

BEFORE THE
FEDERAL MARITIME COMMISSION

DOCKET NO. 16-16

MAVL CAPITAL, INC., IAM & AL GROUP INC. and MAXIM OSTROVSKIY,
(Complainants)

v.

MARINE TRANSPORT LOGISTICS, INC. and DIMITRY ALPER,
(Respondents)

**RESPONDENT MARINE TRANSPORT LOGISTIC, INC.'S
BRIEF IN SUPPORT OF THE ORDER TO SHOW CAUSE**

Respondent Marine Transport Logistics, Inc. (“MTL”) submits this brief in support of Administrative Law Judge Guthridge’s September 15, 2016 Order To Show Cause (“OTSC”), and in opposition to Complainant’s October 3, 2016 Brief (“Compl. Brief”) responding to the OTSC. Accompanying this brief is Respondent’s Appendix of Documents (Exh. 01 – 04) in support of the OTSC.

BACKGROUND

As background, but directly relevant to this proceeding, MTL brings to the Commission’s attention that the claims alleged by Complainants in this case (the “FMC Action”) are duplicative of claims filed by Complainants in 2013 in the U.S. District Court for the Eastern District of New York, in a case captioned *MAVL Capital, Inc. v. Marine Transport Logistics, Inc., et al.*,

Civil Action No. 13-cv-7110 (the “E.D.N.Y. Case.”)¹ See E.D.N.Y. PACER Docket at Respondent’s Appendix Exh. 01. The Complaint in the E.D.N.Y. Case (“E.D.N.Y. Complaint”), dated December 12, 2013, contains the same or substantially identical allegations with regard to the same 2006 Mercedes SL65, 2011 Porsche Panamera, and three Harley Davidson motorcycles at issue in the present FMC Action. See E.D.N.Y. Complaint at Respondent’s Appendix Exh. 02, ¶¶ 78 – 83; 100 – 105; 110 – 123. The E.D.N.Y. Complaint also alleged a Shipping Act Violation. Exh. 02 at ¶¶ 128 – 130.

The significance of the E.D.N.Y. case is that the parties (both Complainants and MTL) have *already completed* discovery on Complainants’ claims of a Shipping Act violation. In other words, this is not a case where Complainants can fall back on the age-old plaintiff’s cry of needing “more discovery” to flesh out its allegations. All the facts needed to support their allegations, if any exist, are within Complainants’ own knowledge or known to Complainants from the E.D.N.Y. Case. Turning to Complainant’s factual allegations, MTL disputes many of the facts alleged by Complainants and the Certification of Maxim Ostrovskiy (“Ostrovskiy Cert.”). For purposes of this OTSC *only*, and without prejudice to Respondent’s right to make a summary judgment motion on the undisputed material facts in Respondent’s favor, MTL treats Complainant’s allegations as true – with the exception of certain facts noted herein, which are known to Complainants but which were presumably deliberately omitted from the Complaint and Complainants’ Brief.

¹ Complainants’ (i.e. the plaintiffs’) claims in the E.D.N.Y. Case are currently pending decision by the E.D.N.Y. court on the court’s September 8, 2015 Order to Show Cause why the claims should not be dismissed. See Appendix Exh. 01 at page 9, Docket Entry #48.

LEGAL STANDARD

On this OTSC, Complainant has the burden of proving Commission jurisdiction by “substantial evidence.” *AHL Shipping Company v. Kinder Morgan Liquids Terminals, LLC*, 2005 WL 1596715, at *3 (ALJ Initial Decision June 13, 2005). As set out in the OTSC, the Commission follows the Fed. R. Civ. P. Rule 12(b)(6) standard used by the federal courts to dismiss a claim over which it does not have any jurisdiction *Kobel v. Hapag-Lloyd America, Inc.*, 32 SRR 40, 42 (ALJ 2011). Under Rule 12(b)(6), a claim must be dismissed if it fails to allege *all* essential elements or fails to allege facts that, if established, entitle a complaint to relief. The party asserting [subject matter] jurisdiction bears the burden of proving its existence. *See Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). Moreover, although well-pled facts are accepted as true, the Complainants’ *legal conclusions* are not entitled to the same deference. *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S.Ct. 1937, 1949 (2009)(emphasis added).

ARGUMENT

I. COMPLAINANTS FAIL TO ALLEGE A SHIPPING ACT VIOLATION WITH REGARD TO THE MERCEDES SL65

The claim by Complainants concerning a Mercedes lacks any connection to the Shipping Act. The OTSC correctly recognizes that the Complaint itself alleges that “respondents unlawfully converted this [Mercedes] *and* shipped it to the United Arab Emirates on or about August 24, 2013.” FMC Complaint at ¶ 31 (emphasis added). As a temporal (not to mention factual and legal) matter, it can only be that respondents *first* converted this vehicle and then *subsequently* shipped it to the U.A.E.; this is the only logical and commonsense sequence of events. Conversion, after all, is the “intentional exercise of dominion or control over a chattel which . . . seriously interferes with the right of another to control it . . .” Restatement (Second) of Torts § 222A. Thus, if a conversion took place, as alleged, it took place at one of two times and

places – both within the U.S. and both without involving international carriage by water. Complainants' remedy, if any, lies with the appropriate state or federal court, and not in a non-existent Shipping Act claim.

A. The alleged “conversion” did not implicate the Shipping Act.

Complainants allege (i.e., concede), under penalty of perjury, two factual occurrences of which either, under the assumption of truth *arguendo*, constitute a prima facie claim of conversion. However, both of these occurrences were in the U.S., without the involvement of any international carriage by water whatsoever, and without implicating the Shipping Act:

First, Complainants allege that on or about June 1, 2013, Complainant approached MTL and MTL “refused to offer any explanation as to the whereabouts of the vehicle.”² Ostrovskiy Cert. at ¶ 13-15. Assuming this to be true, i.e., that on June 1, 2013, MTL interfered with Complainant’s right to the Mercedes, this would be a prima facie claim for conversion, without any Shipping Act implications. *See* Restatement (Second) of Torts § 222A, *supra*.

Second, if MTL exported the Mercedes to Dubai against Complainants’ directives on or about August 24, 2013, then a conversion *must* have occurred prior to the export. The obviousness of this is proven by considering the following hypothetical: instead of exporting the Mercedes to Dubai, what if the Mercedes had been transported elsewhere in New Jersey on August 24, 2013 against Complainants’ wishes? Or what if, after August 24, 2013, MTL simply

² MTL denies the allegations of conversion, including the allegations of Complainants’ unsubstantiated and self-serving testimony purporting a communication on or about June 1, 2013, of which there is no documented evidence whatsoever, despite Complainants’ *obligation* to produce same (if it existed) in the E.D.N.Y. Case pursuant to Federal Rules. Fed. R. Civ. P. 26(a). Nevertheless, Complainants’ allegations are treated as true *only* for the purpose of this OtSC and to determine Commission jurisdiction. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949.

refused to release the Mercedes³? Would Complainants agree that no conversion took place? Of course not. The arrival of the Mercedes in Dubai is immaterial to any conversion; it is the earlier act of interfering with Complainants' control of the Mercedes that makes out a prima facie conversion claim.

Yet, in a desperate attempt to squeeze a square peg into a round hole, Complainants claim that "the conversion occurred *after* [the Mercedes] had arrived in Dubai." Compl. Brief at p. 10 (emphasis in original). In other words, Complainants want the Commission to find that a "refusal" to release the Mercedes to Complainants on June 1, 2013 *and* the precedent action required to export the Mercedes to Dubai when Complainants (allegedly) wanted to export the Mercedes to Germany, did *not* constitute an intentional act interfering with Complainants' right to the Mercedes (i.e. a conversion). This is simply an erroneous legal conclusion contrary to the very facts in the sworn statement by Complainants. Because Complainants' allegations are, in reality, allegations of conversion occurring in New Jersey without any international carriage by water and without any Shipping Act implications whatsoever, Complainants' claim must be dismissed for lack of Commission jurisdiction, with reasonable attorneys fees and costs awarded to respondents.

B. Complainants' did not pay or attempt to pay outstanding storage.

Notwithstanding that Complainants did not allege a Shipping Act violation for the Mercedes, Respondent highlights an additional omission from the Complaint: any facts showing payment or intent to make payment of the storage charges. Complainants' allegations in this regard mysteriously leap from an "agreement" in December 2012 to monthly storage charges of \$150 per month (Complaint at ¶ 30) to the allegation of an unlawful conversion 8 months later

³Assuming, *arguendo*, that Complainants were factually and legally entitled to the Mercedes.

on or about August 24, 2013 (Complaint at ¶ 31.) The solution to this mystery is that Complainants, in fact, did not pay or attempt to pay the agreed-on storage. This is an undisputed fact. Although this fact is not directly material to the absence of Commission jurisdiction on Complainants' claim, this omission is representative of Complainants' attempt to shade the facts to erroneously persuade the Commission to find jurisdiction on what is otherwise a "straightforward" breach of contract or tort claim.

II. COMPLAINANTS FAIL TO ALLEGE A SHIPPING ACT VIOLATION WITH REGARD TO HARLEY DAVIDSON MOTORCYCLES.

Complainants' claim with regard to the motorcycles fails for two reasons. First, aside from the absence of Commission jurisdiction, Complainants' have not and will not be able to prove causation. Consequently, if this claim is not dismissed at this stage, MTL reserves its right to move for summary judgment and, as discussed above, no further discovery is needed. Alternatively, as material to the instant OTSC, this claim also fails for lack of Commission jurisdiction because Complainants have not alleged facts showing a "retaliation" within the meaning of the Shipping Act.

A. Unitrans did not agree to Alper's September 6, 2013 request.

First and foremost, this claim is premised on the continuing fiction from Complainants that Alper's September 6, 2013 action *caused* Complainants' alleged troubles with its motorcycles and with Unitrans. In support of this fiction, Complainants directed the Commission to a September 6, 2013 e-mail by Alper (then-of-MTL) to Unitrans "requesting that [Unitrans] hold the below mentioned [motorcycles]." *See Ostrovskiy Cert. at Exh. C.*

But, the FMC should take notice that the September 6, 2013 e-mail is not the end of the story (or even the end of that specific e-mail exchange.) Complainants only presented part of the story to the Commission; Complainants' counsel is well-aware that on September 10, 2013, Unitrans *responded* to Alper's September 6, 2013 email and *refused* Alper's "request" (in relevant part below)⁴:

Unitrans – PRA Co., Inc has never been involved in any business transactions with MTL so it is *unacceptable* for us to get any requests from MTL in regards of third party transactions.

* * *

If you will provide our company with Court Order, we will execute it, but *any instructions or orders from your company have no legal ground and can not be executed.*

(emphasis added).

Complainants' Brief makes no mention of this key September 10, 2013 e-mail. The unequivocal language in Unitrans' September 10, 2013 e-mail shows that Unitrans *refused* Alper's September 6, 2013 request. In fact, Unitrans chastised Alper for his "unacceptable" request which "can not be executed" by Unitrans absent a Court Order. Appendix Exh. 04. There is no evidence that a court order ever issued and Complainants have never produced any documents to contradict Unitrans' clear refusal of Alper's request, despite their obligation to do so under Fed. R. Civ. P. Rule 26(a)(1) ["Required Disclosures"]. If such a document from Unitrans exists (which it obviously does not), Complainants' nondisclosure would subject Complainants to sanctions and preclusion of evidence in the E.D.N.Y. Case under Fed. R. Civ. P.

⁴ On May 19, 2014, as part of the E.D.N.Y. Case, the undersigned counsel provided MAVL Capital's (i.e., the plaintiff the E.D.N.Y. Suit and the present Complainants) counsel (M. Nussbaum), with a copy of Unitrans' September 10, 2013 email. Respondent's Appendix Exh. 03. The undersigned further reiterated in the May 19, 2014 that neither MAVL nor Mr. Nussbaum had disclosed any documents that would contradict Unitrans' September 10, 2013 email. This has not changed.

Rule 37(c)(1). Thus, the undisputed evidence is that Unitrans *rejected* Alper's request for Unitrans to hold the motorcycles. Consequently, there is no causation between Alper's request and any refusal by Unitrans to export Complainants' motorcycles.

Moreover, if Complainants' incredible allegations were believed, then it would be *Unitrans* that violated the Shipping Act by refusing to export the motorcycles. Yet, suspiciously, Complainants have seemingly made no effort to file suit or bring a FMC proceeding against Unitrans. Instead, Complainants chose only to file suit against third-parties (MTL and Alper) to obtain a court order directing third-parties to give "instructions" to Unitrans; instructions which Unitrans is under no legal obligation to accept and in fact has adamantly refused to accept. The factual basis for this instant Shipping Act proceeding by Complainants is, thus, highly suspect. There are presumably facts which Complainants are secreting from the Commission and from Respondents; but the burden is not on Respondents or the Commission to speculate as to why a non-party (Unitrans) may or may not have refused to deal further with Complainants. It is sufficient at this stage that Complainants have not and will not be able to allege, much less prove, the element of causation for any harm allegedly suffered by Complainants, which warrants dismissal of their claim.

B. Complainants fail to allege a "retaliation" by MTL.

Aside from the lack of causation, Complainants also fail to allege a Shipping Act Violation under 46 U.S.C. § 41104(3). "Retaliation" under 46 U.S.C. § 41104(3) occurs when a carrier "refus[es], or threaten[s] to refuse, cargo space accommodations when available" or "resorts to other unfair or unjustly discriminatory methods." Neither of those actions occurred here. As the OTSC identified and as Complainants concede, Complainants voluntarily elected *not to hire*, book, or pay MTL to ship the motorcycles. MTL, thus, did not refuse or threaten to

refuse space to Complainants. And MTL did not – and obviously could not – act unfairly or discriminate against Complainants for a *non-existent* booking with MTL. Complainants cite to no authority or non-frivolous allegation to the contrary. Accordingly, Complainants' claims concerning the Harley Davidson motorcycles can also be dismissed for lack of Commission jurisdiction.

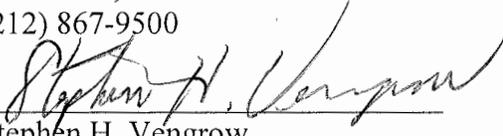
Without proof of causation or Commission jurisdiction, Complainants' claim against MTL concerning the motorcycles fail under any legal standard and is subject to dismissal (or summary judgment).

CONCLUSION

For the foregoing reasons, Respondent MTL respectfully submits that Complainants' claims regarding the Mercedes and the Harley Davidson motorcycles should be dismissed pursuant to the OTSC, with an award of reasonable attorneys fees and costs awarded to MTL.

Dated: October 17, 2016
New York, NY

Respectfully submitted,
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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury that the following is true and correct:

1. I am over the age of eighteen years and I am not a party to this action.
2. On October 17, 2016, I served a complete copy of Respondent's Brief in Support of the Order to Show Cause and Appendix of Documents in Support of the Order to Show Cause in Docket No. 16-16 by mailing same to the below parties by U.S. Mail and by e-mail to:

Original plus 5 copies to:

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Dated: October 17, 2016
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