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

DIAMOND TRANSPORTATION GROUP, INC.	:	CIVIL ACTION
v.	:	
EMERALD LOGISTICS SOLUTIONS, INC.	:	NO. 05-3828

ORDER AND OPINION

JACOB P. HART
UNITED STATES MAGISTRATE JUDGE

DATE: June 21, 2006

In this action, Diamond Transportation Group, Inc., ("Diamond"), seeks a declaratory judgment that its liability to Emerald Logistics Solutions, Inc., ("Emerald"), for the theft of Emerald's goods in its custody, is limited by the Carmack Amendment to the ICC Termination Act of 1995, ("ICCTA") 49 U.S.C. § 14706, to $100 per shipment. It has filed a motion for summary judgment. It also seeks to dismiss Emerald's counterclaims under the Carmack Amendment and for warehouseman liability, conversion and misrepresentation.

I will grant Diamond's motion to the extent that I will dismiss Emerald's common law counterclaims. As explained below, the motion will be otherwise denied.

I. Factual and Procedural Background

Diamond is an interstate motor carrier based in Philadelphia. Affidavit of Claudia Post, ¶ ¶ 1 and 5. Emerald, headquartered in California, is a forwarder of ground freight. Emerald's Answer to Amended Complaint at ¶ ¶ 10-11.

Between January and March, 2005, Emerald hired Diamond to pick up, transport and deliver goods to its customers in the Philadelphia area. Emerald's Counterclaim at ¶ 73. During these months, Diamond handled over 150 shipments for Emerald. Affidavit of Claudia Post at ¶ 23.

As explained in Diamond's proposed pricing schedule and Capability Brochure, which Diamond claims to have sent to Emerald on February 7, 2005, Diamond's standard, "released value" limitation of liability was $100 per shipment where the shipper did not declare a specific value for its shipment. Post Affidavit at ¶ ¶ 10 and 12. The shipper also had the option of declaring a value for its shipment, in which case Diamond's liability would not be so limited. Post Affidavit at ¶ 11. In that case, however, the shipper would pay an additional valuation charge of 20 cents per $100 declared. Id. According to Diamond, this extra charge would permit it to obtain insurance for the shipment in excess of its usual $25,000 in cargo insurance. Id.

Emerald did not declare value for its shipments on its documentation, and, according to Claudia Post, Diamond's president, specifically declined to do so when asked. Post Affidavit at ¶ 18. On the documents for every shipment, an alert manifest and a delivery receipt, Emerald wrote: "Dec. Value $0.00." Post Affidavit at ¶ 26. Diamond never purchased additional insurance for Emerald's shipments. Post Affidavit at ¶ ¶ 11, 18, 27-28.

On Friday, February 25, 2006, Emerald faxed to Diamond the standard documents for four shipments of Sony goods described as "EE" for "electronic equipment." Post Affidavit at ¶ 29. As usual, Emerald wrote: "Dec. Value $0.00," on the documentation. Post Affidavit at ¶ 26. The shipments contained Sony personal computers, but they were loaded on pallets covered in black shrinkwrap. Emerald's Response at 16. The parties dispute whether Diamond actually knew the contents of the shipments.

The shipments were not delivered to their recipients on February 25, however, probably because it was late in the day and the recipient businesses were closing. Post Deposition at 57. They were therefore brought to Diamond's facility for the weekend. Post Deposition at 63-64.

On that same Friday, Post directed an employee of their alarm service to turn off the facility's burglar alarm. Post Deposition at 73-74. According to Post, the alarm had been going off without reason all day, and the alarm company representative told her that he wouldn't be able to fix it until the next week. Id.

On Monday, Diamond employees discovered that the pallets had been compromised and a number of computers stolen. Post Deposition at 71-72. According to Emerald's investigator, a surveillance camera at a side door to the facility showed two individuals entering by use of a key. Exhibit O to Emerald's response. The police noted "burglary; night; no force." Exhibit U to Emerald's response. Emerald's investigator wrote that the individuals wore masks and gloves identical to those issued by Diamond to its employees. Exhibit O. No arrests were ever made in connection with this robbery. Exhibit U. The value of the stolen goods is said by Emerald to be $227,462.

According to Emerald, it is contractually obligated to pay Sony for the loss of the stolen goods, although it has not yet done so. However, Emerald has not been sued by Sony. Abramovic Deposition at 74.

In its motion for summary judgment, Diamond claims that it is not liable for Emerald's entire loss under the Carmack Amendment, because it properly limited its liability, so that it owes Emerald only $400, based on the released value rate Emerald selected. It claims, too, that the Carmack Amendment preempts Emerald's common law counterclaims. Diamond also argues that, whether or not its liability is effectively limited, Emerald cannot make out a *prima facie* case under the Carmack Amendment. Diamond also argues that Emerald has no standing to bring an action against it, and that Emerald's conversion claim is not factually supported.

Emerald responds that it can set forth a *prima facie* case under the Carmack Amendment. It argues, nevertheless, that the Carmack Amendment does not apply, since Diamond was not acting as a motor carrier at the time of the theft, but as a warehouseman, subject to common law liability. Even if the Carmack Amendment applies, Emerald argues, Diamond is liable for the full amount of Emerald's loss, since its attempted limitation of liability was ineffective.

II. Legal Principles

A. Summary Judgment

Summary judgment is warranted where the pleadings and discovery, as well as any affidavits, 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. Pr. 56. The moving party has the burden of demonstrating the absence of any genuine issue of material fact. Celotex Corp.. v. Catrett, 477 U.S. 317, 323 (1986). In response, the non-moving party must adduce more than a mere scintilla of evidence in its favor, and cannot simply reassert factually unsupported allegations contained in its pleadings. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986); Celotex Corp. v. Catrett, supra at 325; Williams v. Borough of West Chester, 891 F.2d 458, 460 (3d Cir. 1989).

When ruling on a summary judgment motion, the court must construe the evidence and any reasonable inferences drawn from it in favor of the non-moving party. Anderson v. Liberty Lobby, supra at 255; Tiggs Corp. v. Dow Corning Corp., 822 F.2d 358 , 361 (3d Cir. 1987). Nevertheless, Rule 56 "mandates the entry of summary judgment ... against a party who fails to make a 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 Corp. v. Catrett, supra, at 323.

B. The Carmack Amendment

The Carmack Amendment provides the exclusive remedy against an interstate common carrier for breach of a carriage contract. 49 U.S.C. § 14706; S & H Hardware & Supply Co. v. Yellow Transportation, Inc., Civ. A. No. 02-9055, 2004 WL 1551730 at *2 (E.D. Pa. Jul. 8, 2004). It imposes full liability upon a carrier for actual loss or injury to property. Carmana Designs, Ltd. v. North Amer. Van Lines, Inc., 943 F.2d 316, 319 (3d Cir. 1991).

However, a carrier may limit its liability "to a value established by written or electronic declaration of the shipper, or by written agreement between the carrier and shipper if that value would be reasonable under the circumstances surrounding the transportation." 49 U.S.C. § 14706(c)(1)(A). The Court of Appeals for the Third Circuit has said that carriers may limit their liability through a written agreement with the customer or shipper which evidences an absolute, deliberate, and well-informed choice by the shipper to limit the carrier's liability. Carmana Designs, Ltd. v. North Amer. Van Lines, Inc., 943 F.2d 316, 319 (3d Cir. 1991).

It has been held that, in order to limit its liability, a carrier must (a) maintain a tariff within prescribed guidelines of the ICC; (b) obtain the shipper's agreement as to his choice of liability; (3) give the shipper a reasonable opportunity to choose between two or more levels of liability; and (4) issue a receipt or bill of lading prior to moving the shipment. Carmana Designs Ltd. v. North American Van Lines, Inc., 943 F.2d 316, (3d Cir. 1991). The first requirement has now been replaced, except in circumstances not applicable here, with the requirement that the carrier provide to the shipper upon request a written copy of the bases for its rate. Emerson Electric Supply Company v. Estes Express Lines Corporation, – F.3d –, 2006 WL 1660575 at n.6 (Jun. 16, 2006). The other requirements, however, are intact in this Circuit. Id.

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) the amount of damages. Paper Magic Group, Inc. v. J. B. Hunt Transport, Inc., 318 F.3d 458, 461 (3d Cir. 2003). The burden then shifts to the carrier to prove it was not negligent. Id.

III. Discussion

A. The Application of the Carmack Amendment to This Case

As noted, Emerald argues that the Carmack Amendment does not apply in this case because, at the time of the loss, Diamond was not acting as a motor carrier, but as a warehouseman. The goods were undeniably located in Diamond's building (whether or not termed a warehouse) at the time of the loss.

However, I do not believe that a reasonable factfinder could decide in favor of Emerald on this issue. The ICCTA's definition of "transportation" is intentionally broad:

> Transportation. The term "transportation" includes –
>
> (A) a motor vehicle, vessel, **warehouse**, wharf, pier, dock, yard, property, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, regardless of ownership or an agreement concerning use; and
>
> (B) services related to that movement, including arranging for, receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, **storage**, handling, packing, unpacking, and interchange of passengers and property.

49 U.S.C. § 13102(21). ("Emphasis supplied").

It appears from this definition that losses sustained during storage which is merely incidental to the transportation of goods is covered by the Carmack Amendment. Diamond has cited to several cases which support this interpretation of the statute. In PNH Corporation v. Hullquist Corporation, 843 F.2d 586, 590-91 (1st Cir. 1988), a defendant carrier had not actually moved the damaged goods at all, but only took delivery of them, and then passed them on to another carrier. Nevertheless, citing the broad ICCTA definition, the Court of Appeals for the First Circuit wrote: "A motor carrier cannot, under this definition, be absolved from liability merely because a loss occurred while the property was temporarily not in transit."

Similarly, in Margetson v. United Van Lines, 785 F. Supp. 917 (D.N.M. 1991), the plaintiff's household goods were to be stored "for some time" by the van line that moved them from Texas. The goods were damaged while in storage. The Margetson court found that the plaintiff could not maintain a breach of contract claim against the carrier, because the sole remedy was under the Carmack Amendment. This court, like the PNH court, took note of the ICCTA definition of transportation. It wrote: "Clearly, transportation is to be broadly construed and the drafters contemplated that transportation would extend to storage facilities." 785 F. Supp. at 920.

A third case cited by Diamond did not involve the Carmack Amendment, but rather the "federal common law" the court found to apply to an airway carrier in a case involving damaged computer equipment. Nippon Fire & Marine Ins. Co., Ltd. v. Skyway Freight Systems, 235 F.3d 53 (2d Cir. 2000). However, it is relevant since the Carmack Amendment clearly embodies much of this "federal common law" regarding carriers. In Nippon, the Court of Appeals for the Second Circuit wrote: "[T]he fact that an air carrier temporarily may have stored the goods does

not render the carrier a warehouseman, subject to common law warehouseman's duties, so long as the storage was only temporary and incidental to the primary goal of interstate shipment."

In opposition to this, the two cases cited by Emerald, while supportive of the view that Diamond should be considered a warehouseman, apply only state common law. Clarke & Thaw v. Needles, 25 Pa. 338, 339 (Pa. 1855); Sheehan v. American Railway Express Company, 91 Pa. Super 71, 73 (Pa. Super. 1927). The ICCTA definition of transportation was not a factor in these cases.

Even if the Carmack Amendment does not always apply to the warehousing of goods moving in interstate transportation, the facts in this case compel a conclusion that it does here. It is evident that any warehousing function Diamond performed was incidental to the main service it performed for Emerald, which was to deliver goods shipped by Emerald's clients to their Philadelphia-area customers. It stored the goods only for as long as it took to arrange delivery. It is clear, therefore, that Diamond is subject to the Carmack Amendment. There is no real question of material fact as to this. As a result of my conclusion in this regard, I will dismiss Emerald's counterclaim for warehouseman liability.

B. Preemption of Emerald's Counterclaims for Conversion and Misrepresentation

The Court of Appeals for the Third Circuit has not yet considered the extent to which the Carmack Amendment preempts state law claims. However, the Honorable Legrome D. Davis of this District discussed the matter at length in Mallory v. Allied Van Lines, Inc., Civ. A. No. 02-7800, 2003 WL 22391296 (E.D. Pa. Oct. 20, 2003), writing:

> "Implied federal preemption may be found where federal regulation of a field would interfere with Congressional objectives." Abdullah v. American Airlines, Inc., 181 F.3d 363, 367 (3d Cir. 1999) (citing Rive v. Santa Fe Elevator Corp.,

> 331 U.S. 218, 230, 67 S. Ct. 1176, 91 L. Ed. 1447 (1947); Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248, 104 S. Ct. 615, 78 L. Ed.2d 443 (1984)). With respect to the Carmack Amendment, the Supreme Court has held that "[a]lmost every detail of the subject [of interstate carriers' liability under a bill of lading] is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject, and supercede all state regulation with reference to it." Adams Express Co. v. E.H. Croninger, 226 U.S. 491, 505-506, 33 S. Ct. 148, 57 L. Ed. 314 (1913). Thus, the Carmack Amendment preempts a state law cause of action if it involves loss of goods or damage to goods caused by an interstate common carrier. See, id., see also Sorokin v. National Van Lines, 2002 U.S. Dist. LEXIS 15093 at *4 (E.D. Pa. July 30, 2002); Faust v. Clark & Reid Co., Civ. A. No. 94-4580, 1994 U.S. Dist. LEXIS 16743 at *3-4 (E.D. Pa. Nov. 23, 1994).

Id. at *2.

Judge Davis also noted that other jurisdictions have "consistently held" that the Carmack Amendment preempts state law in most circumstances. Id. at n. 4. Notably, in Smith v. United Parcel Service, 296 F.3d 1244, 1248-49 (11th Cir. 2002), the Court of Appeals for the Eleventh Circuit wrote: "While we agree that situations may exist in which the Carmack Amendment does not preempt all state and common law claims, including ones for outrage, only claims based on conduct separate and distinct from the delivery, loss of, or damage to goods escape preemption." On the basis of all of the authority he discussed, Judge Davis dismissed the Mallory plaintiff's claims for breach of contract and emotional distress.

I agree with Judge Davis's analysis of the preemption issue, and with the Smith v. UPS holding. Accordingly, I will dismiss Emerald's counterclaims for conversion and misrepresentation. They do not arise from conduct "separate and distinct" from the loss of the stolen computer equipment. Rather, they are directly and solely related the exact same facts which form the basis of the Carmack Amendment claim.

C. Diamond's Motion is Otherwise Denied

Despite the foregoing, I will not grant summary judgment in favor of Diamond on its claim that its liability under the Carmack Amendment is limited to $100 per shipment. Emerald has shown the existence of factual issues about the legitimacy and reasonableness of Diamond's limitation of liability.

Neither will I grant summary judgment on Diamond's claim that Emerald cannot make out a *prima facie* case under the Carmack Amendment. Diamond argues that Emerald cannot show the goods were delivered to Diamond in good condition, since they were on pallets wrapped with dark, opaque plastic. There is a legal basis for this argument, since, even when goods are stolen, the person seeking compensation must still show that they were delivered to the carrier in good condition. See Security Insurance Company of Hartford v. Old Dominion Freight Line, Inc., 391 F.3d 77, 83-84 (2d Cir. 2004). Where the goods were 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." Id.

Nevertheless, Emerald points out that Larry Rodberg, Emerald's vice-president and co-owner, testified at his deposition that Emerald itself shrinkwrapped the pallets of computer boxes. Rodberg Deposition, Exhibit EE to Emerald's response, at 83-84. Id. Emerald also has Shipment Manifests from Sony showing the number of boxes and the weight of the shipments. Exhibit T to Emerald's response. It is likely, therefore, that Emerald will be able to put forth sufficient evidence at trial, whether direct or circumstantial, to show a genuine issue of material fact as to the contents and condition of the shipments. (It might be helpful if the "description"

language on the Shipment Manifests can be deciphered. See A.I.G. Uruguay Compania v. AAA Cooper Transportation, 334 F.3d 997, 1006-1009).

Similarly, although it is relevant that Emerald has apparently not paid Sony for the losses it suffered, it is not clear as a matter of fact that Emerald is not obligated to pay. Thus, Emerald may be able to show that it has suffered damages. If it has suffered damages, Emerald has standing to pursue a Carmack Amendment case. Therefore, I will not grant Diamond's motion in this respect.

IV. Conclusion

For the reasons set forth above, I will enter the following

O R D E R

AND NOW, this day of June, 2006, upon consideration of Plaintiff's Motion for Summary Judgment, filed as Document No. 21, Defendant's response thereto, and the Plaintiff's reply, it is hereby ORDERED that Plaintiff's Motion is

1. GRANTED IN PART in that Emerald's counterclaims for warehouseman liability, conversion and misrepresentation are DISMISSED WITH PREJUDICE;

2. The motion is otherwise DENIED.

BY THE COURT:

/s/ Jacob P. Hart

JACOB P. HART
UNITED STATES MAGISTRATE JUDGE