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

ARCADIA PETROLEUM LIMITED	:	CIVIL ACTION
	:	
v.	:	
	:	
SUN INTERNATIONAL LIMITED	:	NO. 04-821

MEMORANDUM

Padova, J. **December 21, 2004**

Plaintiff, Arcadia Petroleum Limited ("Arcadia") has brought this breach of contract action seeking payment of demurrage arising out of charter party agreements with Sun International Limited ("Sun"). Before the Court are the parties' cross-motions for summary judgment. For the reasons which follow, Plaintiff's Motion is denied and Defendant's Motion is granted.

I. BACKGROUND

Arcadia, the disponent owner of the M/V Magdelaine, is an oil trader that entered into two Tanker Voyage Charter Party agreements with Sun, one dated December 6, 1999 and one dated February 4, 2000, for the transportation of crude oil from Nigeria to Philadelphia, Pennsylvania (the "Contracts"). (Def.'s Exs. A, B.) Under the terms of both the 1999 and 2000 Contracts, Sun, as Charterer, was obligated to "pay [Arcadia] demurrage per running hour and pro rata for a part thereof at the [specified rates] for all time that loading and discharging and used laytime . . . exceeds the allowed laytime elsewhere herein specified . . . ." (Def.'s Ex. A ¶ 8, Ex. B ¶ 8.)

In connection with the 1999 Contract, the M/V Magdelaine was

loaded with crude oil at Escravos, Nigeria on January 9, 2000. (Lamm Aff. ¶ 4.) The M/V Magdelaine arrived in Philadelphia on January 25, 2000 and discharge of the crude oil was completed on February 5, 2000. (Id.) On February 10, 2000, Arcadia, through the parties' broker, notified Sun that demurrage had been incurred in connection with the 1999 Contract. (Id. ¶ 5, Def.'s Ex. C.)

Pursuant to the 2000 Contract, the M/V Magdelaine was loaded with crude oil in Escravos, Nigeria on February 27, 2000. (Lamm Aff. ¶ 6.) The M/V Magdelaine arrived in Philadelphia on March 17, 2000, discharge of the crude oil was completed on March 29, 2000. (Id.) On April 5, 2000, Arcadia, through the broker, notified Sun that demurrage had been incurred in connection with the 2000 Contract. (Id. ¶ 7, Def.'s Ex. D.)

It is usual and customary for parties to vessel charters to exchange their calculations of demurrage under the charter after the discharge of the cargo. (Lamm Aff. ¶ 12.) On August 30, 2000, Sun sent Arcadia, through the broker, notice that Sun's calculation of the total net demurrage due to Arcadia in connection with the 1999 Contract was $300,934.43. (Id. ¶ 9, Def.'s Ex. E.) On September 4, 2000, Arcadia, through the broker, sent Sun notice confirming that it accepted "'the Charterer's calculation of demurrage incurred' in connection with the 1999 Contract." (Lamm Aff. ¶ 10, Def.'s Ex. F.) On October 24, 2000, Sun sent Arcadia, through the broker, notice that Sun's calculation of the total net

demurrage with respect to the 2000 Contract was $299,582.80. (Lamm Aff. ¶ 11, Def.'s Ex. G.) On October 25, 2000, Arcadia, through the broker, sent Sun notice that it accepted Sun's calculation of demurrage in connection with the 2000 Contract. (Lamm Aff. ¶ 12, Def.'s Ex. H.)

On October 27, 2000, Sun notified Arcadia that it intended to set-off against Arcadia's demurrage claims Sun's own demurrage claims, totaling $625,287.75 and Sun's cargo claims in connection with separate crude oil purchase agreements between the parties, totaling $364,111.52. (Lamm Aff. ¶ 13, Def.'s Ex. I.) Arcadia objected to Sun's set-off. (Id. ¶ 15, Murphy Aff. ¶ 11.) Sun does not dispute that it did not pay any demurrage to Arcadia in connection with the 1999 and 2000 Contracts.

Both the 1999 and 2000 Contracts contain identical Dispute Resolution clauses which state, in pertinent part, as follows: "DISPUTE RESOLUTION: Any and all differences and disputes that cannot be resolved between the parties shall be subject to litigation in the U.S. District Court for the Eastern District of Pennsylvania or arbitration in the City of New York, at the option of the initiator of the proceeding." (Def.'s Ex. A Asbatankvoy clauses ¶ 8, Def.'s Ex. B Asbatankvoy clauses ¶ 8, the "Dispute Resolution" clauses.) The 1999 and 2000 Contracts also contain identical Claims clauses which limit the time in which such actions may be initiated:

> "Owners and Charterers further agree that with respect to any claim or other unresolved dispute arising out of this Charter, unless arbitration or litigation, as per this Charter, is commenced within one year after the completion of the discharge or the date when discharge would have been completed, such claim or other dispute is waived and all liability thereto is discharged."

(Def.'s Ex. A, Asbatankvoy clauses ¶ 24, Def.'s Ex. B, Asbatankvoy clauses ¶ 24, the "Claims" clauses.) It is undisputed that Arcadia has not demanded arbitration of its demurrage claims under the Dispute Resolution and Claims clauses of the Contracts. (Id. ¶ 22.)

II. LEGAL STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to 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 could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (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 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the movant's initial Celotex 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 met its initial burden, "the adverse party's response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). That is, 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. The Court must view the evidence presented on the motion in the light most favorable to the opposing party. Anderson, 477 U.S. at 255. However, "[s]peculation, conclusory allegations, and mere denials are insufficient to raise genuine issues of material fact." Boykins v. Lucent Technologies, Inc., 78 F. Supp. 2d 402, 407 (E.D. Pa. 2000). Indeed, evidence introduced to defeat or support a motion for summary judgment must be capable of being admissible at trial. Callahan v. AEV, Inc., 182 F.3d 237, 252 n.11 (3d Cir. 1999)(citing Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224, 1234 n.9 (3d Cir. 1993)). "Where, as here,

cross-motions for summary judgment have been presented, we must consider each party's motion individually. Each side bears the burden of establishing a lack of genuine issues of material fact." Reinert v. Giorgio Foods, Inc., 15 F. Supp. 2d 589, 593-94 (E.D. Pa. 1998).

III. DISCUSSION

The Complaint states two claims for breach of contract, one for Sun's breach of the agreement to pay demurrage in the amount of $300,934.43[1] in connection with the 1999 Contract (Count I) and the second for Sun's breach of the agreement to pay demurrage in the amount of $299,582.80 in connection with the 2000 Contract (Count II). Sun does not contest its failure to pay the demurrage it agreed was owed to Arcadia. However, it maintains that it is entitled to summary judgment on both of Arcadia's causes of action because those claims have been waived pursuant to the time limitation contained in the Claims clauses of the Contracts. The Contracts both provide that any claim or unresolved dispute arising out of the Contracts is waived unless arbitration or litigation is commenced in accordance with the terms of the Contracts, "within one year after the completion of the discharge or the date when discharge would have been completed . . . ." (Def.'s Ex. A,

[1]Count I of the Complaint requests judgment against Sun in the amount of $304,743.73, which sum is the total of the agreed upon demurrage in the amount of $300,934.43 plus a commission of $3809.30. (Compl. ¶¶ 8-9, Exs. A, B.)

Asbatankvoy clauses ¶ 24, Def.'s Ex. B, Asbatankvoy clauses ¶ 24.)

This suit was filed on February 24, 2004, more than four years after discharge was completed pursuant to the 1999 Contract and nearly four years after discharge was completed pursuant to the 2000 Contract. (Lamm Aff. ¶¶ 4, 5.) Arcadia does not contend that it commenced arbitration or litigation regarding its demurrage claims in any other forum prior to February 24, 2004.

Arcadia contends that the time limitation contained in the Claims clauses of the Contracts does not bar its claims for breach of contract in this action because those claims are based upon settlement agreements entered into by the parties regarding the amount of demurrage owed to Arcadia, not upon the 1999 and 2000 Contracts themselves. Arcadia maintains that it entered into enforceable settlement agreements with Sun regarding its demurrage claims, which agreements are evidenced by the August, September, and October 2000 correspondence between the parties regarding the amount of demurrage owed by Sun to Arcadia. (Def.'s Exs. E, F, G, and H.) Arcadia argues that its causes of action for breach of contract are, therefore, governed by Pennsylvania's four year statute of limitations for actions for breach of contract, 42 Pa. Cons. Stat. Ann. § 5525. Arcadia asserts that, since the parties had resolved their differences with regard to the demurrage owed under 1999 and 2000 Contracts via these settlement agreements, the Dispute Resolution and Claims clauses of the Contracts were never

triggered and it had no duty to commence arbitration or litigation within the one year time frame provided in the Claims clauses of those contracts.

"A compromise or settlement is an agreement or an arrangement by which, in consideration of mutual concessions, a controversy is terminated. Its effect is to substitute the mutual promises contained in that agreement for the obligations contained in, or arising out of, the subject matter of the controversy. A compromise or settlement, like other contracts, must be supported by consideration." Progressive Unif. Mfg. Corp. v. Sizes Unltd. Inc., No. Civ. A. 88-7377, 1990 WL 106589, at *5 (E.D. Pa. July 24, 1990) (citation omitted). In determining whether the parties entered into enforceable settlement agreements, the Court looks at: "'(1) whether both parties manifested an intention to be bound by the agreement[s]; (2) whether the terms of the agreement[s] are sufficiently definite to be enforced; and (3) whether there was consideration.'" Blair v. Scott Specialty Gases, 283 F.3d 595, 603 (3d Cir. 2002) (quoting ATACS Corp. v. Trans World Communications, Inc., 155 F.3d 659, 666 (3d Cir. 1998)). For there to be consideration in the settlement of a claim, there must be mutual concessions. See Maynard v. Durham & S. Ry. Co., 365 U.S. 160, 163 (1961) ("In order that there may be consideration, there must be mutual concessions. A release is not supported by sufficient consideration unless something of value is received to which the

creditor had no previous right. If, in other words, an employee receives wages to which he had an absolute right, the fact that the amount is called consideration for a release does not make the release valid.") (citation omitted); see also 15A Am. Jur. 2d Compromise & Settlement § 22 ("Thus, a compromise, as distinguished from other types of accord and satisfaction, is supported by good consideration if it is based upon a disputed or unliquidated claim and if the parties make or promise mutual concessions as a means of terminating their dispute; no additional consideration is required."); 15A Am. Jur. 2d Compromise & Settlement § 24 ("If, at the time of an agreement, there is no dispute between the parties and neither party believes that there is any uncertainty as to the rights and obligations between them, the agreement is not a compromise.").

Arcadia maintains that the settlement agreements are enforceable because the parties agreed to all material terms, i.e., Sun offered to pay the demurrage and Arcadia accepted. Sun, however, contends that two crucial elements of enforceable settlement agreements are missing in this case: a disputed claim and mutual concessions.

The record before the Court is devoid of evidence of a dispute between Sun and Arcadia regarding the amount of demurrage due to Arcadia pursuant to the 1999 and 2000 Contracts. The record also lacks any evidence that either party made concessions regarding the

demurrage due to Arcadia. To the contrary, the record establishes that Sun calculated the amount of demurrage owed to Arcadia and Arcadia accepted Sun's calculations. (Def.'s Exs. E, F, G and H.) The only other evidence before the Court regarding the parties' exchange of these calculations is that it is usual and customary for parties to vessel charters to exchange their calculations of demurrage under the charter after the discharge of the cargo. (Lamm Aff. ¶ 12.) Indeed, the 1999 and 2000 Contracts contemplated that the parties would exchange calculations and documentation regarding any demurrage claims, including exceptions to demurrage. (Def.'s Ex. A, Asbatankvoy clauses ¶¶ 24, 25; Def.'s Ex. B, Asbatankvoy clauses ¶¶ 24, 25.) Accordingly, the Court finds that the parties' correspondence of August, September and October 2000, regarding the calculation of demurrage pursuant to the 1999 and 2000 Contracts, did not result in enforceable settlement agreements regarding the payment of demurrage to Arcadia.

As the Court has found that the parties did not enter into settlement agreements in August, September and October 2000 which are subject to Pennsylvania's four year statute of limitations for contracts, the Court finds that Arcadia's claims for breach of contract arise from Sun's failure to pay demurrage pursuant to the 1999 and 2000 Contracts. Those claims are, therefore, subject to the one year time limitation for filing actions with respect to demurrage claims contained in the Claims clauses of those

Contracts. This suit was not filed until February 2004, considerably more than one year after the commencement of the limitations periods pursuant to both the 1999 and 2000 Contracts. (Lamm Aff. ¶¶ 5, 6; Def.'s Ex. A, Asbatankvoy clauses ¶ 24; Def.'s Ex. B, Asbatankvoy clauses ¶ 24.) The Court finds that Arcadia's claims for demurrage pursuant to the 1999 and 2000 Contracts have been waived pursuant to the Claims clauses of those Contracts and that this action is, therefore, barred by those Contracts. Accordingly, Arcadia's Motion for Summary Judgment is denied and Sun's Motion for Summary Judgment is granted.

An appropriate order follows.

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O R D E R

AND NOW, this 21st day of December, 2004, upon consideration of Defendant's Motion for Summary Judgment (Docket No. 8), Plaintiffs' Motion for Summary Judgment (Docket No. 9), the papers filed with respect thereto, and the argument held in open court on September 27, 2004, **IT IS HEREBY ORDERED** as follows:

1. Plaintiff's Motion for Summary Judgment is **DENIED**.
2. Defendant's Motion for Summary Judgment is **GRANTED** and **JUDGMENT** is hereby entered in favor of Defendant and against Plaintiff.
3. The Clerk of Courts shall **CLOSE** this case for statistical purposes.

BY THE COURT:

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John R. Padova, J.