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| March 10, 2015 | | | | | |
| FEDERAL MARITIME COMMISSION | | | | | |

FEDERAL MARITIME COMMISSION

DOCKET NO. 14-10

ECONOCARIBE CONSOLIDATORS, INC.

v.

AMOY INTERNATIONAL, LLC

ORDER ON COMPLAINANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

I.

On December 22, 2014, Complainant Econocaribe Consolidators, Inc. ("Econocaribe") filed a motion seeking partial summary judgment ("Motion"). On January 20, 2015, Respondent Amoy International, LLC ("Amoy") filed its opposition to the motion ("Opposition"), a request for judicial notice of a press release, and an objection to Mr. Kamada's affidavit. On January 26, 2015, Econocaribe filed its reply to the opposition to the motion ("Reply"), a request for judicial notice of a case, and objection to Ms. Chen's declaration. On February 3, 2015, Amoy filed, by letter, a request to file a supplemental response which included the response. On February 5, 2015, Econocaribe filed, by letter, an objection to Respondent's request to file a supplemental response. On February 6, 2015, Amoy filed a letter responding to Econocaribe's February 5, 2015, letter. On February 12, 2015, Econocaribe filed a letter responding to Amoy's February 6, 2015, letter.

For the reasons set forth below, Econocaribe's motion for partial summary decision is **DENIED**. In addition, the parties are ordered to file requests via motion and not via letter.

II.

Econocaribe's complaint alleges that Amoy violated the Shipping Act of 1984 ("Shipping Act") and Federal Maritime Commission regulations. In Econocaribe's motion for partial summary decision, Econocaribe provides a statement of undisputed facts and asserts that there is no dispute of any material facts and it is entitled to judgement as a matter of law. Motion at 2-15. In its reply, Econocaribe argues that there are no material facts at issue, it is entitled to judgement, it reasonably

mitigated its damages, it sustained damages, and summary judgment is appropriate. Opposition at 1-10.

Amoy contends that it has not violated any of the statutes or the regulations set forth in Econocaribe's motion and, at best, Econocaribe raises disputed issues; summary judgment should not be granted here because material factual issues about Amoy's knowledge of the character of the cargo remains in dispute; and Econocaribe had a duty to mitigate its damages. Opposition at 3-13.

III.

A. Motion for Summary Decision Standard

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 non-moving 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 party opposing the motion. *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); *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").

B. Relevant law

“On October 14, 2006, the President signed a bill reenacting the Shipping Act as positive law. The bill’s purpose was to ‘reorganize[e] and restat[e] the laws currently in the appendix to title 46. It codifies existing law rather than creating new law.’ H.R. Rep. 109-170, at 2 (2005). The Commission continues to cite provisions of the Act by their former section references . . .” *Shipco Transport, Inc. v. Jem Logistics, Inc.*, FMC No. 12-06, Order at 3 n.2 (FMC Aug. 21, 2013) (Order Affirming Initial Decision on Default).

The Shipping Act defines and regulates a number of different types of entities that are involved in the international shipment of goods by water, including two types of ocean transportation intermediaries. “The term ‘ocean transportation intermediary’ means an ocean freight forwarder or a non-vessel-operating common carrier.” 46 U.S.C. § 40102(19). “The term ‘ocean freight forwarder’ means a person that – (A) in the United States, dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers; and (B) processes the documentation or performs related activities incident to those shipments.” 46 U.S.C. § 40102(18). “The term ‘non-vessel-operating common carrier’ means a common carrier that – (A) does not operate the vessels by which the ocean transportation is provided; and (B) is a shipper in its relationship with an ocean common carrier.” 46 U.S.C. § 40102(16). To be a non-vessel-operating common carrier (“NVOCC”), the intermediary must meet the Act’s definition of “common carrier.”

The term “common carrier” – (A) means a person that – (i) holds itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation; (ii) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and (iii) uses, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country.”

46 U.S.C. § 40102(6).

Econocaribe alleges violations of six sections of the Shipping Act and one Federal Maritime Commission regulation in their complaint. The Shipping Act states, in 46 U.S.C. § 41104(2)(A), previously section 10(b)(2)(A), that:

A common carrier, either alone or in conjunction with any other person, directly or indirectly, may not . . . (2) provide service in the liner trade that is – (A) not in accordance with the rates, charges, classifications, rules, and practices contained in a tariff published or a service contract entered into under chapter 405 of this title, unless excepted or exempted under section 40103 or 40501(a)(2) of this title.

46 U.S.C. § 41104(2)(A).

Under the Shipping Act, 46 U.S.C. § 41102(c), previously Section 10(d)(1), a “common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.” 46 U.S.C. § 41102(c).

The Shipping Act further states, in 46 U.S.C. § 41102(a), previously section 10(a)(1), that:

Obtaining Transportation at Less Than Applicable Rates.—A person may not knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, false measurement, or any other unjust or unfair device or means, obtain or attempt to obtain ocean transportation for property at less than the rates or charges that would otherwise apply.

46 U.S.C. § 41102(a).

In addition, the Shipping Act states, in 46 U.S.C. § 41104(1), previously section 10(b)(1), that:

A common carrier, either alone or in conjunction with any other person, directly or indirectly, may not – (1) allow a person to obtain transportation for property at less than the rates or charges established by the carrier in its tariff or service contract by means of false billing, false classification, false weighing, false measurement, or any other unjust or unfair device or means;

46 U.S.C. § 41104(1).

Finally, the Shipping Act states, in 46 U.S.C. §§ 41104(2)(A) and 41104(2)(B), previously sections 10(b)(2)(A) and 10(b)(2)(B), that:

A common carrier, either alone or in conjunction with any other person, directly or indirectly, may not— . . .

(2) provide service in the liner trade that is—

(A) not in accordance with the rates, charges, classifications, rules, and practices contained in a tariff published or a service contract entered into under chapter 405 of this title, unless excepted or exempted under section 40103 or 40501(a)(2) of this title; or

(B) under a tariff or service contract that has been suspended or prohibited by the Federal Maritime Commission under chapter 407 or 423 of this title [46 USCS §§ 40701 et seq. or 42301 et seq.];

46 U.S.C. §§ 41104(2)(A), 41104(2)(B).

Federal Maritime Commission regulation 515.31(e) states:

(e) False or fraudulent claims, false information. No licensee shall prepare or file or assist in the preparation or filing of any claim, affidavit, letter of indemnity, or other paper or document concerning an ocean transportation intermediary transaction which it has reason to believe is false or fraudulent, nor shall any such licensee knowingly impart to a principal, shipper, common carrier or other person, false information relative to any ocean transportation intermediary transaction.

46 C.F.R. § 515.31(e).

C. Evidence

Pursuant to Commission Rule 156 and the Administrative Procedure Act (“APA”), “all evidence which is relevant, material, reliable and probative, and not unduly repetitious or cumulative, shall be admissible.” 46 C.F.R. § 502.156; 5 U.S.C. §556(d). The Commission explained:

Consistent with guidelines set out in the APA and Commission rules governing the admission of evidence, “[i]n comparison with court trials, administrative adjudications generally are governed by liberal evidentiary rules that create a strong presumption in favor of admitting questionable or challenged evidence.” In administrative proceedings, “[a]n agency Administrative Law Judge (ALJ) should admit all relevant and arguably reliable evidence and then should determine the relative probative value of the admitted evidence when . . . [he] writes . . . [his] findings of fact.”

EuroUSA Shipping, Inc., Tober Group, Inc., and Container Innovations, Inc., 31 S.R.R. 540, 547 (FMC 2008) (citation omitted).

Econocaribe requests judicial notice of a complaint filed against Amoy in federal court. Amoy requests judicial notice of an FBI press release. There is no need to take judicial notice of these documents. They were considered as evidence in support of the parties’ positions and may be included as evidence in the parties’ appendix during the briefing stage of this proceeding.

Econocaribe objects to Ms. Chen’s declaration, arguing that it is not signed and raising objections including that it is misleading, providing clarification, and objecting to lack of personal knowledge. Amoy objects to Mr. Kamada’s affidavit, arguing that it lacks foundation and is hearsay. An executed copy of Ms. Chen’s declaration was provided and there is no evidence that any delay caused any harm. The remaining arguments were considered and are relevant to the weight to give to the documents but not to their admissibility. During the briefing stage of this proceeding, these types of arguments should be made in the briefs and not filed separately.

D. Discussion

According to the complaint, Econocaribe is a licensed ocean freight forwarder and NVOCC which shipped four containers to China for Amoy, a licensed ocean transportation intermediary (“OTI”). Complaint at 1. The containers’s contents were described as auto parts (new), however, Chinese customs determined that they were used tires and required that they be shipped back to origin. Complaint at 1-2.

Econocaribe filed a statement of twenty-six undisputed facts, however, Amoy disputed the majority of the facts which were alleged to be undisputed. Among the factual questions raised by the pleadings and not resolved by the motion are why the cargo was initially described as auto parts (new), who knew that the description was not accurate, what the parties’ obligations were once China indicated that the shipment would not be accepted, whether Amoy abandoned the cargo, and what damages, if any, were incurred.

The issue of whether the Respondent violated the Shipping Act requires determination of disputed material facts. Summary decision is only proper if the movant is entitled to a decision as a matter of law, viewing the evidence in the light most favorable to the nonmoving party. Econocaribe has not established that it is entitled to a decision as a matter of law when the evidence is viewed in the light most favorable to the opposing party. These factual disputes preclude granting summary decision at this stage of the proceeding. Moreover, given the procedural posture of the case, the most efficient manner to resolve the proceeding is to decide these issues after briefing.

IV.

For the above-stated reasons, it is hereby **ORDERED** that Econocaribe’s motion for partial summary decision be **DENIED**.



Erin M. Wirth
Administrative Law Judge