

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

THE PAPER MAGIC GROUP, INC. : CIVIL ACTION
 :
 v. :
 :
 J. B. HUNT TRANSPORT, INC. : NO. 00-5590

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

August 29, 2001

Plaintiff, The Paper Magic Group, Inc. ("Paper Magic"), filing an action against defendant J.B. Hunt Transport, Inc. ("Hunt") under 49 U.S.C. §14706, the Carmack Amendment to the Interstate Commerce Act, alleged that Hunt untimely delivered a shipment of its holiday cards to Target Stores, Inc. ("Target") and sought damages equal to the contract price for sale of the goods. Paper Magic moved for summary judgment in its favor and Hunt filed a cross-motion for summary judgment in its favor. After oral argument on the motions, the court denied Hunt's cross-motion for summary judgment and took plaintiff's motion under advisement. For the reasons set forth herein, Paper Magic's motion for summary judgment will be granted.

BACKGROUND

On October 16, 1998, Paper Magic, a manufacturer of greeting cards and related seasonal paper goods, delivered to Hunt a shipment of 2432 cartons of boxed Christmas cards and related holiday merchandise (collectively, "the goods") in good order and

condition in Danville, Pennsylvania for transport to Paper Magic's customer, Target, in Oconomowoc, Wisconsin. The invoice value of the goods was \$130,080.48. Paper Magic and Hunt had been doing business for over ten years; Hunt had transported thousands of shipments for Paper Magic.

The bills of lading did not indicate that the shipment was time-sensitive or that the goods were seasonal, but normally, a shipment of this nature would have taken two to three days to arrive at its destination. The shipment did not arrive in two or three days; on February 5, 1999, nearly four months after delivery to Hunt, the goods were discovered at one of Hunt's facilities in Chicago, Illinois.¹ On that same date, Hunt offered to deliver the shipment to Target. Target refused to accept the goods because after the 1998 holiday season, for which the cards were purchased, it had no commercial use for the goods. Target refused to pay Paper Magic for the shipment. Paper Magic also refused redelivery of the goods because the 1998 holiday cards developed and packaged for Target could not be sold to other vendors.

On April 26, 1999, Paper Magic filed a claim with Hunt for the invoice value of the goods. By letter dated July 23, 1999, Hunt offered Paper Magic \$49,645.96 (obtained for the goods at a

¹Paper Magic was unaware that the shipment had not been timely delivered because Target was not required to pay for the goods until March 2, 1999.

salvage sale) in full and final settlement. Paper Magic never accepted the \$49,645.96 from Hunt. On August 22, 2000, Target assigned Paper Magic its right to pursue a claim against Hunt in connection with this shipment. Paper Magic commenced this action on November 3, 2000.

DISCUSSION

I. Standard of Decision

Summary judgment is appropriate if there are no genuine issues of material fact and the evidence establishes that the moving party is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). A party moving for summary judgment bears the initial burden of demonstrating that there are no facts supporting the opponent's claim; then the non-movant must introduce specific, affirmative evidence there is a genuine issue of material fact. See id. at 322-24. The movant must present evidence to support each element of its case for which it bears the burden at trial. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986). A genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the non-moving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The court must draw all justifiable inferences in the non-movant's favor. See id. at 255.

II. The Carmack Amendment

The Carmack Amendment to the Interstate Commerce Act ("The Carmack Amendment"), 49 U.S.C. §14706, confers federal jurisdiction over civil actions against common carriers alleged to have caused loss or damage. To establish a prima facie case against a common carrier, a plaintiff must show: (1) it delivered the goods in good condition to the common carrier; (2) damage to the goods occurred prior to delivery at their final destination; and (3) the amount of damages. See Beta Spawn, Inc. v. FFE Transp. Servs., Inc., 250 F.3d 218, 223 (3d Cir. 2001). Once a plaintiff establishes a prima facie case, the burden shifts to the defendant carrier to prove it was free from negligence and the damage was caused solely by: (1) an Act of God; (2) a public enemy; (3) an act of the shipper; (4) a public authority; or (5) the inherent nature of the goods. See id. at 226.

III. Paper Magic Established a Prima Facie Case

There is no dispute the goods were delivered to Hunt in good condition. The parties disagree about whether there was damage and if so, in what amount.

A. Late Delivery is Damage

A carrier has a duty to "transport with reasonable dispatch." New York, Philadelphia, & Norfolk R.R. Co. v. Peninsula Produce Exchq. of Maryland, 240 U.S. 34, 38-39 (1916)(affirming judgment in favor of strawberry shipper for

damages incurred from delayed delivery). See also Chesapeake & O. Ry. Co. v. Martin, 283 U.S. 209, 213 (1931)(a "reasonable time" for delivery under the Interstate Commerce Act is "such time as is necessary conveniently to transport and make delivery of the shipment in the ordinary course of business, in the light of the circumstances and conditions surrounding the transaction."). It is undisputed that the customary transit time for a shipment of this nature is two to three days and that four months is not a reasonable time for delivery of goods from Pennsylvania to Wisconsin.

Because the goods were seasonal in nature and Target only sells the current season's merchandise, the goods were worthless to Target when delivery was offered in February, 1999. The goods had been packaged and imprinted with Target's label, so they were difficult to sell to other potential buyers of holiday paper products. The salvage sale at \$80,434.52 less than the invoice price is evidence of the diminution in value that resulted from the delay. The late delivery is in effect a non-delivery and "non-delivery of a shipment establishes a prima facie case of carrier liability." Hopper Furs, Inc. v. Emery Air Freight Corp., 749 F.2d 1261, 1263 (8th Cir. 1984)(air carrier liable for loss of shipment). Paper Magic has evidence to prove actual damages, the second element of a prima facie case.

B. "Special" Damages

Paper Magic argues it incurred actual damages as a result of the delayed delivery in the amount of the invoice price of the goods: \$130,080.48. Hunt contends Paper Magic is seeking "special damages" that the carrier did not have reason to foresee because it was not on notice of the time sensitivity of the shipment. Paper Magic did not expressly state on the bill of lading or otherwise that the goods were time sensitive, so Hunt argues it is not responsible for the loss in value resulting from late delivery. See Main Road Bakery, Inc. v. Consolidated Freightways, Inc., 799 F. Supp. 26 (D.N.J. 1992) (summary judgment in favor of carrier granted because it was not on notice of special damages that would ensue upon delayed delivery even though the bill of lading contained the words "Express Delivery" and "Do Not Delay."); see also Starmakers Pub. Corp. v. Acme Fast Freight, Inc., 646 F. Supp. 780 (S.D.N.Y. 1986). There is no dispute that Paper Magic failed to state on the bills of lading or otherwise that the delivery was time sensitive or that the goods were seasonal in nature.

In Main Road Bakery, the plaintiff bakery informed the carrier that it would start to disassemble its existing oven the day prior to the scheduled delivery of a new oven. 799 F. Supp. at 27. The new oven was totally damaged en route. Id. The plaintiff sought damages for: (1) the cost of hiring oven

installation experts for the scheduled delivery date; (2) trailer costs for delivery of a new oven to replace the one damaged in transit; and (3) lost profits for the days the plaintiff was without an oven. Id. These damages were more than the contract price for the damaged oven. The court deemed these consequential damages "special damages" and stated that had the "carrier had notice of the special circumstances from which such damages would flow at the time the bill of lading contract was made," plaintiff could have recovered such damages under the Carmack Amendment. Id. at 28. Because the carrier did not have such notice at the time of contracting, plaintiff could not recover the "special damages." Id.

In Starmakers, the shipper sued the carrier for a three week delay in delivery of movie posters. Denying plaintiff's claim for the invoice value of the posters, the court stated that, "[o]rdinarily, one would not expect a three week delay in delivery of printed matter in general, or of posters in particular, to result in a total, or even appreciable loss of value of the goods themselves." 646 F. Supp. at 782. The court deemed the damages sought as "special" and granted the carrier's motion for summary judgment.

Unlike Main Road Bakery, the damages sought by Paper Magic are not consequential damages; Paper Magic is merely seeking actual damages in the amount of the invoice price of the goods.

Further, unlike Starmakers, the delivery was delayed for four months, not three weeks. While damages may not be anticipated as a result of a three week delay, delivery of goods after an entire season is almost certain to result in non-acceptance by the consignee. Hunt had every reason to foresee that a four month delivery delay would result in loss to Paper Magic regardless of whether Paper Magic affirmatively notified Hunt of the time sensitivity of the shipment.

A four month delay in delivery is unreasonable.² See Chesapeake & O. Ry. Co., 283 U.S. at 213; Imperial News Co., Inc. v. P-I-E Nationwide, Inc., 905 F.2d 641, 644 (2d Cir. 1990) (holding that four months (124 days) was not a "reasonable time for delivery" of unsold books to a publisher because there was evidence that a reasonable time for delivery would have been six to seven days and another similar shipment took only four days). The damages Paper Magic incurred were actual, not "special." See John Morrell & Co. v. Burlington Northern, Inc., 560 F.2d 277 (7th Cir. 1997)(one week delay in shipment of meat resulted in actual damages equal to the contract price);³ Great Atlantic &

²At oral argument on the cross-motions for summary judgment, defendant admitted that four months is not a reasonable time for delivery.

³The bill of lading for the meat shipment in John Morrell specifically stated that delivery should be "AS SOON AS POSSIBLE NO LATER THAN 12/15/74," but the court did not find this fact necessary to its holding that plaintiff was entitled to actual damages under the contract price rule. See John Morrell, 560

Pacific Tea Co., Inc. v. Atchison, Topeka and Santa Fe Ry. Co., 333 F.2d 705, 707-08 (7th Cir. 1964)(plaintiff did not meet its burden of proving that the delayed delivery of a shipment of plums resulted in a diminution of their sale price; damages denied). Paper Magic has established actual damage.

C. Amount of Actual Damages

The measure of actual damages is the contract price. See Illinois Cent. R. Co. v. Crail, 281 U.S. 57, 64-65 (1930)(the market value test may be discarded when another more accurate measure of actual damages exists); Robert Burton Assoc., Inc. v. Preston Trucking Co., Inc., 149 F.3d 218, 221 (3d Cir. 1998) ("ordinarily when the carrier is responsible for the loss of the goods in transit, the shipper is entitled to recover the contract price from the carrier."); John Morrell, 560 F.2d at 280("[t]he only way to reimburse [a] shipper [whose goods were delivered late] for its 'full actual loss' is to use the contract price method."). It is undisputed that the contract price for the goods was \$130,080.48. Paper Magic has evidence to prove the third element of its prima facie case.

IV. Defendant Has Failed to Meet Its Burden

In its Answer to the Complaint, Hunt asserted all of the available affirmative defenses, but it did not argue or offer evidence in support of any of them in opposing plaintiff's

F.2d at 279, 281.

summary judgment motion. Plaintiff has made out a prima facie case, defendant has failed to meet its burden in proving any affirmative defense, and there are no outstanding issues of material fact. There is no defense Hunt could prove at trial, allowing it defeat Paper Magic's claim, so summary judgment will be granted in plaintiff's favor.

V. Prejudgment Interest

Where, as here, the governing federal statute is without a clear directive on prejudgment interest, it is within the trial court's broad discretion to decide whether to award prejudgment interest. See Ambromovage v. United Mine Workers of America, 726 F.2d 972, 981-82 (3d Cir. 1984)(affirming district court's denial of prejudgment interest); see also Admark, Inc. v. RPS, Inc., No. Civ. A. 96-7287, 1998 WL 19481, *6 (E.D. Pa. Jan. 20, 1998) (Carmack Amendment action awarding 6% per annum prejudgment interest); Corning Inc. v. Missouri Nebraska Express, Inc., No. Civ. A. 95-5826, 1996 WL 224673, *3-*4 (E.D. Pa. Apr. 29, 1996)(Carmack Amendment action awarding 6% per annum prejudgment interest). Exercising this discretion, the court will award prejudgment interest to Paper Magic because it has been deprived of the invoice price of the shipment since 1999. Although Hunt failed to deliver the goods, it has had the use of the salvage

money since at least July, 1999.⁴ An award of prejudgment interest will compensate Paper Magic fully for its loss. See Corning, 1996 WL 224673, at *3.

The rate of the prejudgment interest awarded is also committed to the discretion of the district court in federal question cases. See Sun Ship, Inc. v. Matson Navigation Co., 785 F.2d 59, 63 (3d Cir. 1986)(remanding to district court for determination of the proper rate of interest); Corning, 1996 WL 224673, at *3; Resolution Trust Corp. v. Residential Developers Fund Partners, No. Civ. A. 90-1195, 1991 WL 193363, *23 (E.D. Pa. Sept. 17, 1991)(Shapiro, J.).

Paper Magic requests an award of prejudgment interest at the rate of 6% per annum. This rate is the legal rate under Pennsylvania law. See 41 P.S. §202 (West 1999 & Supp. 2001). Hunt objects to an award of prejudgment interest but does not object to the rate requested. No alternative has been proposed. Without objection to the 6% per annum rate requested by plaintiff and with the legal rate of interest under Pennsylvania law as a guidepost, the court will award prejudgment interest at that rate. See Corning, 1996 WL 224673, at *4.

The date from which prejudgment interest should accrue is

⁴There is no evidence as to when the salvage sale occurred other than that it was prior to July 23, 1999, when Hunt offered Paper Magic the proceeds from the sale in a final settlement of its claim.

also at issue. Plaintiff requests prejudgment interest from March 2, 1999, the date when it would have received the \$130,080.48 from Target. Hunt argues the correct date is July 1, 1999 because under Pennsylvania law a party has ninety days to pay the contract price.⁵ Courts have deemed appropriate various dates of accrual of prejudgment interest under the Carmack Amendment. See Corning, 1996 WL 224673, at *4 n.7 (calculating prejudgment interest from the date carrier denied shipper's claim); Oscar Mayer Foods Corp. v. Pruitt, 867 F. Supp. 322, 329 (D. Md. 1994)(awarding prejudgment interest from the date the shipper submitted its claim to the carrier); Action Drug Co., Inc. v. Overnite Transp. Co., 724 F. Supp. 269, 277 (D. Del. 1989)(awarding prejudgment interest from the day immediately following the latest date the shipment could reasonably have been considered timely).

On July 23, 1999, Hunt sent Paper Magic a check for \$49,645.96 in full settlement of its claim; the check was refused by Paper Magic. Hunt argues that the tender of this check should toll the running of interest because plaintiff was not precluded from endorsing the check and receiving the funds. However, the letter accompanying the check explicitly stated: "By negotiating the enclosed check, you are accepting this payment as full and

⁵No Pennsylvania authority is cited. However even if the court were to agree with Hunt, ninety days would be June 1, 1999, not July 1, 1999.

final settlement of this claim." Such a qualified tender cannot toll the running of interest. See Sun Shipbuilding & Dry Dock Co. v. United States Lines, Inc., 439 F. Supp. 671, 680 (E.D. Pa. 1977)(plaintiff's failure to accept defendant's tender of payment if plaintiff agreed to waive rights did not stop the running of interest because the tender was qualified, did not include interest, and was not paid into court upon plaintiff's refusal). To compensate Paper Magic fully for its loss, the prejudgment interest will be calculated from March 2, 1999, by which date it would have had use of the money for the shipment, through the date judgment is entered, and post-judgment interest runs according to law. See 28 U.S.C. §1961.

CONCLUSION

Paper Magic has established a prima facie case under the Carmack Amendment: it delivered the goods to Hunt in good condition, it incurred damages by the delayed delivery (in effect, non-delivery) of the goods in the amount of the invoice price, \$130,080.48. Hunt has offered no evidence of any statutory defense, so it is liable for actual damages incurred by Paper Magic. In addition to the actual damages incurred, Paper Magic is entitled to prejudgment interest at a rate of 6% per annum from March 2, 1999 through the date judgment is entered.

An appropriate Order follows.

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JUDGMENT

AND NOW, this 29th day of August, 2001, upon consideration of the plaintiff's motion for summary judgment and the objections thereto, it is **ORDERED** that:

1. Plaintiff's motion for summary judgment is **GRANTED**.
2. Judgment is entered in favor of plaintiff, The Paper Magic Group, Inc. and against defendant J.B. Hunt Transport, Inc., in the amount of \$130,080.48 with prejudgment interest at 6% per annum from March 2, 1999, until the date of judgment.
3. The Clerk shall mark this case **CLOSED**.

S.J.

