

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

ADMARK, INC. : CIVIL ACTION  
v. :  
RPS, INC. : NO. 96-7287

**MEMORANDUM OF DECISION**

THOMAS J. RUETER  
United States Magistrate Judge

January , 1998

On January 6, 1998, this court conducted a bench trial in the above-captioned case. Plaintiff is a manufacturer and wholesaler of costume jewelry. Plaintiff contracted with defendant to ship its product to retail jewelers. Plaintiff alleges in this lawsuit that it suffered damages due to problems with defendant's delivery services. Defendant raises a counterclaim against plaintiff for unpaid freight charges in the amount of \$5,315.79. The court makes the following findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a):

**FINDINGS OF FACTS**

1. Plaintiff is a manufacturer and wholesaler of costume jewelry. Plaintiff's President was, at all times material hereto, Phillip Kramer. Mr. Kramer has had approximately fifty (50) years experience utilizing the services of motor carriers of small packages.

2. Defendant is an Interstate Commerce Commission ("ICC") certified motor carrier of small packages in interstate commerce.

3. Plaintiff and defendant entered into a Service Agreement dated March 26, 1996, effective March 27, 1996, (the "Service Agreement") pursuant to which defendant agreed to transport and deliver to various consignees packages of costume jewelry in interstate commerce in consideration for plaintiff's agreement to pay freight charges. (Def. Exh. A.)

4. Plaintiff conducts its business by shipping unsolicited promotional packages of its product, scarab costume jewelry, to retail jewelers, or consignees. If a consignee accepts the jewelry to sell to the public, he or she is to pay plaintiff the invoice price contained in the package. If a consignee refuses the jewelry, he or she is to return the package at plaintiff's cost. In plaintiff's experience, approximately eighty (80%) of these types of promotional packages are returned.

5. Where a consignee refused a package, plaintiff would request defendant to retrieve the package at an additional cost. This service is known as "call tag".

6. The invoice price for the jewelry plaintiff shipped by defendant was \$249.25.

7. Plaintiff's total cost for the jewelry, including packaging and freight, was \$180.00.

8. Between April 1, 1996 and the middle of August, 1996, plaintiff shipped approximately 1600 packages by defendant.

9. Paragraph 2 of the Service Agreement incorporates defendant's Tariff 200-H (Def. Exh. B) and the Terms and Conditions of Transport stated on the reverse defendant's form pick-up record (Def. Exh. D-1).

10. The second paragraph of item number 1 on defendant's pickup record states as follows:

Shipper further agrees that the terms and conditions of transport stated herein and the rates and rules set forth in [RPS'] Rates and Rules Tariff are not negotiable and may not be altered by any agent or employee of shipper or [RPS]; and, that this [RPS] Pick-Up Record has been prepared by shipper or on shipper's behalf by RPS.

(Def. Exh. D-1).

11. At the time the Service Agreement was signed, defendant provided plaintiff with numerous blank pickup forms.

12. Paragraph 5 of defendant's pickup form states in pertinent part as follows:

**THE LIABILITY OF [RPS] IS LIMITED TO THE SUM OF \$100.00 PER PACKAGE**, unless a higher declared value is declared by shipper and an additional charge is paid at the rate set forth in the current [RPS] Rates and Rules Tariff per each \$100.00 of additional value, or fraction thereof.

...

The liability of [RPS] is limited to the declared value of a shipment or the amount of any loss or damage actually sustained by shipper, whichever is lower.

[RPS] is not liable for loss, damage, delay, mis-delivery or non-delivery caused by;

a. Any act or failure to act of the shipper, consignee, or any other party who claims an interest in the shipment,

13. Plaintiff paid an additional \$0.35 per package to increase defendant's liability to \$200.00 per package.

14. Thomas Pierce, defendant's representative, admits that when he discussed the issue of defendant's liability with Mr. Kramer, he may have used the word "insurance".

However, at no time did Mr. Pierce elaborate on the terms of the “insurance”, nor did he provide Mr. Kramer with a copy of an “insurance” policy.

15. Defendant is not an insurance company and does not sell insurance.

16. Paragraph 6 of the Service Agreement provides in pertinent part as follows: “If concealed loss or damage is discovered after delivery, shipper must notify [RPS] within fifteen (15) days ...”.

17. Defendant has paid plaintiff monies on account of claims for concealed loss or damage that were made outside of the 15 day contract period.

18. Defendant hired independent contractors as drivers to deliver the packages for its customers.

19. Plaintiff was entitled to request proof of delivery from defendant to verify that its packages had been delivered.

20. Defendant’s drivers could accomplish delivery of plaintiff’s packages by one of three methods:

(i) the package delivered directly to a consignee representative at the address designated by plaintiff and the signature of consignee’s representative on defendant’s delivery record to verify delivery;

(ii) the package released at the door of the address designated by plaintiff where no consignee representative was present, if in the driver’s judgment the package would likely be found by the consignee, and the driver signed the delivery record indicating that the package was “driver released” with the code number 14; or

(iii) the package indirectly delivered to an adjacent address with instructions to forward it to the consignee and the driver signed the delivery record indicating that the package was indirectly delivered with the code number 19.

21. Plaintiff divides the problems it experienced with defendant's delivery service into six categories: (i) proof of delivery with incorrect signature (Pltf. Exh. A); (ii) proof of delivery to incorrect address (Pltf. Exh. B); (iii) no signature of consignee provided (Pltf. Exh. C); (iv) packages returned empty (Pltf. Exh. D.); (v) proof of delivery with incorrect tracking number (Pltf. Exh. E); and (vi) no proof of delivery (Pltf. Exhs. F, G).

22. With respect to eight packages lost or damaged, defendant paid plaintiff \$200.00 per package. (Pltf. Exh. H.)

23. With respect to four packages lost or damaged, defendant paid plaintiff \$100.00. (Pltf. Exh. I.)

24. Plaintiff paid defendant a total of \$6,817.44 for delivery services. (Pltf. Exhs. L, M, N.)

25. Plaintiff did not pay defendant for any transportation services it provided during the period from on or about May 24, 1996 through September 19, 1996. (Def. Exhs. E, F, G.) The total cost of these services is \$5,315.79.

Having made the above Findings of Fact, the court makes the following,

### **CONCLUSIONS OF LAW**

1. The Service Agreement is a valid and binding contract between the parties.
2. The parties agree that plaintiff's claims for lost or damaged goods under the Service Agreement are governed by the CARMACK Amendment to the Interstate Commerce Act, 49 U.S.C.A. § 14706. Specifically, 49 U.S.C.A. § 14706(a)(1) limits plaintiff's recoverable damages in this action to "actual loss or injury to the property". The Service Agreement superseded any oral representations made by Mr. Pierce regarding "insurance".

3. Plaintiff's measure of damages is its manufacturing and shipping costs of \$180.00 per package.

4. This court rejects plaintiff's argument that defendant should be estopped from denying that subsequent claims should be paid at the rate of \$200.00 per package because defendant previously paid it that amount with respect to eight lost or damaged packages (Pltf. Exh. H).

5. Under Pennsylvania law, a court may apply a doctrine of equitable estoppel to preclude a party from taking a position that is inconsistent with a position previously taken or acting differently from the manner in which that person induced another person to expect. See Louis W. Epstein Family Partnership v. Kmart Corp., 13 F.3d 762, 774 (3d Cir. 1994). To assert an equitable estoppel claim under Pennsylvania law, a party must establish: "(1) an inducement, whether by act, representation, or silence when one ought to speak, that causes one to believe the existence of certain facts; (2) justifiable reliance on that inducement; and (3) prejudice to the one who relies if the inducer is permitted to deny the existence of such facts." American Int'l Surplus Lines Ins. Co. v. IES Lead Paint Div., Inc., 1996 WL 135334, at \*5 (E.D. Pa., Mar. 18, 1996) (quoting Chemical Bank v. Dippolito, 897 F.Supp. 221, 224 (E.D. Pa. 1995)).

6. This court finds that plaintiff failed to establish these elements of equitable estoppel. Defendant did not consistently pay plaintiff \$200.00 for loss or damage claims. It paid plaintiff the lesser amount of \$100.00 per package with respect to four lost or damaged packages. (Pltf. Exh. I.)

7. This court also rejects plaintiff's claim that defendant waived the requirement in the Service Agreement that claims for concealed loss or damage must be made within fifteen days after delivery.

8. Under Pennsylvania law, parties to a written contract are permitted to orally modify a written contract despite a clause in the contract which specifically prohibits oral modification. First Nat'l Bank of Pa. v. Lincoln Nat'l Life Ins. Co., 824 F.2d 277, 280 (3d Cir. 1987); Nicolella v. Palmer, 432 Pa. 502, 506, 248 A.2d 20, 23 (1968). In addition, an oral modification of a contract may be accomplished by either words or conduct. 2101 Allegheny Assoc. v. Cox Home Video, Inc., 1991 WL 225008, at \*4 (E.D. Pa., Oct. 29, 1991), aff'd, 975 F.2d 1552 (3d Cir. 1992) (quoting United States v. 29.16 Acres More or Less, 496 F.Supp. 924, 928 (E.D. Pa. 1980)). Pennsylvania law requires either additional consideration or reliance to support a contractual modification. Barnhart v. Dollar Rent A Car Systems, Inc., 595 F.2d 914, 919 (3d Cir. 1979); Nicolella, 432 Pa. at 508-09, 248 A.2d at 23. Furthermore, a party seeking to demonstrate that a contract was orally modified must prove modification by clear and convincing evidence. United States v. 29.16 Acres, 496 F.Supp. at 938; Nicolella, 432 Pa. at 506.

9. This court finds that the parties did not orally modify the Service Agreement to eliminate the fifteen day notice requirement with respect to the filing of claims for concealed loss or damage. Plaintiff has offered no evidence of additional consideration or reliance to support its claim of contractual modification. The course of dealings between the parties further supports this court's conclusion that the Service Agreement was not modified. Plaintiff submitted numerous "loss and damage claim" forms in support of its claims against defendant. (Pltf. Exhs. A-G). Throughout these documents are copies of many letters from

defendant to plaintiff informing plaintiff that it did not comply with the fifteen day requirement. Even though defendant admitted that some exceptions were made in this regard, defendant's actions in a few instances are not sufficient to amount to an oral modification of the Service Agreement.

10. This court finds the following with respect to plaintiff's claims for specific packages allegedly not delivered to the proper consignees:

(a) **Proof of Delivery with Incorrect Signature:** Plaintiff lists 11 claims in this category. (Pltf. Exh. A). In response to plaintiff's request for proof of delivery with respect to these 11 claims, defendant provided plaintiff with proof that a signature was obtained verifying delivery of each package.<sup>1</sup> According to the "loss and damage claim" forms submitted by plaintiff to defendant, none of these claims are for concealed losses. Defendant has not submitted evidence to the contrary. Consequently, defendant is not liable to plaintiff for any of the claims in plaintiff's exhibit A.

---

1. With respect to plaintiff's claim number 180, plaintiff's President, Philip Kramer, argues that his wife's signature appears for this package which was to be delivered to an address in Maryland, and that his wife was never at that location. Defendant contended that this was actually a call tag package being returned to plaintiff. Defendant's explanation is supported by the proof of delivery provided by defendant which indicates that a package was delivered to an address abbreviated by the driver as "Torr". This court is confident in making the inference that the address referred to as "Torr" is 6114 Torresdale Avenue, Philadelphia, PA, plaintiff's address, and the address at which Mrs. Kramer works. With respect to plaintiff's claim number 339, plaintiff indicates on the summary sheet that no signature was obtained for this package. However, on plaintiff's claim form submitted to defendant, which form Mr. Kramer admitted preparing, there is a handwritten notation "wrong signature". Apparently, a signature was obtained.

This is but one example of the documentary evidence submitted by plaintiff which contains numerous handwritten notations concerning conversations between Mr. Kramer and certain consignees. This court cannot give consideration to this inadmissible hearsay.

(b) **Proof of Delivery to Incorrect Address:** Plaintiff lists 17 claims in this category. (Pltf. Exh. B). Plaintiff did not list any of these claims as being claims for concealed loss or damages. However, a review of the documents submitted by plaintiff reveals that two of the claims in this category, claim numbers 38 and 39, are claims for concealed loss or damage which plaintiff untimely submitted to defendant. Accordingly, defendant is not liable to plaintiff for these two claims. Defendant is also not liable to plaintiff for claim numbers 208 and 300. The driver's abbreviations of the addresses to which these deliveries were made are sufficiently clear for this court to conclude that defendant offered sufficient proof that the packages were properly delivered. Plaintiff has provided this court with sufficient proof that the remaining 13 packages listed in this category were delivered to incorrect addresses, and defendant is liable to plaintiff in the amount of \$180.00 per package, or \$2,340.00.

(c) **No Signature of Consignee Provided:** Plaintiff lists 17 claims in this category. (Pltf. Exh. C). Two of these claims, numbers 33 and 102, involve concealed loss or damage claims. Claim number 33 was submitted untimely. The package representing claim number 102 was not made available for defendant to inspect as required by the Service Agreement. The packages for claim numbers 13 and 133 were returned to plaintiff by call-tag. Signatures were provided verifying delivery for claim numbers 17 and 405. Finally, defendant provided proof that the packages for claim numbers 12, 15, 116, 159, 209, 307, and 333 were "driver released". Consequently, defendant is not liable to plaintiff with respect to these 13 claims. Defendant is liable to plaintiff for the remaining four claims at the rate of \$180.00 per claim, or \$720.00.

(d) **Package Returned Empty:** Plaintiff lists nine claims in this category. (Pltf. Exh. D). These claims are all claims for concealed loss or damage. According to the Service Agreement, plaintiff was required to submit a claim for these losses within 15 days of delivery. Plaintiff submitted all of these claims untimely, therefore, defendant is not liable to plaintiff with respect to these claims.

(e) **Proof of Delivery with Incorrect Tracking Number:** Plaintiff lists 16<sup>2</sup> claims in this category. (Pltf. Exh. E). Plaintiff argued that it would be impossible for defendant to provide reliable proof of delivery if it did not use the proper tracking number. Apparently, defendant tracks its packages by scanning a unique bar code assigned to each package. Defendant argued that plaintiff on many occasions provided the incorrect tracking number. Regardless of the tracking number, this court was able to compare the information on plaintiff's loss and damage claim form with the information on the proof of delivery provided by defendant to conclude that the packages for claim numbers 10, 26, 32 (driver release at neighboring address), 53, 167, 182, 185, 299, 377, 385, and 400 were properly delivered. With respect to claim number 348, plaintiff placed the incorrect tracking number on its loss and damage claim form and defendant provided plaintiff with proof that the package was returned to plaintiff. Plaintiff failed to prove that the package it was concerned about was not returned to plaintiff. The evidence shows that the package for claim number 35 was returned to plaintiff at its Central Avenue address and was actually an untimely claim for concealed loss for which defendant is not liable. Defendant is liable to plaintiff for claim numbers 30 and 227 in the

---

2. Plaintiff listed 17 claims in this category but did not provide this court with any information for claim number 55.

amount of \$180.00 per package, or \$360.00, since defendant has not provided proof of delivery for these packages.

(f) **No Proof of Delivery:** Plaintiff lists 72<sup>3</sup> claims in this category. (Pltf. Exhs. F and G). Seven of these claims (claim numbers 20, 22, 23, 31, 34, 36, and 40) are untimely claims for concealed loss or damage for which defendant is not liable. Defendant provided sufficient proof of delivery for 16 of the claims (claim numbers 52, 76, 119, 139, 154, 161, 204, 280, 302, 364, 397, 424, 453, 454, 458, and 460.) Defendant is liable to plaintiff for the remaining 49 claims, having failed to provide proof of delivery, in the total amount of \$8,820.00.

(g) Defendant paid plaintiff \$100.00 per package on account of the four claims listed on plaintiff's Exhibit I. Since plaintiff's measure of damages is \$180.00 per package, defendant is liable to plaintiff in the additional amount of \$320.00.

11. Plaintiff is liable to defendant in the full amount of its counterclaim, or \$5,315.79, for unpaid freight charges.

12. Both plaintiff and defendant are entitled to prejudgment interest at the rate of 6% per annum. See Corning Inc. v. Missouri Nebraska Express, Inc., 1996 WL 224673, at \*3-4 (E.D. Pa., Apr. 29, 1996); Consolidated Rail Corp. v. Certaineed Corp., 835 F.2d 474, 478 (3d Cir. 1987); 42 Pa. C.S.A. § 8101 (West 1982).<sup>4</sup>

---

3. Plaintiff actually lists 80 claims in this category, but provided documentary evidence for only 72 claims.

4. The time period for which prejudgment interest is awarded extends from the time that the claim accrues until the time that judgment is entered. Corning, 1996 WL 224673, at \*4 n.7.

For all the above reasons, it is hereby **ORDERED** that

1. Judgment will be entered in favor of plaintiff and against defendant in the amount of \$12,560.00, plus prejudgment interest on each claim found by this court to have been improperly rejected by defendant, from the dates defendant rejected such claims, through the date of this order. See infra ¶ 10.

2. Judgment will be entered in favor of defendant and against plaintiff in the amount of \$5,315.79, plus prejudgment interest from September 27, 1996 through the date of this order.<sup>5</sup>

BY THE COURT:

---

THOMAS J. RUETER  
United States Magistrate Judge

---

5. Within fourteen (14) days from the date of this order, the parties shall submit a joint stipulation executed by counsel setting forth the precise interest calculations which the Court should incorporate in the separate judgment order to be filed in accordance with this Memorandum of Decision.