts that when it initially began doing business with Gori in 1999, the wine shipments were covered by what was described to Mr. Faggi as an "all risk" policy purchased by Gori and provided by AXA Assicurazioni ("AXA"). Ca' de Be' further asserts that Mr. Faggi believed the "all risk" policy to include coverage for damages due to temperature fluctuations.

The parties agree that by notice dated June 6, 2000 (more than a year before the shipment in question), Gori was informed by AXA that its policies would no longer cover losses as a result of "natural deterioration of the shipped goods due to temperature fluctuations." See Gori Statement of Material Facts at ¶ 15. Ca' de Be' asserts that neither Fluvo Bosca, Gori's representative who dealt with Ca' de Be', nor any other representative of Gori advised Mr. Faggi of this change in insurance coverage. Gori neither confirms nor denies this assertion. Rather, Gori states that Mr. Faggi never specifically inquired as to whether the insurance Gori purchased for the shipment would cover temperature damage, and that Mr. Faggi made no effort to determine what hazards would be covered by the insurance provided even after receiving the shipping confirmation which indicated "Insurance: covered by Danzas."<sup>3</sup>

As a result of the shipping mishap, Ca' de Be' suffered a loss of \$151,307.82. Ca' de Be' filed the present complaint against Zim American, Giorgio Gori, SRL, and Giorgio Gori USA,

---

<sup>3</sup> "Danzas" is a shortened form of "Danzas Gori," the name under which Giorgio Gori USA did business.

Inc. on August 12, 2002. In the Complaint, Ca' de Be' asserts the following counts: (1) breach of contract against all defendants; (2) negligence against all defendants; (3) Carriage of Goods by Sea Act claim against Zim American; (4) fraud and misrepresentation against the Gori defendants; and (5) negligent misrepresentation against the Gori Defendants. Zim American filed its answer to the complaint on October 21, 2002, and included a cross-claim against the Gori Defendants. The Gori Defendants filed an answer to the complaint on November 15, 2002 and included a cross-claim against Zim American seeking indemnity for any liability that they are determined to have as to Ca' de Be'. Gori filed its motion for partial summary judgment on February 4, 2005, and Ca' de Be' filed its opposition to Gori's motion on February 15, 2005. Gori filed a reply to Ca' de Be's opposition on February 25, 2005.

## **DISCUSSION**

### **I. Legal Standard for Summary Judgment**

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show 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). An issue is “genuine” if the evidence is such that a reasonable jury or fact finder could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A factual dispute is “material” if it might affect the outcome of the case under governing law. Id.

A party seeking summary judgment always bears the initial responsibility for informing the district court of the basis for its motion and identifying those portions of the record that it

believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the moving party's initial burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." Id. at 325. After the moving party has carried its initial burden, "the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). Summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. Under Rule 56, the Court must view the evidence presented in the motion in the light most favorable to the opposing party. Anderson, 477 U.S. at 255.

## II. **Jurisdiction**

Jurisdiction in this case is appropriate pursuant to 28 U.S.C. § 1332 because the parties are diverse and the amount in controversy exceeds \$75,000. Ca' de Be' is a Pennsylvania corporation with a principal place of business in King of Prussia. Giorgio Gori, Srl, is an Italian corporation with a place of business in Hoboken, New Jersey, and Giorgio Gori, USA, Inc. is a Delaware corporation with a place of business in Hoboken, New Jersey. Zim American, which acted as an agent for Zim Israel Navigation Company, Ltd., was not a party to the Sea Waybill between Gori, Zim Israel Navigations Company, Ltd. and Ca' de Be'. Zim American conceded,

however, that as to any claims against it, federal jurisdiction was proper pursuant to 28 U.S.C. § 1333 because the claim arose under the Court's admiralty jurisdiction.

### **III. Motion for Partial Summary Judgment**

The Gori Defendants argue that summary judgment should be granted in their favor with respect to Counts IV and V of the Complaint, in which Ca' de Be' asserts claims for fraud and misrepresentation and negligent misrepresentation.

#### **A. Count IV - Fraud and Misrepresentation**

The Gori Defendants contend with respect to Count IV of the Complaint that Ca' de Be' has not sufficiently demonstrated that Gori intended to defraud Ca' de Be' by not providing insurance for temperature fluctuation damages. The Pennsylvania Supreme Court<sup>4</sup> has stated that fraud is comprised of "anything calculated to deceive, whether by single act or combination, or by suppression of truth, or suggestion of what is false, whether it be by direct falsehood or by innuendo, by speech or by silence, word of mouth, or look or gesture." Moser v. DeSetta, 589 A.2d 679, 682 (Pa. 1991). To establish a claim for fraud or misrepresentation,<sup>5</sup> a plaintiff must prove the existence of: (1) a false representation of an existing fact or a nonprivileged failure to disclose; (2) materiality, unless the misrepresentation is intentional or involves a nonprivileged

---

<sup>4</sup> The parties implicitly agree that Pennsylvania law would apply to resolve this dispute. Both Gori and Ca' de Be', in their respective submissions, cite to Pennsylvania law as being authoritative with respect to the claims of fraud and misrepresentation.

<sup>5</sup> Pennsylvania courts appear to use the term "fraud" and "intentional misrepresentation" interchangeably, applying the same elements for either claim. See, e.g., Gibbs v. Ernst, 647 A.2d 882, 889 (Pa. 1994) (noting that cause of action was for intentional misrepresentation or fraud). The elements of negligent misrepresentation, a claim which is often asserted as an alternative to intentional misrepresentation, do differ and are presented separately infra.

failure to disclose; (3) scienter, which may be either actual knowledge or reckless indifference to the truth; (4) justifiable reliance on the misrepresentation, so that the exercise of common prudence or diligence could not have ascertained the truth; and (5) damage or harm as a proximate result. Wittekamp v. Gulf & Western, Inc., 991 F.2d 1137, 1142 (3d Cir.), cert. denied 510 U.S. 917 (1993). The initial inquiry for a district court in ascertaining the viability of a claim for fraud or intentional misrepresentation is rigorous, requiring that the plaintiff demonstrate every element of the claim by clear and convincing evidence. Id.; see also Moser v. DeSetta, 589 A.2d at 682.

The Gori Defendants argue that summary judgment must be granted in their favor with respect to this count because there is no evidence in the record that anyone from Gori ever represented that the shipment was insured to protect against temperature fluctuations and, even assuming that there was such a representation, Ca' de Be' has presented no evidence that Gori intended to defraud Ca' de Be'. The Gori Defendants specifically argue that the only allegations in the Complaint supporting a claim of such a misrepresentation were with respect to Gori's confirmation that the wine was covered by insurance, but that in his deposition, Mr. Faggi specifically admitted that he did not have a conversation with anyone at Gori in which insurance for temperature fluctuations was discussed, and never inquired of Gori as to the scope of the insurance coverage in general.

In response, Ca' de Be' states that Mr. Faggi testified that when Ca' de Be' initially shipped with Gori in 1999 (two years before the shipment in question), Ca' de Be' was informed that the insurance provided by Gori for Ca' de Be's wine shipments would be covered for "all

risks” connected with shipping the wine, including temperature fluctuations. Ca’ de Be’ also stated, without citing to the record, that the type of insurance originally provided by Gori did cover risks of temperature fluctuation, and that the modification of coverage imposed by AXA on Gori thereafter was never communicated to Ca’ de Be’. Ca’ de Be’ argues that as a result of his belief (presumably emanating from his 1999 initial discussions with Gori) that “all risk” insurance included insurance with respect to temperature fluctuations, Mr. Faggi had no reason to inquire in connection with this August 2001 shipment as to whether these types of potential damages were covered. Ca’ de Be’ further asserts that the non-communication of the change in Gori’s insurance policy amounts to a misrepresentation that “induced Ca’ de Be’ to take no action with respect to insurance coverage.”

The Court finds that summary judgment is appropriate with respect to this count of the complaint because the evidence presented by Ca’ de Be’ in support of its claim for fraud does not meet the rigorous “clear and convincing evidence” requirement that is established under Pennsylvania law. The sum total of the evidence Ca’ de Be’ presents in support of its allegations of fraud and misrepresentation is: (1) deposition testimony by Mr. Faggi described above; (2) an electronic mail message that appears to be from an AXA representative to counsel for the Gori Defendants; (3) a copy of the shipping confirmation sent by Gori to Ca’ de Be’; (4) deposition testimony by Dr. Bennett (a subsequent officer of Ca’ de Be’); and (5) a copy of a letter from AXA to Gori that is written in Italian and remains untranslated. There is no testimony, by deposition or otherwise, from any of the Gori Defendants, and particularly no

“clear or convincing evidence” that would support a finding that Gori intended to defraud Ca’ de Be’ or other evidentiary support for meeting the scienter requirement.

The Court recognizes that the modification to the Gori insurance policy is a material fact, in that the present dispute arose from this exception. However, in his deposition, Mr. Faggi states that he does not recall ever having a conversation with someone from Gori in which he was directly told that the shipments would be insured for variations in temperature fluctuations. Faggi Dep. at 38:10-12. Rather, Mr. Faggi states that he just assumed such risks would be covered. Faggi Dep. at 38:10-12. These statements do not clearly and unequivocally support an allegation that Gori intentionally concealed the modification with a clear intent to defraud Ca’ de Be’. Additionally, Ca’ de Be’ provided no testimony of Gori representatives who dealt with Mr. Faggi, and, other than Mr. Faggi’s testimony, presented no evidence to suggest that Gori knew that Mr. Faggi specifically wanted to purchase (or expected Gori to purchase for Plaintiff’s account) extra insurance to protect against temperature variations and intentionally concealed that the insurance Gori provided would not cover such damage. In this case, the Court concludes that a reasonable juror could not find, by clear and convincing evidence, that Gori intended to deceive Ca’ de Be’. Summary judgment will therefore be granted with respect to Count IV of the Complaint.

**B. Count V - Negligent Misrepresentation**

The Pennsylvania Supreme Court has adopted the definition of negligent misrepresentation stated in the Restatement of Torts, which states that “[o]ne who, in the course of his business, profession or employment, or in any other transaction in which he has a

pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.” RESTATEMENT (SECOND) OF TORTS § 552; see also Rempel v. Nationwide Ins. Co., 370 A.2d 366, 367 (Pa. 1977) (adopting Restatement (First) of Torts definition).<sup>6</sup> In applying this standard, Pennsylvania courts have interpreted the Restatement test to require proof of the following specific elements: (1) misrepresentation of a material fact (2) made under circumstances in which the misrepresenter ought to have known its falsity (3) with an intent to induce another to act on it and (4) which results in injury to a party acting in justifiable reliance on the misrepresentation.<sup>7</sup> Heritage Surveyors & Engineers, Inc. v. National Penn Bank, 801 A.2d 1248, 1252 (Pa. Super. Ct. 2002). Additionally, to pursue a claim for negligent misrepresentation, a plaintiff must establish that a duty is owed by one party to the other.<sup>8</sup> Heritage Surveyors & Engineers, Inc., 801 A.2d at 1252.

---

<sup>6</sup> Rempel, which was decided in 1977, makes reference to the Restatement (First) of Torts. The Restatement (Second) of Torts was set forth that same year, and, aside from adding language with respect to duties imposed upon individuals who have a public duty to disperse information, the substantive elements remain essentially the same.

<sup>7</sup> In its opposition to the Gori Defendants’ motion, Ca’ de Be’ cites to Bortz v. Noon, 729 A.2d 555, 561 (Pa. 1999) with respect to the standard elements of a negligent misrepresentation claim. While the elements listed in that case are essentially the same as those stated in Heritage Surveyors, it must be noted that in Bortz the relationship in question was that of a real estate broker and a property purchaser. The Bortz court went to some length in exploring the existence of a duty between these types of parties. That is, however, obviously not the relationship presented in this case, and Bortz is therefore not completely analogous.

<sup>8</sup> In its Opposition Memorandum, Ca’ de Be’ asserts that the Gori Defendants owed Ca’ de Be’ a duty to notify it of the policy modification because the obligation to provide “all risk”

The elements of negligent misrepresentation differ from those of intentional misrepresentation in that the misrepresentation involved must be with respect to a material fact and the speaker need not know that his or her words are untrue, but must have failed to reasonably investigate the truth of these words. Heritage Surveyors & Engineers, Inc., 801 A.2d at 1252. Of particular importance in this instance, negligent misrepresentation may be proven by a preponderance of the evidence, as opposed to the clear and convincing evidence required to establish intentional misrepresentation or fraud. Fort Washington Resources, Inc. v. Tannen, 858 F. Supp. 455, 461 (E.D. Pa. 1994).

In the present case, the arguments presented with respect to the negligent misrepresentation claim are similar to those that were presented for the fraud and misrepresentation claim. Gori argues that there is no evidence that any Gori representative misrepresented the insurance coverage exclusion or intentionally failed to disclose any fact. Ca' de Be' reiterates that because Gori knew or should have known that its insurance no longer covered temperature fluctuations, the notation on the bill of lading that insurance was provided by Gori was, effectively, a knowing misrepresentation. Ca' de Be' additionally argues that because Gori undertook the obligation to purchase insurance for the shipment as part of its services, Gori owed Ca' de Be' a duty to notify it when the policy terms were changed.

---

insurance was assumed by Gori as part of the services it offered. Opposition Memo at 14. The Gori Defendants do not appear to argue that they had no duty to inform Ca' de Be' of the exclusion in the insurance policy. Thus, the Gori Defendants appear to have assumed the obligation contractually. Moreover, the language of the Restatement (Second) of Torts suggests that as long as the Gori Defendants had a pecuniary interest in the transaction, a claim for negligent misrepresentation may lie.

Considering each of the elements of negligent misrepresentation in light of the facts that are disputed by the parties, taken in conjunction with the lower burden of proof associated with negligent misrepresentation, the Court finds that summary judgment is not appropriate with respect to this claim. In his deposition testimony, Mr. Faggi acknowledged it is well known in the wine import-export industry that wine is a temperature-sensitive commodity, and that care must be taken to ensure that a shipment of wine is not subject to extreme temperatures. The parties' dispute with respect to the awareness of a lack of insurance protection with respect to temperature fluctuations is, therefore, a material fact.

A fact finder could likewise reasonably conclude that a preponderance of the evidence suggests that Mr. Faggi was justified in relying that the insurance provided by Gori, a purported expert in shipping wine, covered damages from temperature fluctuations. *Ca' de Be'* correctly points out that Pennsylvania courts have found that “[w]here the means of obtaining the information in question were not equal, the representations of the person believed to possess superior information may be relied upon.” Fort Washington Resources, Inc. v. Tannen, 858 F. Supp. 455, 460 (E.D. Pa. 1994) (citing Siskin v. Cohen, 70 A.2d 293, 295 (Pa. 1950)). Moreover, in determining whether reliance in a particular case was justified, consideration may be given to “the degree of sophistication of the parties and the history of the negotiation process between them.” Id.<sup>9</sup> Thus, a fact finder could reasonably conclude that based upon his initial

---

<sup>9</sup> Although there may be an argument that as a business person, Mr. Faggi should be considered a sophisticated party who should have inquired about the insurance, this is an argument best decided by a fact finder after having heard all of the testimony and evidence presented.

perceptions with respect to the insurance, and particularly because the insurance was being purchased by an Italian company that routinely arranged for wine shipments, Mr. Faggi justifiably relied on Gori in assuming that the insurance provided would cover fluctuations in temperature.

Although the question of whether Gori intended to induce Ca' de Be' to utilize its services by its non-disclosure of the information is a closer call, the Court finds that the record contains sufficient evidence to preclude summary judgment with respect to this claim. First, the parties do not dispute that the insurance policy that governed Ca' de Be's original shipments was modified to exclude damage caused by temperature fluctuations, see Statement of Undisputed Facts at ¶ 15, thereby creating an inference that these types of damages were once covered. Second, it appears that Gori never informed Ca' de Be' of this modification in coverage. Finally, Mr. Faggi testified that, based on his initial discussions with Gori, he believed that the "all risk" insurance policy covering his shipments with Gori covered such damages. Faggi Dep. at 34:16-23. Considering the evidence in a light most favorable to Ca' de Be', the Court concludes that, given the less rigorous burden of proof to establish a claim for negligent misrepresentation, there are sufficient disputes between the parties with respect to the material fact of Gori's intention to preclude summary judgment with respect to this count of the Complaint. Summary judgment with respect to Count V of the Complaint is denied.

**C. "Frozen Food Clause" Allegations**

In its Statement of Material facts opposing Gori's motion, Ca' de Be' asserts that Gori did not request (or otherwise obtain from its insurer) "The Institute Frozen Food Clause (which

is, apparently, a potential rider to the insurance agreement between AXA and Gori) that would have insured the wine for damages caused by temperature fluctuations and thereby provided the same scope of insurance coverage as represented to Ca' de Be' in 1999.” Plaintiff’s Amended Statement of Material Facts at 3. The Gori Defendants filed a reply to address this statement, arguing that this provision would not have provided protection for damage resulting from variation in temperature.

The Institute Frozen Food Clause riders, which were attached to the Gori Defendants’ reply to Ca’ de Be’s opposition to the motion for partial summary judgment, do not provide any insight with respect to Ca’ de Be’s claims for fraud or negligent misrepresentation. The alleged absence of a request for these riders to apply is more relevant to the substantive contractual dispute. Thus, the Court sees no need to consider these materials in disposing of the present motion.

### **CONCLUSION**

For the reasons stated above, summary judgment will be granted in favor of the Gori Defendants with respect to Count IV of the Complaint and summary judgment will be denied with respect to Count V of the Complaint. An appropriate order follows.

/S/  
Gene E.K. Pratter  
United States District Judge

March 31, 2005

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

CA' DE BE' IMPORTS, INC., : CIVIL ACTION  
Plaintiff :  
v. :  
ZIM-AMERICAN ISRAELI SHIPPING :  
COMPANY, INC., GIORGIO GORI, :  
SRL, AND GIORGIO GORI USA, INC. : No. 02-6710

**ORDER**

AND NOW, this 31st day of March, 2005, upon consideration of the Motion for Partial Summary Judgment filed by Defendants Giorgio Gori, SRL and Giorgio Gori, USA, Inc., d/b/a Danzas Gori (the "Gori Defendants") (Docket No. 28), the Plaintiff's response thereto (Docket No. 30), the Gori Defendants' reply (Docket No. 33) and oral argument on the motion, it is hereby ORDERED that the motion is GRANTED in part and DENIED in part. Summary judgment is GRANTED with respect to Count IV of the Complaint, and summary judgment is DENIED with respect to Count V of the Complaint.

BY THE COURT:

/S/  
GENE E.K. PRATTER  
UNITED STATES DISTRICT JUDGE