

S E R V E D
November 4, 2008
FEDERAL MARITIME COMMISSION

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WASHINGTON, D.C.

DOCKET NO. 07-05

K.E.I. ENTERPRISE d/b/a KEI LOGIX

v.

GREENWEST ACTIVEWEAR, INC.

GREENWEST ACTIVEWEAR, INC.

v.

**K.E.I. ENTERPRISE d/b/a KEI LOGIX and
GREAT WHITE FLEET, LTD.**

**INITIAL DECISION
APPROVING SETTLEMENT AGREEMENT AND MUTUAL RELEASE AND
GRANTING MOTIONS TO DISMISS WITH PREJUDICE¹**

On October 14, 2008, K.E.I. Enterprise d/b/a KEI Logix (KEI) and Greenwest Activewear, Inc. (Greenwest) filed a document entitled Motions to Dismiss with Prejudice. First, Greenwest moves to dismiss with prejudice its complaint against Great White Fleet, Ltd. (GWF). Second, KEI and Greenwest move to dismiss their complaints against each other on the basis of a Settlement Agreement and Mutual Release into which they have entered. The Settlement Agreement and Mutual Release is approved and the motions to dismiss the complaints with prejudice are granted.

¹ The 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.

BACKGROUND

I. FACTUAL BACKGROUND.

Complainant KEI is an ocean transportation intermediary licensed by the Commission (FMC No. 018516) to provide non-vessel-operating common carrier services. *See* 46 C.F.R. Part 515. Respondent Greenwest is in the business of exporting fabric and other goods for sale and distribution outside the United States. Third-party respondent GWF is a vessel-operating common carrier, FMC Org. No. 015579.

The allegations in the pleadings and the documents in the record indicate that the following events led to the complaint in this proceeding. On August 23, 2006, Greenwest entered into an agreement with KEI to ship a container of fabric and other items from Port Hueneme, California, to Fashion Solutions Guatemala in Villa Nueva, Guatemala. KEI issued a bill of lading identifying Greenwest as the shipper and Fashion Solutions as the consignee and “notify party.” The bill of lading indicates that the goods would be shipped in container KEIU8074305 to be carried on the vessel Wild Lotus from Port Hueneme to Puerto Quetzal, Guatemala, then over land to Villa Nueva, identified as the place of delivery. KEI charged Greenwest \$2,450.00 in freight charges plus a \$100.00 fuel charge for a total of \$2,550.00. A representative of KEI signed the bill of lading “as agent for the carrier, Great White Fleet.” (KEI Logix Bill of Lading No. KEI-4121939.)

On the same date, GWF issued its own bill of lading for container KEIU8074305 identifying KEI as the shipper and Logistica Global, Guatemala City, Guatemala, as the consignee. The vessel, port of loading, port of discharge, and place of delivery are the same as stated on the KEI bill of lading. The GWF bill of lading describes the move as “pier/door.” The bill of lading states that the charges would be \$840.00 for ocean freight, \$385.00 for a bunker surcharge, \$125.00 for security charge, \$290.00 for “C.A. Inland,” and \$95.00 for “Inland Fuel Recov,” a total of \$1,735.00. (Great White Fleet (US) Ltd. Bill of Lading No. GWFT2060591A.)

The shipment did not go as planned. The container was hijacked on the inland leg between Puerto Quetzal and Villa Nueva and the goods have not been recovered. Neither KEI nor GWF disputes the fact that container KEIU8074305 and the goods it carried were stolen. (KEI Complaint ¶ 3; GWF Answer ¶ 4.)

Greenwest alleges that on September 1, 2006, it filed a claim with KEI for the lost goods shipped in container KEIU8074305 and for other consequential damages totaling \$152,152.90. It apportioned the claimed damages as follows: \$91,022.84 for the value of the goods in the container; \$30,795.75 for “Air charge (Expected)”;

\$26,687.51 for sewing line blank charge in Guatemala; and \$3,646.80 for overtime at L.A. dye house. (Greenwest Cross-Complaint at 3 and Cross-Complaint Exhibit 4.) Greenwest alleges that KEI presented the claim to GWF, but GWF denied the claim in a letter to KEI. (Greenwest Cross-Complaint at 3.)

[T]his is not an issue where U.S. COGSA would apply, since the loss transpired during the inland carriage of goods caused by a force majeure act, in this case hijacking. Under the prevailing laws of Guatemala where the inland contract of carriage was issued, no liability can be established against carriers for this type of act, because we took reasonable care to ensure that the freight moved forward, but were not able to overcome the physical force of the assailants which also resulted in the loss of our container and chassis as well.

(Greenwest Cross-Complaint, Exhibit 5 (undated letter from James W. Parker, vice-president of GWF, to Andy Paik of KEI Logix).) GWF also claimed that section 19(c) of the bill of lading would limit GWF's liability "to US\$500 per container (not package), if the loss was the result of some other action, such as a highway accident." (*Id.*)

From the above you will note that as the incident involved hijacking and as our bill of lading limits our liability based on the limitations and defenses of the applicable inland bill of lading, which would incorporate the laws of the country of Guatemala, Great White Fleet cannot accept liability for this loss and we regret that we must close out this matter as unrecoverable.

(*Id.*)

Greenwest continued to ship goods with KEI while they negotiated whether and how much KEI would compensate Greenwest for the goods lost with container KEIU8074305. Greenwest claims that it and KEI

entered into a written agreement with respect to disposition of the claim, ongoing business between Greenwest and KEI Logix, and payment of the claim by way of offset against KEI Logix freight invoices to Greenwest. . . . Initially the amount to be offset . . . was set at \$4,000.00 per month increasing the 12-month term theoretically and then in April changed to \$3,000.00 per month.

(Greenwest Cross-Complaint at 3.) Greenwest alleges that it expected that its agreement with KEI required KEI to consider the freight charges for future shipments to be paid by offsets against the amount set forth in the agreement.

Greenwest contends that in May 2007, KEI "abruptly changed its mind relative to the agreement . . . and without prior notice to Greenwest, refused to deliver three containers in-transit unless the full amount of it [*sic*] outstanding invoices were paid, all in breach of the signed agreement . . . and in violation of [FMC] rules and regulations." (Greenwest Cross-Complaint at 3-4.) To secure release of the three containers, on May 16, 2007, Greenwest delivered to KEI three

post-dated checks for \$40,697.43 (dated May 18, 2007), \$21,848.01² (dated May 25, 2007), and \$38,473.64 (dated June 15, 2007) for a total \$101,019.08. Upon receipt of the three checks, on May 17, 2007, KEI released the three containers to Greenwest or its agent in Guatemala. Greenwest then instructed its bank to stop payment on the checks. (KEI Complaint ¶ 3.)

KEI contends that it “asserted its defenses and declined [Greenwest’s] claim” for the damages resulting from the hijacking of container KEIU8074305. (KEI Complaint ¶ 3.) KEI admits that its representative “signed a document concerning disposition of the subject claim [for damages for the loss of container KEIU8074305]. KEI denies Greenwest’s allegations concerning the terms of the document and their legal significance to the extent that those allegations are inconsistent with the document, which speaks for itself.” (Answer by KEI to Cross-Complaint by Greenwest ¶ 10.)

KEI alleges that Greenwest refused to pay freight due on several shipments. It claims that Greenwest

paid freight slowly, so a large amount of freight was due, and the corresponding cargo was held by [KEI]. Eventually, the parties reached a compromise whereby [Greenwest] agreed to pay [KEI] freight due in the amount of \$101,019.08, and [KEI] agreed to release all of [Greenwest’s] cargo (Cargo) in the possession of [KEI].

(KEI Complaint ¶ 3.) Greenwest gave KEI the three checks, obtained the cargo, then stopped payment on the checks. When KEI presented the May 18, 2007, check to Greenwest’s bank, the bank marked the check “STOP PAYMENT” and did not pay. (*See* KEI Complaint Ex. A.) KEI also alleges that:

[d]uring the course of their business and shortly before the three checks were delivered and the Cargo released, [Greenwest] without explanation withheld \$7,000.00 from freight payments due to [KEI]. On information and belief, the withholding of the \$7,000.00 by [Greenwest] was part of its plan fraudulently to obtain release of the Cargo.

(KEI Complaint ¶ 3.) Adding the \$101,019.08 from the three checks and the \$7,000.00 Greenwest allegedly withheld, KEI alleges that Greenwest owes KEI a total of \$108,019.08 in freight charges for which it seeks reparations. (*Id.* ¶ 7.)

² KEI’s Complaint states \$21,838.01. The copy of the check indicates \$21,848.01, an amount consistent with the total.

II. THE PLEADINGS.

A. KEI Complaint against Greenwest.

KEI alleges that Greenwest violated of the Shipping Act by inducing KEI to relinquish the cargo in the three containers and lose its possessory maritime lien when Greenwest made payment of freight by postdated checks knowing that it would stop payment on the checks once KEI released the cargo. KEI alleges that these actions violated 46 U.S.C. § 41102(a) because Greenwest “knowingly and willfully, directly or indirectly, by means of . . . [an] unjust or unfair device or means, obtain[ed] or attempt[ed] to obtain ocean transportation for property at less than the rates or charges that would otherwise apply.” (KEI Complaint ¶ 4.) KEI alleges that it has been injured and damaged in the sum of \$108,019.08, and seeks reparations in that amount. (*Id.* ¶¶ 6 and 7.)

B. Greenwest’s Answer and Cross-Complaints.

Greenwest denies that it in bad faith induced KEI to relinquish the cargo or that it paid freight slowly. It describes the agreement Greenwest claims resolved the dispute about the loss of container KEIU8074305 and contends that KEI “is the party which knowingly, willfully directly or indirectly used unfair device or means with respect to its transaction with [Greenwest].” (Greenwest Answer ¶ 4.) Greenwest expressly denies that KEI has been damaged in the amount of \$108,019.08, (*id.* ¶ 6), and “denies that it owes [KEI] the sum of \$108,019.08 with interest or any amount whatsoever.” (*Id.* ¶ 7.)

Greenwest filed a “Formal Docket Cross-Complaint” against KEI and GWF. The Cross-Complaint against KEI alleges that KEI breached the agreement it reached with Greenwest for resolution of Greenwest’s claim regarding the stolen goods. When KEI refused to deliver the three containers in transit unless Greenwest immediately paid the full amount claimed by KEI (including charges allegedly owed for shipments other than the three containers being held), Greenwest asserts that it had no alternative but to tender the three checks to obtain the release of its containers, then to place a stop-payment order on them. (Greenwest Cross-Complaint at 4.) Greenwest alleges that KEI’s actions violate 10(d)(1) of the Shipping Act: “No common carrier, marine terminal operator, or ocean transportation intermediary may fail to establish, observe, and enforce just and reasonable regulations and practices relating to or in connection with receiving, handling, storing, or delivering property.” (Greenwest Cross-Complaint at 1.)³

³ When the Shipping Act was reenacted as positive law, this provision was changed to read: “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 purpose of the reenactment was to “reorganiz[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 Cross-Complaint against GWF alleges that GWF wrongfully denied Greenwest's claim for the stolen goods in container KEIU8074305 by evoking *force majeure* pursuant to an inland bill of lading that Greenwest claims has not been produced. Furthermore, Greenwest contends that GWF failed to prove that the goods were released in Guatemala with the customary escort and security practices required of all carriers in that particular area. (Greenwest Cross-Complaint at 4.) GWF denies liability. (GWF Answer.)

III. DISPOSITIVE MOTIONS AND SETTLEMENT DISCUSSIONS.

KEI and Greenwest filed motions for dismissal or for summary judgment of each other's complaints. On February 22, 2008, I denied these motions. *K.E.I. Enterprise d/b/a KEI Logix v. Greenwest Activewear, Inc.*, FMC No. 07-05 (ALJ Feb. 22, 2008) (Memorandum and Order on Respondent's Motion Pursuant to Rule 207(b) for an Order, etc.). In that order, I established deadlines for discovery, but suggested that:

If the parties determine that it would be in their interest to engage in some form of alternative dispute resolution, either through the Commission's Office of Consumer Affairs & Dispute Resolution Services [CADRS] or some other source, they should file a joint motion to extend the date for filing the schedule required by Rule 201.

Id. at 22. The parties responded that they had contacted CADRS and asked that discovery be delayed to allow the parties an opportunity to engage in some form of alternative dispute resolution. I granted the request. *K.E.I. Enterprise d/b/a KEI Logix v. Greenwest Activewear, Inc.*, FMC No. 07-05 (ALJ Mar. 18, 2008) (Order Extending Time to File Rule 201 Statement). The stay was extended two more times.

CADRS's efforts did not directly lead to a settlement. Therefore, after a telephonic status conference conducted on August 14, 2008, I issued a procedural order setting forth a schedule for discovery and filing of papers that would lead to an initial decision. *K.E.I. Enterprise d/b/a KEI Logix v. Greenwest Activewear, Inc.*, FMC No. 07-05 (ALJ Aug. 18, 2008) (August 18, 2008, Discovery and Procedural Order). I noted in that order that counsel for "Greenwest stated that it intended to file a [voluntary] dismissal without prejudice of its third party complaint against Great White Fleet. Therefore, counsel for Great White Fleet withdrew from the conference." *Id.* n.1.

On September 4, 2008, I received information from counsel for KEI stating that KEI and Greenwest had settled their dispute and asking that the filings required by the August 18, 2008, Discovery and Procedural Order be stayed pending submission of settlement papers. I granted the request, *K.E.I. Enterprise d/b/a KEI Logix v. Greenwest Activewear, Inc.*, FMC No. 07-05 (ALJ Aug. 18, 2008) (Order Extending Due Date for Stipulations), followed by two extensions of the stay on September 23, 2008, and October 8, 2008.

DISCUSSION AND CONCLUSION

I. MOTION TO DISMISS GREENWEST COMPLAINT AGAINST GWF.

Greenwest “moves to dismiss with prejudice its Complaint against [GWF]. This is the motion Greenwest undertook to file in the conference telephone call with the presiding Officer on August 14, 2008.” (Motions to Dismiss with Prejudice at 1.) Greenwest did not cite any authority for voluntary dismissal. The motion does not set forth GWF’s position on the motion. GWF has not filed a reply.

The Commission does not have a specific rule to cover a voluntary motion to dismiss. Commission Rule 12 provides that “[i]n proceedings under this part, for situations which are not covered by a specific Commission rule, the Federal Rules of Civil Procedure will be followed to the extent that they are consistent with sound administrative practice.” 46 C.F.R. § 502.12. The Federal Rules of Civil Procedure govern the voluntary dismissal of an action by a plaintiff. *See* Fed. R. Civ. P. 41(a)(2) (when an answer to a complaint has been filed, “an action may be dismissed at the plaintiff’s request only by court order, on terms that the court considers proper. . . . Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice”).

I find that under the circumstances of this case, dismissal of the complaint against GWF with prejudice is proper. Therefore, Greenwest’s motion to dismiss with prejudice its complaint against GWF is granted.

II. MOTION TO APPROVE SETTLEMENT AGREEMENT AND DISMISS WITH PREJUDICE KEI’S COMPLAINT AGAINST GREENWEST AND GREENWEST’S COUNTER-COMPLAINT AGAINST KEI.

The Commission has a strong and consistent policy of “encourag[ing] settlements and engag[ing] in every presumption which favors a finding that they are fair, correct, and valid.” *Inlet Fish Producers, Inc. v. Sea-Land Service, Inc.*, 29 S.R.R. 975, 978 (ALJ 2002), quoting *Old Ben Coal Co. v. Sea-Land Service, Inc.*, 18 S.R.R. 1085, 1091 (ALJ 1978) (*Old Ben Coal*). *See also Ellenville Handle Works, Inc. v. Far Eastern Shipping Co.*, 20 S.R.R. 761, 762 (ALJ 1981). Using language borrowed in part from the Administrative Procedure Act,⁴ Rule 91 of the Commission’s Rules of Practice and Procedure gives interested parties an opportunity, *inter alia*, to submit offers of settlement “where time, the nature of the proceeding, and the public interest permit.” 46 C.F.R. § 502.91(b).

The law favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation, and it is the policy of the law to uphold

⁴ “The agency shall give all interested parties opportunity for – (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit.” 5 U.S.C. § 554(c).

and enforce such contracts if they are fairly made and are not in contravention of some law or public policy. . . . The courts have considered it their duty to encourage rather than to discourage parties in resorting to compromise as a mode of adjusting conflicting claims. . . . The desire to uphold compromises and settlements is based upon various advantages which they have over litigation. The resolution of controversies by means of compromise and settlement is generally faster and less expensive than litigation; it results in a saving of time for the parties, the lawyers, and the courts, and it is thus advantageous to judicial administration, and, in turn, to government as a whole. Moreover, the use of compromise and settlement is conducive to amicable and peaceful relations between the parties to a controversy.

Old Ben Coal, 18 S.R.R. at 1092, quoting 15A American Jurisprudence, 2d Edition, pp. 777-778 (1976).

“While following these general principles, the Commission does not merely rubber stamp any proffered settlement, no matter how anxious the parties may be to terminate their litigation.”
Id.

If a proffered settlement does not appear to violate any law or policy and is free of fraud, duress, undue influence, mistake or other defects which might make it unapprovable despite the strong policy of the law encouraging approval of settlements, the settlement will probably pass muster and receive approval.

Id. at 1093.

Generally, when examining settlements, the Commission looks to see if the settlement has a reasonable basis and reflects the careful consideration by the parties of such factors as the relative strengths of their positions weighed against the risks and costs of continued litigation. Furthermore, if it is the considered judgment of the parties that whatever benefits might result from vindication of their positions would be outweighed by the costs of continued litigation and if the settlement otherwise complies with law the Commission authorizes the settlement.

Delhi Petroleum Pty. Ltd. v. U.S. Atlantic & Gulf/Australia - New Zealand Conference and Columbus Line, Inc., 24 S.R.R. 1129, 1134 (ALJ 1988) (citations omitted).

KEI and Greenwest state that they have concluded that:

(a) discovery and trial of disputed facts, including issues of unjustness, unfairness, and reasonableness, will be extensive, (b) briefing the issues, some complex, will be considerable, (c) the legal fees for this discovery, trial and briefing will exceed the damages sought, and (d) the prospects of the parties do not merit continuance of this litigation. Accordingly, the parties have settled their dispute with no payment by

either party, mutual release of claims, and dismissal of this Docket in the attached Settlement Agreement and Mutual Release.

(Motions to Dismiss with Prejudice at 1-2.) KEI and Greenwest attached to the motion a Settlement Agreement and Mutual Release releasing their claims against each other and dismissing their claims pending in this proceeding and in a parallel proceeding in a California state court.

I have carefully considered the record herein and the proposed Settlement Agreement and Mutual Release. I find that KEI and Greenwest have met their burden to demonstrate that the Settlement Agreement and Mutual Release does not appear to violate any law or policy and is free of fraud, duress, undue influence, mistake or other defects which might make it unapprovable. The Agreement is consistent with public policy and Commission precedent regarding approval of settlements. "Finally, the settlement agreement has the added benefit of terminating the state court case, another point in its favor, and, as is obvious from my discussion, fully comports with the strong policy in the law favoring settlements." *Al Kogan d/b/a Galaway International v. World Express Shipping, Transportation and Forwarding Svcs., Inc.*, 29 S.R.R. 68, 70 (ALJ 2000). Therefore, I approve the Settlement Agreement and Mutual Release.

ORDER

Upon consideration of the Motions to Dismiss with Prejudice, the record herein, and for the reasons set forth above, it is hereby

ORDERED that the Settlement Agreement and Mutual Release between K.E.I. Enterprise d/b/a KEI Logix's and Greenwest Activewear, Inc., be **APPROVED**. It is

FURTHER ORDERED that the Motions to Dismiss with Prejudice be **GRANTED**. It is

FURTHER ORDERED that K.E.I. Enterprise d/b/a KEI Logix's complaint against Greenwest Activewear, Inc., Greenwest Activewear, Inc.'s complaint against K.E.I. Enterprise d/b/a KEI Logix, and Greenwest Activewear, Inc.'s complaint against Great White Fleet, Ltd., be **DISMISSED WITH PREJUDICE**.



Clay G. Guthridge
Administrative Law Judge