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

KOENIG ENGINEERING, INC. and STATE FARM INSURANCE COMPANY	: CIVIL ACTION
vs.	: NO. 05-CV-4957
CENTRAL TRANSPORT INTERNATIONAL, INC.	:

DECISION

JOYNER, J. **May 2, 2007**

In July, 2005, Plaintiff Koenig Engineering, Inc. commenced this action in the Court of Common Pleas of Chester County under the Carmack Amendment, 49 U.S.C. §14706, to recover the value of two destroyed torque converters. The case was thereafter timely removed to this Court and heard by a Board of Arbitrators. Following appeal from the arbitrators' decision and joinder of State Farm Insurance Company as a party plaintiff, a non-jury trial was held before the undersigned on October 10, 2006. At this time, the matter is ripe for disposition and we now make the following:

Findings of Fact

1. Plaintiff Koenig Engineering, Inc. ("Koenig") is a Pennsylvania corporation with its principal place of business located at 410 Eagleview Boulevard, Suite 104, Exton, Pennsylvania.

2. Defendant Central Transport International, Inc. ("CTI")

is a corporation organized and existing in accordance with the laws of Michigan with a principal place of business located at 1225 Stephens Road, Warren, Michigan.

3. Intervenor-Plaintiff State Farm Insurance Company is an Illinois corporation with a principal place of business located at One State Farm Plaza, Bloomington, Illinois.

4. On January 22, 2004, Koenig purchased two torque converters from Twin Disc, Inc. of Racine, Wisconsin for $29,672.77 each.

5. Koenig retained TBB Global Logistics, Inc. ("TBB") as its agent for the purpose of arranging the transport of the two torque converters which it purchased from Twin Disc, Inc. to an entity known as L.B. Smith in Camp Hill, Pennsylvania. TBB is a third party logistics company which acts as an independent shipping and transportation broker arranging for transportation of cargo and freight on behalf of its customers. Typically it is TBB, as the agent of the customer, that is listed on the bill of lading.

6. TBB then contacted CTI to arrange for the transport of the two torque converters by motor carrier from Racine, Wisconsin to Camp Hill, Pennsylvania.

7. At all times relevant to this case, TBB and CTI were parties to and acting in accordance with a Motor Transportation Contract dated June 15, 2003. Paragraph 8 of that Contract

provides in relevant part that CTI, the Trucker,

> "shall be liable to either TBB or the customer or the beneficial owner for the full actual loss or injury to freight occurring while in the possession of or under the control of Trucker in accordance with Section 14706 of the Act. Unless specifically provided for in this Contract, Trucker shall not have the right to limit its liability. All liability standards and burdens of proof are governed by the common law applicable to carriers classified as "common carriers." Notwithstanding the above, maximum liability shall be $25.00 per pound per package, subject to a maximum liability of $150,000 per occurrence.

8. Paragraph 9 of the Motor Transportation Contract provides still further:

> Trucker's liability begins when it signs a bill of lading or receipt and there is nothing further for TBB or its customer to do in tendering the freight to Trucker. Trucker's common carrier liability shall end when it receives a signed delivery receipt from the proper named consignee and nothing remains to be done by Trucker to deliver the shipment to the consignee. When a shipment is refused by the consignee, or Trucker is unable to deliver it for any reason, Trucker's liability as a warehouseman shall not begin until Trucker has placed the shipment in a public warehouse or in its terminal or storage facility under reasonable security, and TBB or its customer have been notified in writing of such placement and such notification has been received by TBB and or its customer.

9. CTI picked up the torque converters on the day of the sale. Despite the standard, pre-printed language of the bill of lading which provides that "[t]he property described below [is] in apparent good order, except as noted...," there is nothing noted anywhere on the bill of lading which reflects any damages to or other deficiencies in the torque converters at the time that CTI took possession of them.

10. On January 29, 2004, a fire occurred at CTI's transport terminal facility, located in Harrisburg, Pennsylvania.

11. The torque converters, which were present in CTI's Harrisburg facility at the time of the January 29, 2004 fire were so severely damaged that they had no salvage value.

12. On February 2, 2004, Koenig filed a claim with CTI for the loss of the torque converters in the amount of $59,345.54, which Koenig represents is the value of the damaged property.

13. On April 19, 2004, CTI approved Koenig's claim in the full amount, but subsequently determined that it was entitled to credit the amount of Koenig's claim against monies owed to it by TBB. In making this determination, CTI did not know whether any of the monies owed to it by TBB were attributable to freight bills and/or transportation services for Koenig.

14. CTI has produced no documents which evince that it ever gave a credit to the TBB account or otherwise reduced the amount which it claims TBB is indebted to it in the amount of Koenig's claim.

15. Due to the fire which occurred at CTI's Harrisburg, PA facility, CTI is unable to return the torque converters to Koenig or to TBB in the condition in which it received them.

16. To date, CTI has yet to pay the sum claimed to Koenig, despite Koenig's repeated requests therefor.

17. State Farm Insurance Company has paid Koenig $15,000

for some of the damages to the torque converters pursuant to a policy of insurance between them.

Discussion

As noted above, the plaintiff brought suit under the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. §14706, which provides for liability of common carriers for damage to or loss of goods during shipment. See, S & H Hardware & Supply Co. v. Yellow Transportation, Inc., 432 F.3d 550, 554 (3d Cir. 2005), citing 49 U.S.C. §14706(a). Indeed, the Carmack Amendment provides the *exclusive* remedy for damages and/or loss of such goods transported by interstate common carrier and/or freight forwarder.[1] Phoenix Assurance Co. v. K Mart Corp., 977 F.Supp. 319, 324 (D. N.J. 1997); Mesta v. Allied Van Lines, 695 F.Supp. 63 (D. Mass. 1988). Specifically, Section 14706(a) states in relevant part:

(1) Motor carriers and freight forwarders.-- A carrier

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[1] Under 49 U.S.C. §14706(a)(2),

> "[a] freight forwarder is both the receiving and delivering carrier. When a freight forwarder provides service and uses a motor carrier providing transportation subject to jurisdiction under subchapter I of chapter 135 to receive property from a consignor, the motor carrier may execute the bill of lading or shipping receipt for the freight forwarder with its consent. With the consent of the freight forwarder, a motor carrier may deliver property for a freight forwarder on the freight forwarder's bill of lading, freight bill, or shipping receipt to the consignee named in it, and receipt for the property may be made on the freight forwarder's delivery receipt.

See Also, Accu-Spec Electronic Services, Inc. v. Central Transport International, 391 F.Supp.2d 367, 370 (W.D.Pa. 2005).

> providing transportation or service subject to jurisdiction ... shall issue a receipt or bill of lading for property it receives for transportation under this part. That carrier and any other carrier that delivers the property and is providing transportation or service ... are liable to the person entitled to recover under the receipt or bill of lading. The liability imposed under this paragraph is for actual loss or injury to the property caused by (A) the receiving carrier, (B) the delivering carrier, or (C) another carrier over whose line or route the property is transported in the United States or from a place in the United States to a place in an adjacent foreign country when transported under a through bill of lading and, except in the case of a freight forwarder, applies to property reconsigned or diverted under a tariff under section 13702. Failure to issue a receipt or bill of lading does not affect the liability of a carrier. A delivering carrier is deemed to be the carrier performing the line-haul transportation nearest the destination but does not include a carrier providing only a switching service at the destination.

To establish a *prima facie* case against a carrier under the Carmack Amendment, a shipper must prove (1) delivery of goods to the initial carrier in good condition, (2) damage of the goods before delivery to their final destination, and (3) amount of the damages. Paper Magic Group v. J.B. Hunt Transport, Inc., 318 F.3d 458, 461 (3d Cir. 2003); Hams Express, Inc. v. Joseph Land & Co., 506 F.Supp. 209, 214 (E.D.Pa. 1980). The burden then shifts to the carrier to prove it was not negligent and the damage was caused entirely by "act of God, the public enemy, the act of the shipper itself, public authority or the inherent vice or nature of the goods." Paper Magic, supra, quoting Beta Spawn, Inc. v. FFE Transportation Services, Inc., 250 F.3d 218, 223 (3d Cir. 2001). Where the goods are open and visible to the carrier, a plaintiff can rely solely on a bill of lading to establish the

contents of the container. Mallory v. United Van Lines, Inc., Civ. A. No. 02-CV-7800, 2004 U.S. Dist. LEXIS 7237 at *4(E.D.Pa. April 6, 2004). Where the goods are not visible for inspection, a clean bill of lading is not sufficient evidence; instead, the plaintiff must present additional evidence, either direct or circumstantial, in order to establish the initial contents and condition of the cargo. Beta Spawn, 250 F.2d at 224; Diamond Transportation Group, Inc. v. Emerald Logistics Solutions, Inc., Civ. A. No. 05-3828, 2006 U.S. Dist. LEXIS 42918 at *16 (E.D.Pa. June 22, 2006).

In this case and as the Defendant acknowledges, the plaintiff has clearly demonstrated that the goods were damaged before delivery to their final destination and that the amount of the damages was $59,345.54. However, in reviewing and re-reviewing the evidence and the record in this matter, we find that the only evidence before us on the condition of the torque converters is the standard, pre-printed language on the bill of lading which declares that "[t]he property described below [is] in apparent good order, except as noted...," Given that there is also absolutely no evidence as to whether the torque converters were open and visible to the carrier, we are forced to conclude that the plaintiff has failed to satisfy its burden of proving a

prima facie case under the Carmack Amendment.[2]

Conclusions of Law

1. This Court has jurisdiction over the subject matter and the parties to this litigation pursuant to 49 U.S.C. §14706(d).

2. While the Plaintiff has succeeded in demonstrating two of the three elements necessary to making out a cause of action against the Defendant for the loss of the two Torque Converters which it purchased from Twin Disc, Inc. on January 22, 2004, it has failed to make out a *prima facie* case under the Carmack Amendment by virtue of its failure to provide any evidence that the torque converters were delivered to CTI in good condition.

3. Judgment is properly entered in favor of the defendant and against the plaintiff in no amount.

An appropriate order follows.

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[2] Plaintiff submits that "there was no need to call at trial any witnesses from Twin Disc to testify as to the condition of the Torque Converters when placed on CTI's truck...," ostensibly because CTI had at one time approved the claim for payment in the full amount and because it had "never raised the condition of the Torque Converters as a defense in this litigation." (See, Footnote 1 to Plaintiff's Proposed Findings of Fact and Conclusions of Law, filed 10/26/06). Plaintiff, however, has cited no authority to support its argument that the failure to raise this argument as an affirmative defense operates to waive it nor has our independent research revealed any such authority. See, e.g., Fed.R.Civ.P. 8, 12(b). Moreover, in reviewing the Defendant's answer, it is clear that the defendant denied the averment in paragraph 8 of the complaint that "[a]t the time CTI took possession of the Torque Converters, they were in an undamaged condition," by responding that it lacked "sufficient knowledge, information or belief to admit or deny the allegations contained in this paragraph...," and accordingly denying "the averments of this paragraph of the Complaint and demand[ing] strict proof at time of trial." In so doing, we find that CTI clearly placed Koenig on notice that the matter of the condition of the torque converters would be at issue at the trial of this case.

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ORDER

AND NOW, this 2nd day of May , 2007, following Non-Jury Trial in this matter on October 10, 2006 and for the reasons set forth above in the preceding Findings of Fact and Conclusions of Law, it is hereby ORDERED that Judgment is hereby entered in favor of the Defendant, Central Transport International, Inc. and against the Plaintiffs Koenig Engineering, Inc. and State Farm Insurance Company on all of the claims set forth in the Plaintiff's Amended Complaint and State Farm's Intervenor Complaint in no amount.

BY THE COURT:

s/J. Curtis Joyner
J. CURTIS JOYNER, J.