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May 24, 2011					
FEDERAL MARITIME COMMISSION					

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WASHINGTON, D.C.

DOCKET NO. 10-06

YAKOV KOBEL AND VICTOR BERKOVICH

v.

**HAPAG-LLOYD A.G., HAPAG-LLOYD AMERICA, INC.,
LIMCO LOGISTICS, INC., AND INTERNATIONAL TLC, INC.**

ORDER ON DISPOSITIVE MOTIONS

I. PROCEDURAL BACKGROUND

On March 10, 2011, Complainants Yakov Kobel and Victor Berkovich filed a motion for partial summary judgment against Respondents International TLC, Inc. ("International TLC" or "Int'l TLC") and Limco Logistics, Inc. ("Limco"), a memorandum of law, and supporting affidavits ("KB Motion"). Complainants also filed a request for oral argument on the motion for partial summary judgment. To date, no replies to the Complainants' motion or request for oral argument have been received. The International TLC and Limco motions discussed below are utilized in evaluating the Complainants' motion for partial summary judgment.

On March 10, 2011, Respondents Hapag-Lloyd A.G. ("HLAG") and Hapag-Lloyd America, Inc. ("HLAI") filed a motion to dismiss and/or for summary judgment and a memorandum in support of the motion ("HL Motion"). On March 28, 2011, Complainants Yakov Kobel and Victor Berkovich filed a reply ("HL Reply").

On March 14, 2011, Respondent Limco filed a motion for summary judgment ("Limco Motion"). On March 28, 2011, Complainants Yakov Kobel and Victor Berkovich filed a reply ("Limco Reply").

On March 16, 2011, Respondent International TLC filed a motion for dispositive ruling ("Int'l TLC Motion"). On March 28, 2011, Complainants Yakov Kobel and Victor Berkovich filed a reply ("Int'l TLC Reply").

II. LEGAL STANDARD

A. Motion to Dismiss

Although the Commission's Rules of Practice and Procedure ("Rules") do not explicitly provide for motions to dismiss or for summary judgment, Rule 12 permits reference to the Federal Rules of Civil Procedure for situations which are not covered by a specific Commission rule. 46 C.F.R. § 502.12. Thus, the standard used to evaluate motions to dismiss in Commission proceedings mirrors the standard used in federal courts. *See, e.g., Tienshan, Inc. v. Tianjin Hua Feng Transport Agency Co., Ltd.*, FMC No. 08-04 (ALJ Apr. 23, 2010) (Memorandum and Order on Respondent Tianjin Hua Feng Transport Agency Co., Ltd.'s Motion to Dismiss Pursuant to F.R.C.P. 12(b)(1) and (6) for Lack of Subject Matter Jurisdiction and for Failure to State a Claim for Relief).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 555). "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 129 S. Ct. at 1950.

B. Motion for Summary Judgment

The Commission has emphasized that

At the summary judgment stage, the role of the judge ". . . is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, [477 U.S. 242, 249 (1986)]. The party seeking summary judgment . . . has the burden of demonstrating that there is no genuine issue of material fact. *Adickes v. Kress & Co.*, 398 U.S. 144, 157 (1970); [10A]Wright, Miller & Kane, [*Federal Practice and Procedure* § 2727, p. 455 (3d ed. 1998)].

EuroUSA Shipping, Inc., Tober Group, Inc., and Container Innovations, Inc. – Possible Violations of Section 10 of the Shipping Act of 1984 and the Commission's Regulations at 46 C.F.R. § 515.27, 31 S.R.R. 540, 545 (FMC 2008).

The party moving for summary judgment bears the initial burden of identifying evidence that demonstrates the absence of any genuine issue of material fact. *Green v. Dalton*, 164 F.3d 671, 675 (D.C. Cir. 1999) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). The mere existence of a factual dispute will not in and of itself defeat an otherwise properly supported motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). However, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there

is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation omitted). The inferences to be drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party. *Matsushita*, 475 U.S. at 587.

Even if summary judgment is technically proper, sound judicial policy and the proper exercise of judicial discretion permit denial of such a motion for the case to be developed fully at trial. *Roberts v. Browning*, 610 F.2d 528, 536 (8th Cir. 1979); *State of New York v. Amfar Asphalt Corp.*, 1986 WL 27582, at *2 (E.D.N.Y. 1986); *In re Korean Air Lines Disaster of September 1, 1983*, 597 F. Supp. 613, 618 (D.D.C. 1984). See also Fed. R. Civ. P. 56 advisory committee notes, 2007 amendments ("there is discretion to deny summary judgment when it appears that there is no genuine issue as to any material fact").

III. DISCUSSION

A. Kobel-Berkovich Motion

Complainants Yakov Kobel and Victor Berkovich move for summary judgment against Respondents International TLC and Limco arguing that these Respondents violated section 10(d)(1) of the Shipping Act by changing the name of the shipper/exporter and consignee on three bills of lading without Complainants' consent or authorization, resulting in loss of Complainants' cargo; International TLC acted as an ocean transportation intermediary when shipping Complainants' five containers, but did not have a license with the Federal Maritime Commission, in violation of Section 19(a); and International TLC did not furnish a bond, proof of insurance, or other surety as required by Section 19(b) of the Shipping Act. KB Motion at 8-14. International TLC and Limco did not file responses. Their dispositive motions, however, address these issues and will be utilized in evaluating the motion.

Complainants' motion relies on factual assertions denied by these Respondents. For example, Complainants assert that International TLC acted as an ocean transportation intermediary while International TLC contends that it operated as a loading and consultation company and Limco states that International TLC operated as the freight forwarder. KB Motion at 2; Int'l TLC Motion at 2; Limco Motion at 1. Complainants assert that International TLC exercised a self-help remedy, selling and disposing of the Complainants' containers when it had no legal authority to do so. KB Motion at 12. International TLC contends that the Complainants failed to timely pay for shipping, failed to pick up the containers, and provided incorrect information about the weight of the containers. KB Motion at 6. Limco indicates that there is a factual dispute as to whether International TLC had the right to liquidate the Complainants' cargo by sale at that point in time. Limco Motion at 1.

The determination of the role played by each Respondent and whether the liquidation of Complainants' cargo was proper requires a determination of disputed material facts. The disputed material facts raised in the Complainants' motion cannot be resolved without an evidentiary hearing. Viewing the evidence in the light most favorable to the nonmoving party, the Respondents, there exist genuine disputes of material facts and a decision cannot be rendered as a matter of law.

Therefore, Complainants' motion for partial summary judgment against International TLC and Limco is denied.

B. Hapag-Lloyd Motion

Complainants object to exhibit 1 of Hapag-Lloyd's motion, arguing that the affiant does not have personal knowledge and relies on hearsay without qualifying as an expert witness. HL Reply at 3-4. These arguments are more appropriately considered in weighing the value of the affidavit. Exhibit 1 will be allowed and Complainants' arguments have been considered in the weight given to the evidence. Each ground asserted in Hapag-Lloyd's motion will be addressed in turn.

1. Subject Matter Jurisdiction

HLAG and HLAI contend that the amended complaint essentially alleges a failure to deliver three containers, that failure to deliver cargo is a cause of action under the Carriage of Goods by Sea Act, 46 U.S.C. § 30701 ("COGSA"), but is not a Shipping Act violation, and therefore, the Commission lacks subject matter jurisdiction over the amended complaint. HL Motion at 8. Complainants respond that the amended complaint alleges violations of the Shipping Act over which the Commission has jurisdiction. HL Reply at 10.

Taking the factual allegations of the amended complaint as true, Complainants allege violations of the Shipping Act for conduct both before loading on the ship and after discharge at the port. *See DSW Int'l, Inc. v. Commonwealth Shipping, Inc., and Abou Merhi Lines, LLC*, FMC No. 1898(F) (ALJ Mar. 29, 2011) (Initial Decision); *Kuzela v. A.P. Moller-Maersk A/S*, Docket 1883(F) (ALJ Dec. 13, 2007) (Memorandum and Order on Motion to Dismiss for Lack of Jurisdiction or in the Alternative, to Dismiss the Complaint Based on the Statute of Limitations and/or Limiting Damages to \$500 per Package under COGSA). Moreover, this case does not involve merely the failure to deliver one container, but the liquidation of three containers.

A previous motion to dismiss for subject matter jurisdiction was denied. Order on Motion to Dismiss and Motion to Substitute a Party, or Alternatively Motion to Amend Complaint (September 28, 2010). Hapag-Lloyd has not presented any reason to alter the analysis in the September 28, 2010 Order. Moreover, the facts regarding the disposition of the containers are in dispute, so that summary judgment would not be appropriate. Accordingly, HLAG and HLAI have not demonstrated that they are entitled to judgment as a matter of law.

2. Double Damages

HLAG and HLAI argue that the Complainants failed to state a valid claim for extraordinary relief, requiring dismissal of their claim for double damages. HL Motion at 11-12. Specifically, HLAG and HLAI contend that the sections alleged in the amended complaint are not sections which permit double damages. HL Motion at 12. Complainants barely address this issue and do not adequately defend the claim for double damages.

A review of the claims alleged in the amended complaint confirms that the Complainants are not entitled to seek double damages. Pursuant to 46 U.S.C. § 41305, the Commission may order the payment of additional amounts, not to exceed twice the amount of the actual injury, for violation of sections 41102(b), 41104(3), 41104(6), 41105(1), or 41105(3). 46 U.S.C. § 41305. Complainants did not allege violations of these sections. Accordingly, the motion to dismiss the double damages claim is **GRANTED**. Complainants' claim for double damages is **DISMISSED**.

3. Personal Jurisdiction

HLAI argues that it is not an ocean common carrier and therefore that the Commission does not have personal jurisdiction over it. HL Motion at 12. HLAI indicates that it is a wholly-owned subsidiary of HLAG that acts as the general agent of HLAG in the United States. HL Motion at 12. As an agent, HLAI contends it is not subject to the Shipping Act. HL Motion at 13.

Complainants respond that the facts do not support the contention that HLAI acted only as an agent. HL Reply at 19. Specifically, the Complainants point to contemporaneous emails and an affidavit submitted with the Hapag-Lloyd motion to support their assertion that HLAI was involved in the transactions beyond simply being an agent for HLAG. HL Reply at 19 (referring to HL Reply, exhibit 4 and HL Motion, exhibit 1).

A factual determination of HLAI's role will be required to decide whether HLAI acted merely as HLAG's agent in these transactions. Accordingly, HLAI cannot be dismissed or granted summary judgment at this point in the proceeding.

4. Sections 41104(11) and 41104(12)

HLAG and HLAI contend that because they did not transport cargo for or enter into a service contract with an unbonded, untariffed NVOCC, claims under sections 41101(11) and 41101(12) must be dismissed. HL Motion at 13. HLAI states it is not an ocean common carrier subject to these provisions and it did not contract or accept cargo from or transport cargo for anyone. HL Motion at 13. HLAG contends that it accepted cargo from and transported cargo for the account of Limco, pursuant to its service contract with Limco. HL Motion at 14. Complainants contend that HLAI's role in the transactions is contested. HL Reply at 3, 19. HLAG and HLAI do not cite case law supporting their position. Given the dispute regarding HLAI's role and the need for a hearing on other issues, resolution of this issue as a matter of law is not appropriate at this time.

5. Sections 41104(d)(D) and 41104(4)(E)

HLAG and HLAI argue that because the shipments in question were transported under the terms of a service contract between HLAG and Limco, Complainants' claims under sections 41104(4)(D) and 41101(4)(E) do not apply and must be dismissed. Complainants contend that HLAI's role in the transactions is contested. HL Reply at 3, 19. HLAG and HLAI do not cite case law sufficient to support their position. Given the dispute regarding each party's role and the need for a hearing on other issues, resolution of this issue as a matter of law is not appropriate at this time.

6. Section 41102(c) claims

HLAI argues that section 10(d)(1) (recodified as 46 U.S.C. 41102(c)) is not applicable to it because it is not a common carrier. HLAG argues that section 10(d)(1) is not applicable because that section does not apply to the transportation of property, which is the subject of COGSA, and because there is only a single incident which does not constitute “regulations and practices.” HL Motion at 15-17.

Complainants respond that HLAG and HLAI mishandled the cargo when they made an unauthorized shipment of Complainants’ damaged container, then diverted and delayed the container for six months, and then delivered the damaged container and two other containers to an unauthorized party. HL Reply at 15. Complainants assert that this case involves multiple incidents. *Id.*

A hearing will be necessary to make the factual determination as to whether there is a regulation or practice relating to or connected with receiving, handling, storing, or delivering property that would constitute a violation of section 41102(c). This claim cannot be resolved as a matter of law at this point in the proceeding.

7. Unreasonable refusal to deal

HLAI and HLAG contend that they have not engaged in an unreasonable refusal to deal. HLAG indicates that it had a carrier/shipper relationship only with Limco and had no privity of contract or obligation to negotiate or settle claims with the cargo owners. HL Motion at 18. In addition, HLAI and HLAG contend that refusal to deal under the Shipping Act does not apply to the settlement of a cargo claim. *Id.* Complainants respond that HLAG and HLAI unreasonably refused to negotiate with respect to the damaged container or that they negotiated in bad faith. HL Reply at 16-17.

The September 28, 2010 Order stated “Neither party presents any authority supporting their position regarding the impact of a lack of privity of contact on each of the claims alleged. Respondent has not demonstrated that a lack of privity, even if established, would bar recovery.” The current motions do not provide sufficient support to resolve these issues. Moreover, the facts underlying these shipments are disputed. The refusal to deal claim will not be dismissed as a matter of law at this point in the proceeding.

8. Causation

HLAG and HLAI contend that the Complainants cannot demonstrate the requisite causation. HL Motion at 19. Complainants respond that the alleged violations were the proximate cause for the loss of the cargo and other consequential damages. HL Reply at 18. Complainants indicate that all of the Respondents are jointly liable for the damage and loss of the containers. HL Reply at 18. Given the factual disputes regarding the cause of the loss, judgement as a matter of law is not appropriate.

C. Limco Motion

Limco seeks summary judgment, arguing that the Complainants' cause of action for conversion must be brought as a COGSA claim in federal court because it does not constitute a Shipping Act violation within the jurisdiction of the Commission, and that Limco is not liable to the Complainants for breach of contract as there is no privity between the parties. Limco Motion at 3-10.

Complainants respond that Limco's motion should be denied as the contention that Complainants' claim is simply a conversion claim subject to COGSA federal court jurisdiction relies on facts which are in dispute and that Limco had privity of contract with Complainants. Limco Reply at 4-12.

Limco's arguments regarding COGSA and privity of contact were also raised by HLAG and HLAI. Those arguments have been addressed above. Limco's motion does not alter the analysis. As described above, the genuine disputes of fact raised by the pleadings can only be properly determined through an evidentiary hearing. Such disputes preclude granting summary judgment, as a matter of law, at this stage of the proceeding. Limco, the moving party, has not established that it is entitled to summary judgment and its motion is denied.

D. International TLC Motion

International TLC moves for dismissal and a dispositive ruling, presumably summary judgment, and states that International TLC did not violate the Shipping Act. Int'l TLC Motion at 2. International TLC describes the background of the transaction and the process of liquidation of the containers. Int'l TLC Motion at 3-5. International TLC contends that the amended complaint should be dismissed based on the facts of the transaction as well as the limitations of COGSA. Int'l TLC Motion at 6-7.

Complainants respond that International TLC's motion to dismiss should be denied as COGSA does not apply and that International TLC's motion for summary judgment should be denied as unsubstantiated and lacking evidentiary support. TLC Reply at 6-7.

International TLC's motion addresses the factual basis of the case. These arguments will be more appropriately addressed once all of the evidence is admitted (either at a hearing or through affidavits, depositions, and other paper evidence) and the parties have fully briefed both the legal and factual issues. At this stage, the parties need to demonstrate that they are entitled to judgment as a matter of law. International TLC needs to demonstrate the legal justification for the liquidation of the cargo. International TLC's motion describes the background facts and the process of liquidation. The motion does not focus on the elements of the alleged Shipping Act violation, but instead questions the Complainants' credibility and critiques the Complainants' conduct. Int'l TLC Motion at 3-7. International TLC includes a brief excerpt of a deposition and a letter regarding the containers purchased by the Complainants. Int'l TLC Motion at 6, Exhibit A. Facts cited by International TLC to support its motion are disputed by the Complainants and are primarily

unsubstantiated. International TLC does not provide sufficient evidence to support a finding that it is entitled either to dismissal or to judgment as a matter of law. International TLC will want to demonstrate, at the hearing, by evidence admitted into the record, the legal justification for the liquidation and the impact, if any, of the container's damage.

E. Schedule

In the amended complaint, the Complainants requested an oral hearing in Portland, Oregon. Amended Complaint at 16. In the Supplemental Joint Status Report, Complainants reaffirm their request for a hearing with oral testimony and cross-examination in Portland, Oregon, and state that they can present their case in one day. Supplemental Joint Status Report (February 1, 2011) at 2; *see also* Complainants' Request for Oral Hearing (Dec. 10, 2010).

Respondents HLAG, HLAI, and Limco request that an oral hearing be held in Washington, D.C., and have not indicated the length of time to present their case. Supplemental Joint Status Report at 2. It appears from the dispositive motions addressed in this Order that there are genuine disputes of material fact that cannot be resolved on the basis of sworn statements, affidavits, depositions, or other documents.

Accordingly, the parties are required, on or before June 8, 2011, to meet and confer regarding the requested oral hearing. The parties shall discuss the logistics of an oral hearing and propose a schedule for such hearing. Utilizing the facts agreed upon between the Complainants and HLAG and HLAI, the parties shall discuss whether those or other facts can be stipulated to by all parties.

The parties shall file a joint status report on or before June 8, 2011. The joint status report shall (1) make arguments regarding the location of an oral hearing (2) provide estimates of the duration of the hearing, (3) propose a schedule for the hearing and post-hearing briefing, and (4) provide a list of stipulated facts. In the event an oral hearing is no longer requested, the requirement to file Rule 95 statements will be waived and Complainants' brief will be due thirty days after the order on this joint status report.

IV. ORDER

For the reasons discussed above, it is hereby **ORDERD** that:

The request for oral argument on Complainants' motion for partial summary judgment and on their response to Respondents' motions for summary judgment and/or to dismiss be **DENIED**.

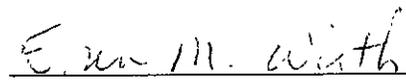
The motion for partial summary judgment filed by Complainants Yakov Kobel and Victor Berkovich be **DENIED**.

The motion to dismiss and/or for summary judgment filed by Respondents HLAG and HLAI be **GRANTED IN PART AND DENIED IN PART** and Complainants' claim for double damages be **DISMISSED**.

The motion for summary judgment filed by Respondent Limco be **DENIED**.

The motion for dispositive ruling filed by Respondent International TLC be **DENIED**.

The parties shall submit a joint status report, as outlined above, on or before June 8, 2011.



Erin M. Wirth
Administrative Law Judge