

FEDERAL MARITIME COMMISSION

MAHER TERMINALS, LLC,

Claimant,

v.

THE PORT AUTHORITY OF NEW
YORK AND NEW JERSEY,

Respondents.

Docket No. 08-03

Served: February 11, 2014

BY THE COMMISSION: Mario CORDERO, *Chairman*; Rebecca F. DYE, Richard A. LIDINSKY, JR., and Michael A. KHOURI, *Commissioners*. William P. Doyle, *Commissioner*, not participating.

Memorandum Opinion and Order on Petition for Reconsideration

I. INTRODUCTION

This case is before the Commission on a petition for reconsideration filed by Maher Terminals, LLC (Maher) to the Commission's order (Order) dated January 31, 2013, granting in part the Port Authority of New York and New Jersey's (PANYNJ) motion for summary judgment. *Maher Terminals, LLC v. The Port Authority of New York and New Jersey*, 32 S.R.R. 1185 (FMC 2013). On February 11, 2013, Maher filed a petition for review of

the Order with the U.S. Court of Appeals for the D.C. Circuit. (*Maher Terminals, LLC v. Federal Maritime Comm'n*, No. 13-1028). On March 4, 2013, Maher filed its petition for reconsideration with the Commission. On March 5, 2013, the Commission filed a motion in the D.C. Circuit proceeding to dismiss Maher's petition for review.¹ On June 18, 2013, the D.C. Circuit granted the motions to dismiss filed by the Commission and PANYNJ, finding that the Order was not final and Maher's request for agency reconsideration rendered its petition for review in the D.C. Circuit incurably premature.² The petition for reconsideration is therefore properly before the Commission.³

II. POSITIONS OF THE PARTIES

A. Maher's Petition for Reconsideration

Maher argues that the Commission's majority made material mistakes in fact and that the Commission's majority decision addressed matters upon which Maher did not have an opportunity to comment. Maher points to three alleged substantive mistakes of fact:

¹ The grounds for dismissal were that: (1) the Order was not final as it did not dispose of all issues as to all parties in the administrative proceedings; and (2) Maher's request for agency reconsideration of the Order rendered its petition for review in the D.C. Circuit premature. On March 13, 2013, PANYNJ filed a motion to intervene in the D.C. Circuit proceeding and also filed a motion to dismiss Maher's petition for review on grounds similar to those argued by the Commission. On May 16, 2013, the court granted PANYNJ's motion to intervene.

² The D.C. Circuit issued its mandate on August 14, 2013.

³ Maher argued that the D.C. Circuit has jurisdiction over the issues appealed absent a request by the Commission to remand the matter to the Commission and an order from the Court of Appeals granting remand. This argument was rendered moot by the D.C. Circuit's dismissal of Maher's petition for review.

- 1) The Commission's conclusion that the only two remedies available to PANYNJ for Maersk- APM Terminals North America, Inc.'s (APM) failure to meet the port guarantee are specific performance of the port guarantee or a rent penalty as specified in the terms of the lease;
- 2) The Commission's conclusion that the port guarantee was not otherwise enforceable, including that specific performance was not a viable remedy for Maersk-APM's failure to meet the port guarantee; and
- 3) The "factual conclusion that Maher knew or should have known, at the time its lease ("EP-249") took effect (on or about October 2000), that the lease-term discrimination alleged in the Complaint based on the 'facial' lease terms was 'undue,' as required by *Ceres* element 3, because 'the remedy contained in Lease EP-248 for the failure of Maersk-APM to meet the Port Guarantee for whatever reasons was...higher rental rates.'" Maher Petition, p. 2, citing the Commission's Order at 14 (emphasis added).

Maher argues that the Commission made these substantive material mistakes of fact because "it eschewed plain evidence on the summary judgment record before it, including the 'facial' terms of Maersk-APM's lease, and furthermore because it erroneously excluded and did not consider the full body of merits evidence, legal authorities, and argument before the agency." Maher Petition, p. 2. Maher argues the Commission "erred by failing to provide it with an opportunity to comment on newly devised pivotal issues and merits submissions" and that the Commission decided new issues *sua sponte*, specifically, whether a rent penalty was "the remedy" and whether specific performance was viable. *Id.* Maher

also argues that it was not given an opportunity to comment on excluded merits evidence, authorities, and argument. Maher further argues that the Commission should remand the statute of limitations question to the presiding officer for findings of fact based on a complete record. Additionally, Maher argues that remand is warranted as PANYNJ has presented a new position on the merits that is contrary to its summary judgment argument.

B. PANYNJ's Position in Opposition to Maher's Petition for Reconsideration

PANYNJ argues that Maher's petition for reconsideration is frivolous as Maher has failed to satisfy any of the requirements for reconsideration. Specifically, PANYNJ argues that Maher's contention that the Commission made material mistakes of fact is baseless for several reasons. PANYNJ argues that the Commission's statement that the rent increase was the remedy for breach is not an issue of fact but an issue of law. PANYNJ also argues that the Commission did not make any mistake at all, noting that the rental rate increase was the only practical remedy, given that the only specified remedy contained in the lease for breach of the port guarantee was a rental rate increase; specific performance is an extraordinary remedy and the enforcement of the port guarantee through specific performance would be particularly impracticable as compliance is determined annually and in retrospect.

PANYNJ also argues that even if the Commission had made any mistake of fact in stating that the rental increase was the remedy for breach of the port guarantee, such mistake was not material to the Commission's summary judgment ruling. PANYNJ argues that Maher's position that it had no reason to know that the differences between the two leases were undue until 2007 or 2008 (when Maher claims to have learned facts regarding the control of cargo) or 2011 (when Maher learned that PANYNJ had decided in 2010 to enforce the rental increase remedy) is contrary to the controlling "should have known" standard for claim accrual.

PANYNJ further argues that Maher expressly argued and presented evidence regarding the possible remedies if the port guarantee was not met and therefore, this issue was not raised *sua sponte* by the Commission. PANYNJ also argues that Maher's argument that PANYNJ has altered its position in its merits arguments is false. PANYNJ states that it argued on the merits that Maher did not believe they had any basis to sue PANYNJ and viewed their lease as an extremely valuable asset, not that Maher neither knew nor should have known of its cause of action. PANYNJ argues that the chart of quotes taken from its merits pleadings, found in Maher's petition, which allegedly shows PANYNJ's changed position, merely illustrates PANYNJ's position that Maher has, and had, no valid Shipping Act claims.

III. DISCUSSION

A. Standard of Review

The Commission's rule for reconsideration of proceedings is found at 46 C.F.R. § 502.261. The rule provides that "[a] petition will be subject to summary rejection unless it: (1) [s]pecifies that there has been a change in material fact or in applicable law, which change has occurred after issuance of the decision or order; (2) [i]dentifies a substantive error in material fact contained in the decision or order; or (3) [a]ddresses a finding, conclusion, or other matter upon which the party has not previously had the opportunity to comment or which was not addressed in the briefs or arguments of any party." 46 C.F.R. § 502.261(a). The rule goes on to state that "[p]etitions which merely elaborate upon or repeat arguments made prior to the decision or order will not be received." 46 C.F.R. § 502.261(a)(3).

B. Analysis

Maher argues that when the Commission reviews an initial decision, it applies a *de novo* standard and should consider all relevant evidence, even if it was not something discussed in an initial decision or in exceptions. Therefore, Maher argues the Commission should consider all of the evidence submitted by the parties, including the evidence submitted on the merits. We note that, as stated in the Order, a grant of summary judgment is reviewed *de novo*, such review is based on the record that existed at the time of summary judgment.

Maher does not identify in its petition for reconsideration what evidence, contained in the merits record but not already contained in the summary judgment record, the Commission needs to consider.⁴ Maher cites to both the merits pleadings and the summary judgment pleadings establishing what it characterizes as various key facts (“facts that PANYNJ’s position presented to Maher was that the port guarantee was a unique cargo guarantee; facts that PANYNJ did not consider the port guarantee a cargo guarantee available to Maher; facts that PANYNJ did not offer an equivalent cargo guarantee/rent concession term to Maher; and facts that there were multiple powerful remedies available to PANYNJ to enforce the Maersk-APM guarantee,” Maher Petition, p. 11) (emphasis omitted). But those facts were established by evidence contained solely in the summary judgment record and were already

⁴ In the Order, we held that evidence excluded by the ALJ from the summary judgment record should have been admitted and then considered that evidence in our determination. *Maher v. PANYNJ*, 32 S.R.R. at 1194. That evidence included: 1) statements of material fact filed by PANYNJ, which the ALJ found were not material to the question of whether Maher’s claim accrued on October 1, 2000, and Maher’s responses to those statements; 2) parts of Maher’s responding statement to PANYNJ’s statement of material facts, setting forth facts regarding events occurring after October 1, 2000; and 3) portions of PANYNJ’s statement in response to the new facts contained in Maher’s responding statement.

considered. Presumably, if there was new evidence contained in the merits record but not the summary judgment record that would meet the criteria contained in 46 C.F.R. § 502.261(a)(1) (a change in material fact, which change has occurred after issuance of the decision or order), Maher would have identified such evidence. Maher, however, has not done so. There does not appear to be any change in material fact since the issuance of the Order that would justify Maher's petition for reconsideration or that would justify a remand of the statute of limitations question to the presiding officer for findings of fact based on a complete record. Maher's petition appears to "merely elaborate upon or repeat arguments made prior to the decision or order" and accordingly, Maher's petition should "not be received." 46 C.F.R. § 502.261(a)(3).

Maher next argues that the Commission's conclusions (delineated in Section II.A, above) are substantive errors in material fact which should be reconsidered. Maher argues that other remedies were available, such as filing a complaint with the Commission and specific performance, citing to a provision in the lease that allows for the exercise of any remedy available to PANYNJ in law or equity. Accordingly, Maher argues that the Maersk-APM lease did not reveal that the remedy for failure to meet its port guarantee was a mere rent penalty; the mere existence of a rent penalty should not have tipped off Maher to its cause of action; and the inability to enforce the port guarantee against the Maersk ocean carrier did not appear on the face of the lease and was not known nor should have been known to Maher in October 2000. Maher also argues that PANYNJ has admitted on the merits that the rent penalty is not the exclusive remedy for failure to meet the port guarantee.

PANYNJ argues that the Commission's statement that the rent increase was the remedy for breach is not an issue of fact but an issue of law. PANYNJ also avers that the Commission did not make any mistake at all, noting that the rental rate increase was the only practical remedy, given that the only specified remedy for

breach was a rental rate increase; specific performance is a extraordinary remedy and the enforcement of the port guarantee through specific performance would be particularly impracticable as compliance with the port guarantee is determined annually and in retrospect. PANYNJ further argues that Maher's argument that the possibility of a remedy other than a rent increase demonstrates it was not on notice of its unreasonable discrimination claims in 2000 should be rejected. PANYNJ also claims that even if the Commission had made any mistake of fact in stating that the rental increase was the remedy for breach of the port guarantee, such mistake was not material to the Commission's summary judgment ruling. PANYNJ also alleges that Maher's statements to the effect that PANYNJ has altered its position in its merits arguments are false. PANYNJ states that it argued on the merits that Maher did not believe they had any basis to sue PANYNJ and viewed their lease as an extremely valuable asset, not that Maher neither knew nor should have known of its cause of action.

The determination that an increase in rent was the remedy for failure to meet the port guarantee was not a substantive error of material fact. By the plain, undisputed terms of the lease, known by both parties as of October 1, 2000, PANYNJ could have, and in fact, has, increased the basic annual rental rate for the failure of APM to meet the port guarantee. The Commission took this undisputed fact and determined, as a matter of law, that as of that date, Maher knew, or should have known this fact and accordingly, could have determined whether the terms of the two leases were or were not justified by valid transportation factors (*Ceres* Element 3). Whether PANYNJ could have obtained another remedy, such as specific performance or through an enforcement action at the Commission, is, as PANYNJ argued, both an issue of law and purely speculative. Maher's other arguments "merely elaborate upon or repeat arguments made prior to the decision or order." Additionally, PANYNJ does not appear to have altered its position in its merits argument and therefore, remand is not warranted for this reason.

Finally, Maher argues as support for its petition for reconsideration that the Commission erred by failing to provide Maher an opportunity to comment on the viability of a specific performance remedy. PANYNJ argues that Maher expressly argued and presented evidence regarding the possible remedies if the port guarantee was not met and that this issue was not raised *sua sponte* by the Commission. PANYNJ also argues that the Commission decided no new issue in making the statement upon which Maher has predicated its petition and that not only did Maher have opportunities to comment on the issues for which it now seeks reconsideration but it, in fact, did so.

A review of the summary judgment and exceptions pleadings indicates that both parties had an opportunity to, and did, address the viability of a specific performance remedy and other available remedies. *See* Material Facts as to which there is no Genuine Dispute, Statement 22 and Maher's Response; reproduced on p. 19 of the Initial Decision (initially found in Maher's Responding Statement to the Port Authority's Statement of Material Facts, April 15, 2011, pp. 11-17); Maher's Reply to PANYNJ's exceptions, pp. 29-30; and PANYNJ's Reply in Opposition to Maher's Exceptions to I.D, pp. 9, 23 (PANYNJ argued that mandatory injunctions or specific performance are disfavored by the courts). The Order specifically admitted Maher's Exhibit A (previously excluded by the ALJ), which included an argument about enforcing the port guarantee. *Maher v. PANYNJ*, 32 S.R.R. at 1194. In addition, the oral argument before the Commission contained a brief discussion of specific performance and other available remedies. (May 17, 2012, Oral Argument Transcript, pp. 13-16, 45). The Order does not contain "a finding, conclusion, or other matter" upon which Maher has not had the opportunity to comment or "which was not addressed in the briefs or arguments of any party." 46 C.F.R. § 502.261(a)(3). Therefore, Maher's petition for reconsideration is rejected.

IV. CONCLUSION

Upon consideration of the conclusions above, Maher fails to meet the criteria for granting a petition for reconsideration and we reject Maher's petition.

THEREFORE, IT IS ORDERED, That Maher's petition for reconsideration be rejected.

By the Commission.

Karen V. Gregory
Secretary