

negligence on their part and that plaintiff has failed to produce evidence to support such a finding, I will enter judgment for defendants.

BACKGROUND

The lemons at issue were shipped in crates in refrigerated holds aboard the M/V CHAITEN from Valparaiso, Chile on June 27, 1994 pursuant to a bill of lading issued by the defendant carrier, Compania Sud Americana de Vapores (CSAV). Regarding perishables such as lemons, ¶ 12 of the bill of lading provides in relevant part:

12. Special Containerized and Perishable Goods

The Carrier shall have the right to carry fruits, vegetables, meats and any Goods of a perishable or special nature in ordinary compartments, ordinary dry cargo containers or on deck and without special cooling, heating or ventilation facilities or attention unless this Bill of Lading contains a typewritten provision on the face hereof that Goods will be carried in refrigerated or heated or ventilated spaces or containers.

* * * *

Unless a special agreement is made and inserted in this Bill of Lading the Carrier does not undertake and shall not be liable for failure to give the Goods, whether or not of a perishable or special nature, any unusual or special care, handling, storage or facilities not given ordinary nonperishable general Goods, nor will it discharge or deliver the Goods into or to any refrigerated, chilled, cooled, ventilated, insulated, heated, drained, dry, moist, or special equipped place, compartment, container or other facility and the Merchant represents and warrants the Goods do not require any such special care or facilities.

In no event shall the Carrier be liable in any respect because heating, refrigeration, or special-cooling facilities are not furnished during loading, discharge or any part of the time that the Goods are on a dock wharf, craft or other loading or discharging place, and the carrier does not undertake to furnish such facilities.

(Stipulation of Facts, Ex. A at ¶ 12.)

The bill of lading contained a typewritten note on its face that the lemons would be refrigerated in transit, and it is undisputed that the lemons were properly stowed and refrigerated aboard the ship. (Ex. A; Stip. Facts ¶¶ 7-9; Ex. D.) There was, however, no “special agreement” incorporated in the bill of lading that the lemons would be refrigerated after they were discharged from the ship, and defendants never represented to plaintiff that the lemons would be refrigerated at any time after discharge or that refrigeration would or would not be available at the Philadelphia port. (Stip. Facts ¶ 17.)

The ship arrived at Philadelphia without incident. For the 72 hours immediately prior to discharge and in accordance with usual practice, the temperatures of the holds were raised so that the lemons would be within the acceptable temperature range for fumigation -- 69° to 70° Fahrenheit. (Stip. Facts ¶¶ 5-8.)² The lemons were discharged in two lots from the two refrigerated holds in which they had been stowed on July 9 beginning at approximately 12:50 a.m. and 4:00 a.m. and stored in an unrefrigerated transit shed operated by defendant Tioga Fruit Terminal, Inc. to await fumigation.³ The temperature that day, July 9, reached a high of 99° Fahrenheit and averaged 90°.

The next day, July 10, from about 10:30 a.m. to noon, the lemons were fumigated with methyl bromide, as required by law, by plaintiff’s contractor, Western Fumigation. As was the usual practice at the Terminal, the lemons remained stored in the unrefrigerated transit shed after

² A surveyor found that the lemons were within this range upon discharge. Ex. D (National Marine Consultants, Inc. report at 3-4); Stip. Facts ¶ 8.

³ See Ex. E (Horger report at 3).

fumigation. (Stip. Facts ¶ 16.) The high temperature on July 10 was 92° and the average 84°.

The following day, July 11, the lemons were inspected by the USDA and John Carapella, an expediter for plaintiff Hillcrest, and given a USDA grade No. 1. Upon inspection, the lemons were available for immediate pick-up by plaintiff. (Stip. Facts ¶ 15.) That day and the next, July 11 and 12, the lemons were picked up from the terminal and delivered by trucks to plaintiff's customers. There is no evidence in the record as to whether or not these trucks were refrigerated. It is also unclear whether only lemons from the lot picked up from the terminal on July 12 were damaged or whether lemons in both the July 11 and July 12 lots were affected, though the record tends to suggest the former. On July 11, the high was 86°, the low 67°, and the average 77°. On July 12, the high was 91°, the low 66°, and the average 79°.

Some of plaintiff's customers complained of decay and oil spotting in the lemons, leading to subsequent inspections in which the USDA reduced the grade of a portion of the lemons. Plaintiff ultimately suffered a \$71,882 loss in the market value of the lemons, selling them for a total of \$127,033 rather than the \$190,015 they could have fetched if all were graded USDA No. 1. (Stip. Facts ¶¶ 19-21.)

On plaintiff's behalf, Edward B. Horger of CIGNA Marine Claims investigated the damage to the lemons and produced a report which the parties have incorporated as part of the stipulated factual record. (Ex. E.) Horger noted that Carapella and the USDA had found the lemons USDA grade No. 1 on July 11, but that the subsequent inspections carried out in response to customer complaints on July 12 found substantial portions of the fruit failed to make the top grade. He concluded:

It is my opinion that the exposure of this cargo to ambient temperatures of 90°F or

above for 3 days in the pier transit shed and in conjunction with methyl bromide fumigant caused rapid degradation of these lemons after discharge from the vessel. This is borne by the satisfactory inspection reports of July 11, 1994 (both USDA and Carapella) and next day degradation as indicated by subsequent USDA reports.

It is my opinion that it is not prudent to permit perishable cargo to remain on the pier during ambient temperatures in excess of 90°F. Mr. Crawford [of Hillcrest's import division, Florida office] stated that he could have shipped the cargo on July 10, 1994 (Sunday) had the fumigation been accomplished Saturday afternoon. The cargo was discharged from the vessel very early Saturday morning (#3D deck commenced discharge 0400 hours and 4B deck 0050 hours[,] 1600 and 6431 cases respectively). The "customary" 24 hours waiting period prior to fumigation should take into consideration the ambient temperatures and perishable nature of the cargo. Pulp temperatures at the time of delivery from the pier ranged from 70 to 78°F.

There was no refrigeration [sic] breakdown but merely a failure to expedite the movement of the cargo.

Plaintiff contends, largely relying on Horger's report, that defendants should have refrigerated the lemons after they were fumigated (from July 10 to July 12), and that their failure to do so caused the lemons to decay from the high temperatures. Defendant contends they had only a duty to use reasonable care with respect to the lemons and were not negligent for failing to refrigerate them. According to defendants, the damage was caused not by a failure to refrigerate but by plaintiff's failure to process and move the lemons quickly.

DISCUSSION

The Harter Act, 46 U.S.C. §§ 190-91, governs the duties of carriers such as defendant CSAV during the period between discharge of goods from the ship and delivery to the consignee. Pursuant to the Act, a carrier may not include any provision in a bill of lading or other shipping document purporting to relieve it from liability for loss or damage to the goods it carries "arising

from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery” of the goods, and any provision purporting to have such effect is null and void. 46 U.S.C. § 190.

Accordingly, defendants had a non-disclaimable duty to properly stow, care for, and deliver the lemons. See, e.g., F.J. Walker, Ltd. v. The Motor Vessel “LEMONCORE,” 561 F.2d 1138, 1142-43 (5th Cir. 1977).⁴

Defendants contend the lemons were properly delivered when they were discharged from the ship and placed in the unrefrigerated transit shed for fumigation pursuant to customary practice at the port. After this point, they argue, the Harter Act ceased to apply and they could be held liable only if plaintiff’s loss resulted from defendants’ negligence. In the alternative, defendants contend that even if the lemons were not “delivered” by the time they were fumigated by plaintiff’s contractor on July 10, they could be held liable pursuant to ¶ 12 of the bill of lading only if they were negligent in failing to provide refrigeration and thus caused plaintiff’s loss which, they claim, plaintiff has failed to show. Plaintiff, on the other hand, argues that

⁴ Plaintiff claims defendants also had certain duties of care during the period between discharge and delivery because the bill of lading expressly incorporated the Carriage of Goods by Sea Act (“COGSA”), 46 U.S.C. § 1300 et seq., to cover the same period. COGSA requires, among other things, essentially the same duties of care as does the Harter Act with regard to the carriage of goods during the period after loading and up until discharge. However, it may be incorporated into a bill of lading to cover the periods before loading and after discharge, and such was the case with the bill of lading here. (Ex. C, ¶ 2.) The contractual incorporation of COGSA in a bill of lading does not necessarily extend COGSA’s duties of care into the post-discharge period. Section § 1307 of COGSA allows carriers to enter into “any agreement, stipulation, condition, reservation, or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to or in connection with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship . . .” 46 U.S.C. § 1307. Thus, a bill of lading may consistently both incorporate COGSA as governing the carrier’s duties and rights between discharge and delivery and yet waive any duty and disclaim liability as to its handling of goods during this period. See id.; THE MONTE ICIAR, 167 F.2d at 336-38, 337 n. 2. That is exactly what the bill of lading did in this case. (See Ex. C, ¶¶ 2, 12.)

The point is ultimately unimportant, however, as it is undisputed that COGSA and the Harter Act impose essentially the same duties of reasonable care and that the Harter Act governs defendants’ conduct in this case.

defendants had the same duty to refrigerate the lemons after discharge (and fumigation) as they did on the ship. Their failure to do so, plaintiff contends, amounted to a failure to properly deliver the lemons in violation of defendants' duties under the Harter Act -- a failure for which ¶ 12 is ineffective to immunize defendants from liability. In the alternative, plaintiff asserts that even if the lemons were properly delivered for purposes of the Harter Act, defendants are nonetheless liable for negligence as the warehousemen of the cargo.

Leaving the liability-limiting provisions of ¶ 12 of the bill of lading aside, I find that defendants properly delivered the lemons within the meaning of the Harter Act when they discharged them to unrefrigerated sheds for fumigation by plaintiff's contractor. After this point, the Harter Act no longer applied, the risk of loss passed to plaintiff, and defendants could be held liable only if their own negligence caused the loss of the lemons. See, e.g., North American Smelting Co. v. Moller S.S. Co., Inc., 204 F.2d 384, 386-87 (3d Cir. 1953); J. Kinderman & Sons v. Nippon Yusen Kaisha Lines, 322 F. Supp. 939, 942 (E.D. Pa. 1971); Goya Foods Inc. v. S.S. ITALICA, S.S., 561 F. Supp. 1077, 1086 (S.D.N.Y. 1983). I further conclude that plaintiff has presented no evidence from which a reasonable juror could conclude that as the warehousemen of the lemons defendants were negligent and thereby caused plaintiffs' loss.

I. Proper Delivery under the Harter Act

"Proper delivery" under the Harter Act requires that the carrier discharge the cargo upon a "fit and customary wharf" so that it is accessible to the consignee and give the consignee notice of the cargo's arrival and a reasonable opportunity to come and pick it up or place it under proper care. See, e.g., Metropolitan Wholesale Supply, Inc. v. The M/V ROYAL RAINBOW, 12 F.3d

58, 61 (5th Cir. 1994); Wemhoener Pressen v. Ceres Marine Terminals, Inc., 5 F.3d 734, 741-42 (4th Cir. 1993); J. Kinderman & Sons, 322 F. Supp. at 941.⁵ However, these requirements, which derive from general maritime common law, are “subject to the ‘custom of the port doctrine,’ which is the ‘well settled rule . . . that the common law requirements of proper delivery are modified by the custom, regulations, or law of the port of destination . . .’” Servicios-Expoarma, C.A. v. Industrial Maritime Carriers, Inc., 135 F.3d 984, 993 (5th Cir. 1998) (citations omitted). Thus, delivery made consistent with the custom of the port is normally considered “proper.” However, if there are peculiar circumstances such that the customary manner of delivery “subjects the cargo to a greater than normal risk for cargo in that particular port,” then the delivery is not “proper.” F.J. Walker, Ltd. v. The Motor Vessel “LEMONCORE,” 561 F.2d 1138, 1144 (5th Cir. 1977).

Some examples from the case law help flesh out these principles. In F.J. Walker, Ltd., a case cited by plaintiff, the defendant carrier continued to discharge meat from a ship as rapidly as possible even though the meat was backing up on the dock for lack of stevedoring personnel and cold storage facilities, and as a result much of the meat thawed and spoiled. The court found that the carrier’s rapid discharge violated a custom of the port whereby carriers adapted their discharge speed to the ability of personnel on shore to move and store the goods. The court also found that the carrier was repeatedly informed that sufficient cooling facilities were not available and that meat was backing up and beginning to thaw on the dock and would be lost if discharge

⁵ The elements of proper delivery set forth above are sometimes collectively denoted as “constructive” delivery. See, e.g., Wemhoener Pressen v. Ceres Marine Terminals, Inc., 5 F.3d 734, (4th Cir. 1993) (distinguishing between “actual” and “constructive” delivery); cf. J. Kinderman & Sons, 322 F. Supp. at 941 (observing that “actual delivery into the possession of the owner or consignee of the goods” is not required for proper delivery of goods under a port to port carriage contract).

was not stopped or slowed. 561 F.2d at 1144-45. Because the carrier discharged the meat in a manner that violated port custom and that the carrier knew was posing a serious risk of damage, the delivery was found to be improper and the carrier was held liable under the Harter Act.

In Levatino Co. v. American President Lines, Ltd., 233 F. Supp. 697 (S.D.N.Y. 1964), another case upon which plaintiff relies, the carrier discharged fresh chestnuts onto an unheated wharf in winter and the nuts, which froze easily, suffered freezing damage by the time they were picked up several days later. The court found that the evidence failed to demonstrate that there was a custom of discharging fresh nuts to unheated warehouses and, in addition, that a major snowstorm precluded the consignee from following its usual practice of picking up the nuts within one or two days of discharge. Id. at 699. Accordingly, the court found that the carrier had failed to discharge the nuts onto a “fit and proper” wharf and was liable for improper delivery.

In the instant case, there is no contention that defendants failed to discharge the lemons onto a “fit and proper” wharf. Plaintiff concedes that it was normal for lemons to be discharged into unrefrigerated sheds prior to fumigation; unrefrigerated storage prior to fumigation was required in order to rid the lemons of condensation that might react with the methyl bromide fumigant. In fact, plaintiff takes no issue at all with the discharge and placement of the lemons in the unrefrigerated sheds for fumigation.⁶ Nor does plaintiff dispute that it received notice of the arrival of the lemons or that the lemons were accessible to it once they were placed in the transit shed on July 9. As of that day, the undisputed facts and evidence in the record establish that the

⁶ Plaintiff claims, in effect, that the wharf became unfit and improper for lack of refrigeration only after the lemons had been fumigated, nearly a day and half after discharge. It is conceivable that in some cases, discharge to a wharf that was fit and proper at the time but that the carrier knew would imminently become unfit might be considered “improper delivery.” As discussed further below, however, there is no evidence in the record to support such a finding in this case.

further processing (e.g., the fumigation and USDA inspection) and transportation of the lemons were out of defendants' control and that the lemons were at the complete disposal of plaintiff.⁷

I hold, therefore, that the lemons were "properly delivered" when defendants placed them in the sheds pursuant to normal practice at the port to await fumigation and pick-up by plaintiff's contractors and/or agents.⁸ After that point, the Harter Act ceased to apply, the risk of loss of the

⁷ There are some cases in which it has been found that delivery was not completed even though the consignee had notice of the cargo's arrival and the cargo had been discharged onto a fit and proper wharf and put in storage. In such cases, however, the cargo required further processing or transport that was the responsibility of the carrier, so the cargo was not accessible to the consignee or subject to its control. A good example is Pressen v. Ceres Marine Terminals, Inc., 5 F.3d 734 (4th Cir. 1993). There, the goods at issue were packed in containers, loaded onto a "mafi" (a flatbed trailer owned by the carrier and used to move goods on "roll-on, roll-off ships") and strapped down with steel cables. At the destination port, the goods, still on the mafi, were placed in storage until rail cars became available to transport them to their final destination. Several days later, an employee of the defendant terminal, which was paid for its stevedoring services by the carrier, attempted to cut off the steel cables holding the goods to the mafi with a torch. The goods' packaging caught on fire and the goods were damaged. Negligence was undisputed. What was disputed was the extent of the terminal's liability. The plaintiff, seeking to avoid valid liability limitations in the bill of lading, argued that the goods were "delivered" when they were discharged from the ship and placed in storage. The court, however, found that the cargo was not available to the consignee for further inland transportation until it was stripped from the mafi. Id. at 742. Accordingly, proper delivery had not yet occurred when the cargo was damaged and the bill of lading liability limitations applied. To similar effect, as I read it, is another case cited by plaintiff, Standard Multiwall Bag Manufacturing Co. v. Marine Terminals Corp., 961 F. Supp. 240 (D. Ore. 1996) (stevedores damaged machinery while attempting to move it to gate for pick-up by truck). See also, e.g., Walker Sons Inc. V. Kirk Lines R.B., 30 F.3d 1370 (11th Cir. 1994) (goods damaged while stevedores were attempting to move them with a forklift).

The manifest distinction between these cases and the instant one is that there is no evidence (indeed, there is no allegation) that defendant controlled the processing or movement of the lemons after they were placed in the storage shed. In addition, unlike the cases described above where damage occurred while terminal employees were carrying out additional cargo processing that were among the carriage responsibilities of the carrier contemplated by the parties, in this case ¶ 12 of the bill of lading demonstrates that refrigeration after discharge was expressly not contemplated as part of the parties' carriage contract.

⁸ In arguing that the delivery of the lemons was improper, plaintiff relies upon four cases: F.J. Walker, Ltd. v. The Motor Vessel "LEMONCORE", 561 F.2d 1138, 1144 (5th Cir. 1977); Levatino Co. v. American President Lines, Ltd., 233 F. Supp. 697 (S.D.N.Y. 1964); Monsieur Henri Lines, Ltd. v. S.S. COVADONGA, 1965 A.M.C. 740 (D.N.J. 1964); and Norjac Trading Corp. v. MOTORSHIP MATHILDA THORDEN, 173 F. Supp. 23 (E.D. Pa. 1959). The first two, as set forth in the text above, are patently distinguishable from the instant case and require no further discussion. The latter two cases are also easily distinguishable on at least two significant bases. First, in neither case was it established

goods not due to others' negligence passed to plaintiff, and defendants could be held liable only for their own negligence. See, e.g., North American Smelting Co. v. Moller S.S. Co., Inc., 204 F.2d 384, 386 (3d Cir. 1953) ("There is no doubt that in discharging the cargo on to the pier and notifying the consignee the carrier was no longer in possession of the goods so as to suffer the risk of loss not due to any negligence on its part."); Goya Foods, Inc. v. S.S. Italica, S.S., 561 F. Supp. 1077, 1086 (S.D.N.Y. 1983) (proper delivery ends the carrier's liability under the Harter Act, but "a carrier in possession of goods not yet called for [remains] liable as a bailee for negligence in the storage of the goods") (quotations and citation omitted).⁹

II. Defendants' Duty as Warehousemen

Plaintiff contends, and defendants do not dispute, that defendants remained liable after

that the delivery at issue (delivery of wine to an unheated pier in Monsieur Henri Lines, Ltd. and failure to refrigerate horseradish roots held up by problems with customs clearance in Norjac Trading Corp.) was consistent with the custom of the port, while in the instant case plaintiff has stipulated that the lemons were left unrefrigerated after fumigation pursuant to customary practice at the port. Second, in neither of those cases had the consignee exercised or been in a position to exercise control or care over the goods before or during the time the goods sustained damage on the wharf. In this case, as discussed further in part II below, plaintiff did exercise care over the lemons through its fumigator and expeditor on July 10 and July 11, and evidence suggests it could have begun processing the lemons as early as July 9.

⁹ Even if proper delivery were not accomplished when the lemons were placed in the transit shed for fumigation, I would find that defendants could be held liable only for their own negligence by operation of ¶ 12 of the bill of lading. This provision disclaims any duty by defendants to provide refrigeration for perishable goods after discharge in the absence of an express agreement to the contrary and purports to waive defendants' liability for any damage incurred because the goods are not refrigerated upon discharge. Plaintiff claims this provision is void on its face as contrary to the Harter Act's prohibition on exculpatory clauses in bills of lading. In my view, however, THE MONTE ICIAR, 167 F.2d 334, 336-38 (3d Cir. 1948) suggests, to the contrary, that ¶ 12 is a proper exception to defendants' liability except to the extent it purports to immunize defendants from their own negligence. In effect, ¶ 12 puts the risk of loss of perishable goods due to lack of refrigeration between discharge and delivery on the shipper, and this the carrier may do consistent with the Harter Act to the extent it is not thereby immunized from the consequences of its own negligence. See id. at 336-38. To hold defendants liable and avoid ¶ 12, therefore, plaintiff would have to demonstrate that defendants acted negligently and thereby caused damage to the lemons. See id.

delivery of the lemons for any damage caused by their own negligence as warehousemen pursuant to Pennsylvania law.¹⁰ See 13 Pa.C.S.A. § 7204(b) (warehouseman has duty to exercise reasonable care for goods); see also Dole Fresh Fruit Co. V. Delaware Cold Storage, Inc., 961 F. Supp. 676, 684-85 (D. Del. 1997) (applying Pennsylvania warehouseman statute and law of negligent bailment). Normally, of course, negligence is a matter for the jury. In this case, however, plaintiff has failed to point to any fact or evidence in the record from which a reasonable juror could conclude that the heat damage suffered by the lemons due, allegedly, to high temperatures on July 10, 11, and 12 was reasonably foreseeable such that defendants' failure to protect against it amounted to negligence. See, e.g. Fiorentino v. Rapoport, 693 A.2d 208, 216 (Pa. Super. Ct. 1997) (defendant will not be held liable for harm that was not a reasonably foreseeable result of his conduct).

Plaintiff appears to contend that defendants should have provided refrigeration after the lemons were fumigated because (1) they had notice that the lemons were perishable items since the lemons had been refrigerated on board the ship and (2) it was "unusually warm" at the time of discharge. (Pls. Brief at 3.) That defendants knew the lemons were perishable and had to be refrigerated aboard the ship is not enough of itself, however, to make defendants' failure to

¹⁰ At first glance, it might appear that ¶ 12 of the bill of lading immunizes defendants from liability for failing to refrigerate the lemons after delivery even if their failure to do so was negligent, since the Harter Act no longer applies after delivery to prohibit such exculpatory clauses. It appears to be settled law, however, that bills of lading, like the Harter Act itself, only govern until proper delivery is made, see e.g., Pressen, 5 F.3d at 738 (and authorities cited therein); Metropolitan Wholesale Supply, Inc., 12 F.3d at 61, and, at any rate, defendants do not contend otherwise. (See Def. Resp. Brief at 4.)

Since I have found that plaintiff has no claim under the Harter Act and that defendants' remaining potential liability is not governed by the bill of lading (which might be governed by federal law, see Pressen, 5 F.3d at 740), and no basis for diversity jurisdiction appears from plaintiff's complaint, there is no longer subject matter jurisdiction over plaintiff's remaining state law claim for negligence. Since the claim has been addressed by the parties, however, I will exercise supplemental jurisdiction over the claim in the interests of judicial and the parties' economy.

refrigerate the lemons after fumigation negligent. Plaintiffs have stipulated that it was the customary practice of the port not to refrigerate perishables after fumigation. There is no evidence that this custom had resulted in heat damage incidents in the past or that defendants knew of such incidents.

Further, plaintiffs fail to produce any evidence supporting its assertion that the temperatures during the period at issue were “unusually” warm. The only evidence on this point in the record -- weather data for the month of July -- shows that while July 9 was the hottest day of the month, the temperatures from July 10 through 12 appear to have been normal for the month. (See Ex. B.) There is therefore no evidence to support a finding that defendants should have realized that the weather presented an obviously greater-than-usual risk of heat damage to the lemons during the period after they were fumigated.

And finally, plaintiff failed to provide any notice to defendants that the heat might pose a threat to the lemons. This is significant because plaintiff concedes that customary practice at the terminal was not to refrigerate lemons after fumigation. See e.g., Italusa Corp. v. M/V THALASSINI KYRA, 733 F. Supp. 209, 216 (S.D. N.Y. 1990) (plaintiff’s failure to notify carrier of risk heat posed to cargo of cheese after discharge was material because plaintiffs had not demonstrated any custom of refrigerating that type of cheese at the port). It is also significant because defendants could have reasonably expected that plaintiff would draw their attention to the matter and/or request refrigeration had a significant threat of heat damage been posed. Plaintiff was exercising control and care over the lemons by June 10 at the latest.¹¹ On that day

¹¹ Mr. Horger’s report (see supra page 4-5) suggests that the lemons could have been fumigated the afternoon of July 9th and picked up the next day, yet the lemons were not fumigated until July 10 and were not picked up until July 11 and 12. There is no evidence suggesting that defendants had any control

the lemons were fumigated by a firm which, though perhaps not plaintiff's "agent" as defendants contend, was paid by plaintiff and is not alleged to have been defendants' agent or under defendants' control. Presumably, the fumigator had experience with the possible damaging interactions between high temperatures and the methyl bromide. So far as the record shows, however, the fumigator did not recommend that the lemons be refrigerated or even bring the possibility of a problem to defendants' attention. The next day, July 11, Mr. Carapella, plaintiff's expeditor, and the USDA inspected the lemons. There is no evidence that they requested refrigeration or brought a potential problem to defendants' attention.¹² If plaintiff's fumigator and expeditor, who presumably had extensive experience with lemons and other perishables, demonstrated an apparent lack of concern for possible heat damage, it clearly cannot be said that the threat should have been obvious to defendants and that they were negligent for failing to take protective measures and refrigerate the lemons.

I conclude that plaintiff has failed to produce any evidence from which a reasonable juror could conclude that the damage to the lemons was reasonably foreseeable and that defendants breached their duty of care by failing to refrigerate the lemons of their own accord. Accordingly, defendants' motion for summary judgment will be granted, plaintiffs' will be denied, and summary judgment will be entered in favor of defendants.

over these events. The record suggests, to the contrary, that these events were controlled by the USDA, the fumigator, and plaintiff.

¹² Nor, so far as it appears from the record, did Mr. Carapella register concern by requesting that all the lemons be picked up on July 11th, and pick-up was spread over that day and the next, July 12.

(3) plaintiffs' claims against the remaining defendants, Chilean Line, Inc., Southern Shipmanagement, Ltd., Chaiten Reefer Co., S.A., Compania Chilena de Navagacion Interoceanica, S.A., and M/V CHAITEN, in rem, are DISMISSED.

THOMAS N. O'NEILL, JR J.