

ORIGINAL

S	E	R	V	E	D
October 15, 2010					
FEDERAL MARITIME COMMISSION					

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

DOCKET NO. 10-07

RENDEZVOUS INTERNATIONAL

v.

**CHIEF CARGO SERVICES, INC., KAISER APPAREL, INC., EDCO LOGISTICS, INC.,
ORIENTAL LOGISTICS, INC., AND RAZOR ENTERPRISE**

**INITIAL DECISION GRANTING REQUEST TO DISMISS COMPLAINT AGAINST
EDCO LOGISTICS, INC., ORIENTAL LOGISTICS, INC., AND
RAZOR ENTERPRISE WITHOUT PREJUDICE and
GRANTING SUMMARY JUDGMENT FOR ORIENTAL LOGISTICS, INC.¹**

Complainant Rendezvous International commenced this proceeding by filing a formal complaint with the Secretary. Rendezvous International alleges that it is a partnership formed in Pakistan that engages in the business of manufacturing garments. (Complaint ¶ I.) Rendezvous International alleges that Respondents are “corporations and/or business entities formed in the State of New York and doing business in the State of New York” and that Respondents “perform importing services, freight forwarding and handling services, pay duties and freight, and clear shipments of goods through US Customs.” (*Id.* ¶ II.)

Rendezvous International alleges that Respondents carried three shipments of merchandise from Pakistan to the United States on April 24, May 23, and June 5, 2009, and that Respondents violated the Shipping Act of 1984 by “fraudulently and unlawfully/wrongfully releas[ing] the shipments to the customer without bills of lading.” (Complaint ¶ V.) Rendezvous International cites several sections of the Shipping Act and alleges that as a result of Respondents’ violations of the Act, Rendezvous International suffered actual injury in the sum of \$290,424.91. (*Id.* ¶ VI.)

¹ This Initial Decision will become the decision of the Commission in the absence of review by the Commission. Rule 227, Rules of Practice and Procedure, 46 C.F.R. § 502.227.

Rendezvous International also commenced an action based on the same facts in the Supreme Court of the State of New York against Chief Cargo Services, Inc. and Kaiser Apparel, Inc., respondents in this proceeding, and Rich Kids Jeans Corp., an entity that is not a respondent in this proceeding. *Rendezvous Int'l v. Rich Kids Jeans Corp., Chief Cargo Services, Inc., and Kaiser Apparel, Inc.*, No. 10-601198 (N.Y. Sup. Ct., Cty. of New York May 10, 2010) (summons issued). (See Chief Cargo Motion to Dismiss Ex. A.) The case has been removed to the federal district court. *Rendezvous Int'l v. Rich Kids Jeans Corp., Chief Cargo Services, Inc., and Kaiser Apparel, Inc.*, No. 10-CV-04100-DAB (S.D.N.Y. May 19, 2010) (Notice of Removal). (See Chief Cargo Motion to Dismiss Ex. B.)

On August 6, 2010, respondent Chief Cargo Services, Inc. (Chief Cargo), a non-vessel-operating common carrier (NVOCC), filed a motion to dismiss the Complaint in this proceeding, and on August 11, 2010, respondent Oriental Logistics, Inc., also an NVOCC, filed a motion to dismiss the Complaint. Accountants for respondents Kaiser Apparel, Inc., and Edco Logistics, Inc., sent unsworn letters to the Commission stating that Kaiser Apparel (letter dated July 28, 2010, from Yuching Pai to the Commission) and Edco Logistics (letter dated July 28, 2010, from Selina Mo to the Commission), are no longer in business, but Kaiser Apparel and Edco Logistics did not otherwise answer or respond to the Complaint. Respondent Razor Enterprise sent an unsworn letter to the Commission stating that it has no connection to the transaction and that it "is not a party and not even mentioned as a party in any bill of lading or any transaction," (letter dated July 28, 2010, from Sam Haq to the Commission), but did not otherwise answer or respond to the Complaint.

On August 21, 2010, complainant Rendezvous International and respondent Chief Cargo filed "Complainants and Respondents Joint Stipulation to Dismiss the Complaint Without Prejudice" (punctuation as in original). The Joint Stipulation cited the case pending in the federal district court in New York. The Joint Stipulation included a Settlement Agreement "between Rendezvous International (Claimant) and Chief Cargo Services, Inc.₁ (Respondent)." Rendezvous International "has not filed opposition to [Chief Cargo's] motion [to dismiss] in lieu of this agreement by the parties to withdraw this claim in the FMC without prejudice." (Joint Stipulation to Dismiss at 2.) The Settlement Agreement states that:

Claimant and [Chief Cargo] wish to withdraw the FMC claim without prejudice to continuing with claims filed by Claimant against [Chief Cargo] and Rich Kids Jeans Corporation, in the United States District Court, Southern District of New York under Docket No. 1:10-cv-04100-DAB.

Now, therefore, it is agreed as follows:

1. The parties agree to dismiss the pending FMC claim, Docket No. 10-07, without prejudice;
2. The claim against [Chief Cargo] and Rich Kids Jeans Corporation shall proceed in the action filed in United States District Court, Southern District of New York, Docket No. 1:10-cv-04100-DAB;

3. Each party shall bear its own costs, including attorneys fees;
4. Nothing in this agreement is intended to waive or modify any rights that may exist between the parties; and
5. This Agreement may be signed in counterparts.

(Complainants and Respondents Joint Stipulation to Dismiss the Complaint Without Prejudice Part IV.) The Stipulation is signed by attorneys for Rendezvous International and Chief Cargo. No other party (or attorney) signed the Stipulation. No other party filed a reply to the Joint Stipulation.

Because the Joint Stipulation did not make clear whether Rendezvous International intended to dismiss without prejudice as to all Respondents or only as to Chief Cargo, on August 30, 2010, I issued an Order requiring Rendezvous International to make its intentions clear. The Order required a response by September 1, 2010. *Rendezvous Int'l v. Chief Cargo Services, Inc.*, FMC No. 10-07 (ALJ Aug. 30, 2010) (Order to Supplement the Record).

When Rendezvous International did not respond to the August 30 Order, on September 2, 2010, this Office sent the August 30 Order to counsel for Rendezvous International a second time. On September 3, 2010, counsel for Rendezvous International sent an email to this office (judges@fmc.gov) stating:

We are attorneys for claimant, Rendezvous International. We acknowledge receipt of "Order to Supplement The Record", dated August 30, 2010.

Notice of Intention to Withdraw Action

The Joint Stipulation made is intended to withdraw the complaint filed in the FMC Court by the Claimant, Rendezvous International against all Respondents in the FMC Court claim under Docket No. 10-07.

This document is intended to be used in lieu of a formal notice to withdraw action. Thank you for your courtesy.

(Email dated September 3, 2010, from Allen M. Schwartz to judges@fmc.gov.)

On September 3, 2010, the Assistant Secretary responded to the email, stating:

Thank you for your email. Upon consideration, the email is not sufficient and we need to have you do a formal filing in response to the ALJ's Order of August 30, 2010. Pursuant to our rules of practice and procedure at 46 CFR 502, your filing should (1) take the same format as your recent filing (the Motion to Dismiss) including the case caption (2) should indicate what you indicate in the email below (that the intent is for the stipulation to dismiss the complaint to apply to all respondents in the proceeding), (3) should be signed, (4) should be served on the

other parties to the proceeding and include a certificate of service. (5) Please send us an original and 4 copies. I encourage you to send the document to us via email or fax as well so that the Judge can proceed as quickly as possible.

Feel free to call me if you have any questions[.]

(Email dated September 3, 2010, from Rachel E. Dicken to counsel for Rendezvous International.) When the Assistant Secretary spoke to counsel for Rendezvous International on September 8, 2010, and learned that counsel had not seen the September 3 email, the Assistant Secretary sent the email again. As of September 17, 2010, Rendezvous International had not complied with the August 30 Order or the Assistant Secretary's request. Because of Rendezvous International's failure to comply, I treated the Joint Stipulation as a request to dismiss the Complaint against Chief Cargo only. I approved the settlement with Chief Cargo and granted the motion to dismiss the Complaint against it. *Rendezvous Int'l v. Chief Cargo Services, Inc.*, FMC No. 10-07 (ALJ Sept. 17, 2010) (Initial Decision Approving Settlement Agreement and Granting Request to Dismiss Complaint Against Chief Cargo Services, Inc. Without Prejudice; and Memorandum and Order on Motion to Dismiss Filed by Oriental Logistics, Inc.).

Since Rendezvous International's Complaint remained pending against the other Respondents, I ordered Rendezvous International to submit a proposed scheduling order for its Complaint against respondents Kaiser Apparel, Inc., Edco Logistics, Inc., and Razor Enterprise on or before October 1, 2010. *Id.* at 8. I found that Oriental Logistics's motion to dismiss presented matters outside the pleadings; therefore, I could not rule on it as a motion to dismiss. Since the motion to dismiss claimed that Oriental Logistics had no connection with the shipment, I converted the motion to dismiss to a motion for summary judgment and required Oriental Logistics to "file an affidavit (or declaration pursuant to 28 U.S.C. § 1746) signed by an officer, director, or other representative of Oriental Logistics with first hand knowledge of the facts stating Oriental Logistics's connection or lack of connection to the shipments that are the subject of Rendezvous International's complaint." *Id.* I also stated that:

On or before October 1, 2010, Rendezvous International may file a traversing affidavit or evidence. As set forth above, Rendezvous International has failed to respond to the August 30 Order despite receiving service of the Order and receiving requests for a response from the Assistant Secretary. Therefore, Rendezvous International is put on notice that failure to file a traversing affidavit or evidence on or before October 1, 2010, will be construed as admission of the facts stated in Oriental Logistics's affidavit.

Id.

On September 20, 2010, Rendezvous International filed a "Notice of Intent to Withdraw Action." In this Notice, Rendezvous International acknowledged receipt of the September 17 Initial Decision approving the settlement with Cargo Express. Rendezvous International continued:

Upon information and belief, the Respondents, Kaiser Apparel, Inc., Edco Logistics, Inc., Oriental Logistics, Inc., and Razor Enterprise are subdivision/satellite businesses owned by Chief Cargo Services, Inc., performing specialized freight forwarding and transportation services for Chief Cargo Services, Inc., and using the credit and funds provided by Chief Cargo Services, Inc.

We allege that it is the parties' intention that the Stipulation of Settlement to dismiss the FMC complaint apply to all Respondents in FMC action without prejudice to the pending Federal Court action.

Since Claimant, Rendezvous International, has not responded to the Oriental Logistics, Inc [sic] motion to dismiss the action filed against Rendezvous International [sic], we respectfully request the motion be denied in the FMC Court, **without prejudice** for Oriental Logistics, Inc, [sic] to re-file the motion in the Federal Court. Claimant will pay the Court filing fees for the re-filing of the motion. We believe there has been no detriment or loss caused the Respondent, Oriental Logistics, Inc., by this request for a withdrawal of the Oriental Logistics, Inc. motion in the FMC Court.

(Notice of Intent to Withdraw Action at 1-2 (emphasis in original).)

On September 24, 2010, Oriental Logistics filed the affidavit required by the September 17 Initial Decision. The affidavit states:

1. My name is Samuel Wong. I am an officer of Oriental Air [T]ransport Services Inc., operating under the assumed name of Oriental Logistics Services, the respondent in the above entitled action. . . .
2. My principle [sic] place of business is part of the second floor of 175-41 148th Road, Jamaica, New York.
3. My office had no dealing whatsoever with Rendezvous International.
4. We are a separate business apart from any of the other offices on that floor.
5. We have our own separate entrance to our offices.
6. My office had no connection to any shipments that is subject of this complaint.
7. My office had no connection with a shipment that took place between Pakistan and New York, USA via ocean vessels NYK Cosmos, Asir and Fowairet, from April 24, 2009, May 23, 2009 and June 5, 2009.

8. My office never took control of any such shipment and thus did could not [*sic*] improperly release such shipment that it did not control.
9. My office is not a party to the case pending in the United States District Court Southern District of New York action, with Docket No. 1:10-CV-04100-DAB.
10. The only connection that Oriental Logistics, has with any of the defendants is the physical location of its offices.

(Affidavit in Support of Motion for Summary Judgment Pursuant to Fed. R. Civ. P. 12(b)(6) pursuant to Rule 56.)

Rendezvous International did not file an affidavit or evidence traversing the averments in Oriental Logistics's affidavit as permitted by the September 17 Initial Decision.

DISCUSSION

I. REQUEST TO DISMISS COMPLAINT AGAINST KAISER APPAREL, INC., EDCO LOGISTICS, INC., AND RAZOR ENTERPRISE WITHOUT PREJUDICE.

In its Notice of Intention to Withdraw Action filed September 20, Rendezvous International states that Rendezvous International and Chief Cargo, the parties that signed the Stipulation of Settlement, intended the Stipulation to dismiss the FMC complaint against all Respondents in the FMC action without prejudice to the action pending in the district court. (Notice of Intention to Withdraw Action at 1.) If Rendezvous International had supplied this information in response to the earlier orders entered in this proceeding, the Complaint against Kaiser Apparel, Inc., Edco Logistics, Inc., and Razor Enterprise would have been dismissed without prejudice in the September 17 Initial Decision. There is no reason to reach a different result at this time. Therefore, the Complaint against Kaiser Apparel, Inc., Edco Logistics, Inc., and Razor Enterprise is dismissed without prejudice.

II. ORIENTAL LOGISTICS, INC.'S MOTION FOR SUMMARY JUDGMENT.

Oriental Logistics's circumstances require different treatment. Rendezvous International's Complaint alleges that Oriental Logistics violated several sections of the Shipping Act in its handling of three shipments from Pakistan to the United States. Therefore, the Commission has jurisdiction over the Complaint. *See Anchor Shipping Co. v. Aliança Navegação E Logística Ltda.*, 30 S.R.R. 991, 998-999 (FMC 2006). Oriental Logistics moved to dismiss based on its claim that it had no connection with the shipments. Because the motion to dismiss relied on matters outside the pleadings, I converted it to a motion for summary judgment and ordered Oriental Logistics to file an affidavit or declaration supporting its claims. *Rendezvous Int'l v. Chief Cargo Services, Inc.*, FMC No. 10-07 (ALJ Sept. 17, 2010) (Initial Decision). Oriental Logistics filed the affidavit

required by the September 17 Initial Decision setting forth facts regarding its lack of involvement in the shipment that is the subject of Rendezvous International's Complaint. Rendezvous International has not attempted to rebut those facts.

Summary judgment is appropriate when the pleadings and the record demonstrate that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party seeking summary judgment bears the burden of informing the court of the basis of its motion and "identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)). The facts must be viewed in the light most favorable to the non-movant, giving the non-movant the benefit of all justifiable inferences derived from the evidence in the record. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). A motion for summary judgment should be granted only when genuine issues of material fact do not exist. See *McKenna Trucking Co., Inc. v. A.P. Moller-Maersk Line and Maersk Inc.*, 27 S.R.R. 1045, 1052 (1997).

"A defendant need not prove a negative when it moves for summary judgment on an issue that the plaintiff must prove at trial. It need only point to an absence of proof on plaintiff's part, and, at that point, plaintiff must 'designate specific facts showing that there is a genuine issue for trial.'" *Parker v. Sony Pictures Entertainment, Inc.*, 260 F.3d 100, 111 (2d Cir. 2001) (quoting *Celotex*, 477 U.S. at 324); see also *Gallo v. Prudential Residential Servs. L. P.*, 22 F.3d 1219, 1223-1224 (2d Cir. 1994) ("[T]he moving party may obtain summary judgment by showing that little or no evidence may be found in support of the nonmoving party's case."). The non-moving party, in order to defeat summary judgment, must then come forward with evidence that would be sufficient to support a jury verdict in his or her favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 249 ("[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party."). A party opposing summary judgment "may not rest upon the mere allegations or denials of the adverse party's pleading," Fed. R. Civ. P. 56(e), and "some metaphysical doubt as to the material facts" is insufficient. *Matsushita Elec. Ind. Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986) (citations omitted).

Oriental Logistics presented evidence that it was not involved in the shipments. Rendezvous International was on notice that "failure to file a traversing affidavit or evidence on or before October 1, 2010, will be construed as admission of the facts stated in Oriental Logistics's affidavit." *Rendezvous Int'l v. Chief Cargo Services, Inc.*, FMC No. 10-07, Decision at 8 (ALJ Sept. 17, 2010) (Initial Decision). Rendezvous International has not "come forward with evidence that would be sufficient to support a [judgment] in [its] favor. I find that Oriental Logistics has established the facts set forth in its affidavit and repeated above at page 5-6. These facts support findings that Oriental Logistics did not have any connection to the shipments that are the subject of Rendezvous International's Complaint, did not take control of the shipments, and did not improperly release the shipments. Based on those facts, I find that Oriental Logistics did not have any involvement with the shipments that are the subject of Rendezvous International's Complaint.

Rendezvous International filed its "Notice of Intent to Withdraw Action" on September 20. At that time, it had knowledge of the order converting Oriental Logistics's motion to dismiss to a motion of summary judgment, the requirement that Oriental Logistic file an affidavit supporting its claims that it did not have any connection to the shipments, and Rendezvous International's obligation to contest Oriental Logistics's affidavit or the facts in the affidavit would be construed as admission of the facts stated in Oriental Logistics's affidavit. Since it had not responded to Oriental Logistics's motion, Rendezvous International requested that the motion be denied without prejudice to Oriental Logistics refiling the motion in the district court. As set forth in Oriental Logistics's affidavit and confirmed by the district court docket, Oriental Logistics is not a party in the district court and could not file a motion to dismiss in that case. Therefore, this is not a practicable alternative.

Rendezvous International commenced this proceeding by filing a Complaint alleging that Oriental Logistics violated the Shipping Act in connection with three shipments from Pakistan to the United States. Oriental Logistics joined the issue with a motion to dismiss converted to a motion to summary judgment claiming that it had no involvement with the three shipments. The un rebutted affidavit filed by Oriental Logistics provides proof that Oriental Logistics had no involvement in the three shipments. There is no genuine issue as to this material fact. Since Oriental Logistics was not involved in the shipments, it could not have violated the Shipping Act on the shipments as alleged in the Complaint. Therefore, Oriental Logistics is entitled to judgment as a matter of law. The Complaint against Oriental Logistics is dismissed with prejudice.

ORDER

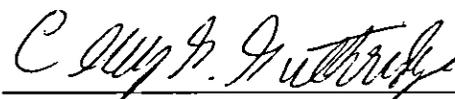
Upon consideration of Complainants and Respondents Joint Stipulation to Dismiss the Complaint Without Prejudice filed by complainant Rendezvous International and respondent Chief Cargo Services, Inc., and for the reasons stated above, it is hereby

ORDERED that this proceeding against respondents Kaiser Apparel, Inc., Edco Logistics, Inc., and Razor Enterprise be **DISMISSED WITHOUT PREJUDICE**.

Upon consideration of the Motion to Dismiss in Lieu of Answer Filed by respondent Oriental Logistics, Inc., converted to a motion for summary judgment, *Rendezvous Int'l v. Chief Cargo Services, Inc.*, FMC No. 10-07, Decision at 8 (ALJ Sept. 17, 2010) (Initial Decision), and for the reasons stated above, it is hereby

ORDERED that the motion for summary judgment be **GRANTED**. It is

FURTHER ORDERED that the Complaint against respondent Oriental Logistics, Inc., be **DISMISSED WITH PREJUDICE**.



Clay G. Guthridge
Administrative Law Judge