

**BEFORE THE
FEDERAL MARITIME COMMISSION**

DOCKET NO. 16-03

KSB SHIPPING & LOGISTICS LLC

v.

DIRECT CONTAINER LINES ALSO KNOWN AS VANGUARD LOGISTICS

**RESPONDENT, VANGUARD LOGISTICS SERVICES (USA), Inc., DOING BUSINESS
UNDER TRADE NAME DIRECT CONTAINER LINE's REPLY IN SUPPORT OF ITS
MOTION TO DISMISS COMPLAINT**

In opposition to Respondent Direct Container Line d/b/a Vanguard Logistics' ("DCL") Motion to Dismiss Complainant KSB Shipping & Logistics LLC ("KSB") argues that it has proper standing to bring this case as agent of the consolidator and/or shipper of the cargo. KSB is incorrect. KSB also fails to establish the alleged conduct of DCL constitutes a violation of the Shipping Act.

I. ANALYSIS

A. KSB Lacks Standing

In its Motion to Dismiss, Respondent DCL challenged KSB's standing to pursue this claim based upon its admitted lack of damages or ownership in the property. KSB has opposed this motion arguing that it has standing based upon its role as agent for consolidator of the cargo and the shippers of the cargo.

Federal Rules of Civil Procedure 17 mandates that suit must be brought in the name of the real party in interest: "An action must be prosecuted in the name of the real party in interest." FRCP 17(a)(1)(F) then expands this to allow agents to sue in certain limited circumstances:

(1) The following may sue in their own names without joining the person for whose benefit the action is brought:

...

(F) a party with whom or in whose name a contract has been made for another's benefit; ...

Here, according to the Complaint, the bill of lading at issue in this dispute was issued by DCL and was not entered into by KSB in KSB's name. See Complaint p. 2. Rather, the contract was entered into in the name of the shipper, Risona Inc. ("Risona"), and the consignee, Cargo Clearing Service GMBH ("CCS"). KSB is only

listed in that contract as a Forwarding Agent; KSB has not alleged facts or law supporting a finding that it would qualify as a named party to the contract. Consequently, KSB does not fit within the specified exceptions to FRCP 17(a)(1).

KSB attempts to rely on several cases that interpret FRCP 17(a)(1)(F). Those cases are not on point based upon an issue acknowledged but glossed over in KSB's opposing brief. That is, the agents in all of those cases were parties to the contracts on which they brought suit.

For instance, the plaintiff in *Global Aerospace, Inc. v. Platinum Jet Management, LLC*, 488 Fed.Appx. 338, 341 (11th Cir. 2012), contracted with the defendant in its own name, thus qualifying directly within FRCP 17(a)(1)(F): "Global issued the insurance contract to Platinum Jet, and signed the contract in its own name on behalf of its principal."

In *Bache & Co. v. International Controls Corp.*, 324 F.Supp. 998, 1004 (S.D.N.Y. 1971), the court also found that the plaintiff had standing because it entered into the contracts for the sale of securities in its own name. Similarly, in *Mitsui & Co. v. Puerto Rico Water Resources Authority*, 528 F.Supp. 768, 777 (D.P.R. 1981), the plaintiff entered into the contract in its own name: "Mitsui USA was a party to the Prime Contract from its inception and at all times thereafter. It

had an actual ownership, not a mere possessory interest in the Prime Contract and funds received thereunder.”

Although there was no finding that the plaintiffs in *Lubbock Feed Lots, Inc. v. Iowa Beef Processors, Inc.*, 630 F.2d 250, 258 (5th Cir. 1980) had entered into the contracts in their own names, plaintiffs were deemed to be “party promisees” in that, based upon custom of the industry, “...the other party to [the] contract has agreed with the agent to pay the purchase price to the agent, and not to the principal in person or to any other agent of the principal.” *Id.*

Here, KSB has not alleged facts suggesting that the other parties to the contract agreed to perform – i.e. deliver the cargo – to KSB. Instead, based upon the contract attached to KSB’s complaint, the parties to the bill of lading agreed to deliver the cargo to the consignee on behalf of the shipper.

As pointed out in the moving papers, KSB did not own the cargo and admits that it was not the party that suffered damages. For example, on page 2 of the Complaint, KSB alleges that the alleged misdelivery “...result[ed] in massive loss to our customer and their suppliers...” Similarly, Complaint p. 3 indicates that the alleged conduct: “...result[ed] in all the suppliers of this shipment which was consolidated by R&A International Logistics ... lost considerable amounts of money totaling to US\$191,110.00.”

Indeed, it is not clear from those allegations how much damage KSB's alleged principal Risona suffered and how much damage Risona's suppliers suffered. There is no allegations that would support a finding that KSB acted as the agent for Risona's suppliers. A dismissal of this claim would therefore be proper in that KSB is not entitled to recover reparations for damages that it admittedly has not sustained on cargo that it did not own.

B. The Alleged Release of the Cargo does not Constitute a Shipping Act Violation

The crux of KSB's opposition relies upon its interpretation of *Bimsha International v. Chief Cargo Services Inc.*, 32 S.R.R. 353 (Initial Decision, 2011) to hold that the release of containers without presentation of the original bills of lading constitutes a *per se* violation of section 10(d)(1) of the Shipping Act. *Bimsha* does not make such an expansive holding.

In *Bimsha*, the Administrative Law Judge concluded that under the particular facts of that case the NVOCC Chief Cargo Services, Inc., had failed to fulfill its obligations with respect to the transportation of the cargo by releasing the cargo without surrender of the original bills. However, the case of *Bimsha*

does not stand for the proposition that all releases of cargo without presentation of original bills of lading constitutes a violation of section 10(d)(1) of the Shipping Act. In fact, such a ruling would be inconsistent with common practices within the transportation industry, which regularly allows for delivery without collection of original bills of lading (e.g. Express Release bills).

Upon petition for review of the *Bimsha* decision, the Second Circuit made note that it was not ruling that NVOCCs could not contract with a shipper to permit delivery without presentation of the original bills of lading:

We express no opinion on whether Chief Cargo could contract with a shipper to permit the unloading of cargo without requiring the presentation of an original bill of lading as no party advances that possibility and Chief Cargo may petition the FMC to modify its cease-and-desist order should it arise. *Chief Cargo Services, Inc. v. Federal Maritime Commission*, 586 Fed.Appx. 730, 733, n. 2 (2nd Cir. 2014).

Here, the NVOCC in question did contract to allow delivery without presentation of the original bill of lading. The face of the bill of lading at issue specified that the bill of lading was non-negotiable and that "...if a 'Non-Negotiable' BILL OF LADING is issued, neither an original nor a copy need be

surrendered in exchange for delivery unless applicable law so requires.” (See DCL bill of lading attached to Complaint.)

Consequently, *Bimsha* is inapplicable and KSB fails to set forth the requisite facts and law establishing why the conduct alleged in this case constitutes a violation of section 10(b)(1) of the Shipping Act.

II. CONCLUSION

Based upon the moving papers and the above, Respondent DCL’s Motion to Dismiss should be granted.

Dated: April 15, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this 15th day of April, 2016, served a copy of the foregoing RESPONDENT, VANGUARD LOGISTICS SERVICES (USA), Inc., DOING BUSINESS UNDER TRADE NAME DIRECT CONTAINER LINE's REPLY IN SUPPORT OF MOTION TO DISMISS COMPLAINT by First-Class Mail and/or e-mail upon the following:

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