UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES – GENERAL

Case No.	**2:22-cv-04468-MCS-GJS**	Date	March 6, 2024
Title	***Atl. Specialty Ins. Co. v. Top Sealand Int'l Co.***		

Present: The Honorable Mark C. Scarsi, United States District Judge

Stephen Montes Kerr	Not Reported
Deputy Clerk	Court Reporter
Attorney(s) Present for Plaintiff(s):	Attorney(s) Present for Defendant(s):
None Present	None Present

Proceedings: (IN CHAMBERS) ORDER RE: PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT (ECF NOS. 42, 43)

Defendant Top Sealand International Company moves for summary judgment on Plaintiff Atlantic Specialty Insurance Company's complaint. (Top Sealand MSJ, ECF No. 42-1.) Plaintiff opposed, (Opp'n to Top Sealand MSJ, ECF No. 52), and Defendant filed a reply, (Reply ISO Top Sealand MSJ, ECF No. 55).

Separately, Plaintiff moves for summary judgment on its first claim for relief. (Atlantic Specialty MSJ, ECF No. 44.) Defendant opposed, (Opp'n to Atlantic Specialty MSJ, ECF No. 53), and Plaintiff filed a reply, (Reply ISO Atlantic Specialty MSJ, ECF No. 54). The Court heard oral argument on both motions on January 22, 2024.

I. BACKGROUND

This is a damaged cargo case. Plaintiff insured a shipment of 232 cartons from Shanghai to Los Angeles. (*See* Def.'s Objs. to Pl.'s SUF ¶¶ 2–3, 5, 8, ECF No. 53-1.) Defendant, a non-vessel-operating common carrier ("NVOCC"), received the cargo in good order in Shanghai, loaded the cargo into an ocean container, and issued a bill of lading. (*See id.* ¶¶ 1–4.) Defendant failed to deliver the cargo in Los Angeles in the same condition and has no explanation for the damage of the cargo, (*id.* ¶ 5,

7), and Plaintiff paid $108,522.88 on account of the damage to the cargo, (*id.* ¶ 9). On these facts, Plaintiff brings claims for breach of contract in violation of the Carriage of Goods by Sea Act ("COGSA"),[1] (FAC ¶¶ 11–16, ECF No. 27); negligence, (*id.* ¶¶ 17–24); and breach of bailment, (*id.* ¶¶ 25–32).

II. LEGAL STANDARD

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A fact is material when, under the governing law, the resolution of that fact might affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The burden of establishing the absence of a genuine issue of material fact lies with the moving party, *see Celotex*, 477 U.S. at 322–23, and the court must view the facts and draw reasonable inferences in the light most favorable to the nonmoving party, *Scott v. Harris*, 550 U.S. 372, 378 (2007). To meet its burden,

> [t]he moving party may produce evidence negating an essential element of the nonmoving party's case, or, after suitable discovery, the moving party may show that the nonmoving party does not have enough evidence of an essential element of its claim or defense to carry its ultimate burden of persuasion at trial.

Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc., 210 F.3d 1099, 1106 (9th Cir. 2000).

Once the moving party satisfies its burden, the nonmoving party cannot simply rest on the pleadings or argue that any disagreement or "metaphysical doubt" about a material issue of fact precludes summary judgment. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). There is no genuine issue for trial where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party. *Id.* at 587.

[1] "Congress recodified . . . COGSA . . . on October 6, 2006, at 46 U.S.C. § 30701 historical and statutory notes. Act of October 6, 2006, Pub. L. No. 109-304, 120 Stat. 1485." *Starrag v. Maersk, Inc.*, 486 F.3d 607, 610 & *id.* n.1 (9th Cir. 2007); 46 U.S.C. § 30701, note (2006) ("COGSA").

III. ATLANTIC SPECIALTY'S MOTION

Plaintiff moves for summary judgment on its first claim for breach of contract in violation of COGSA. (Atlantic Specialty MSJ 4–6, 11–20.)

A. Threshold Matter

As a threshold matter, Defendant is an NVOCC, and therefore not the actual shipper of the of the cargo. "An NVOCC is an intermediary between the shipper of goods and the operator of the vessel that will carry the goods." *All Pac. Trading, Inc. v. Vessel M/V Hanjin Yosu*, 7 F.3d 1427, 1429 (9th Cir. 1993). "Generally, an NVOCC combines the goods of various shippers into a single shipment, contracts with a vessel for the transportation of the goods, and delivers the goods to the vessel, usually in a sealed container." *Id.* (citing *NLRB v. Int'l Longshoremen's Ass'n*, 447 U.S. 490, 496 n.8 (1980)). "NVOCCs perform a function similar to overland freight forwarders, consolidating small shipments from multiple shippers into large, standard-sized reusable containers that can be quickly loaded on and off ships and onto trucks or other types of transportation." *Id.* at 1429–30 (citing *Nat'l Customs Brokers & Forwarders Ass'n v. United States*, 883 F.2d 93, 101 (D.C. Cir. 1989)).

"As defined by statute, an NVOCC is a 'common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier." *Id.* at 1430 (citing statute now codified at 46 U.S.C. § 40102(17)(A)–(B)). "Conversely, an NVOCC is considered a carrier in its relationship with the shipper of goods." *Id.* (citing *Nat'l Customs Brokers*, 883 F.2d at 101). As such, "NVOCCs assume the same responsibility for the delivery of cargo as do vessel owners or operators." *Logistics Mgmt., Inc. v. One (1) Pyramid Tent Arena*, 86 F.3d 908, 914 (9th Cir. 1996) (citing, inter alia, statute now codified at 46 U.S.C. § 40102(7)).

"The original shipper of the cargo receives a bill of lading from the NVOCC upon delivery of the cargo to the NVOCC. The NVOCC receives an entirely separate bill of lading from the actual carrier, on which the owner of the cargo may or may not be named." *All Pac. Trading*, 7 F.3d at 1430.

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B. Discussion

1. Liability

"Generally, under COGSA, a shipper establishes a prima face case against the carrier by showing that the cargo was delivered in good condition to the carrier but was discharged in a damaged condition." *Taisho Marine & Fire Ins. Co. v. M/V Sea-Land Endurance*, 815 F.2d 1270, 1274 (9th Cir. 1987) (citing, inter alia, statutes now codified as COGSA §§ 2, 3). The shipper need not explain how the damage occurred; rather, "[t]he burden of explanation falls upon the carrier." *Daido Line v. Thomas P. Gonzalez Corp.*, 299 F.2d 669, 671 (9th Cir. 1962). After the shipper establishes a prima facie case, "[t]he burden of proof then shifts to the vessel owner to establish that the loss came under a statutory exception to COGSA." *Taisho Marine & Fire Ins. Co.*, 815 F.2d at 1274–75 (citing, inter alia, statute now codified as COGSA § 4(2)).

The undisputed facts show that Plaintiff delivered the cargo in good condition. "[I]n the usual cargo-damage case the shipper makes the showing of good condition on shipment sufficient for its prima facie case by introducing a 'clean' bill of lading." *Daido Line*, 299 F.2d at 671. Plaintiff has such a bill of lading here. (*See* Wang Decl. ¶ 2; *id.* Ex. 1, ECF No. 42-5.) Further, Defendant does not dispute that it received the cargo in good order and condition or that it issued the bill of lading. (*See* Def.'s Objs. to Pl.'s SUF ¶¶ 2, 4).

The undisputed facts also show that Defendant failed to deliver the cargo in Los Angeles in the same good order and condition. (*See* Def.'s Objs. to Pl.'s SUF ¶ 5.) Specifically, a delivery receipt shows that nonparty Forever 21 rejected the delivery on August 17, 2021, because of water damage, (Bartels Decl. ¶ 29 & Ex. G, ECF No. 46), and photos attached to an August 23, 2021, notice of claim show extensive water damage, (Liapis Decl. ¶ 11 & Ex. D, ECF No. 47). Defendant argues that Plaintiff has produced no admissible evidence showing that the cargo was damaged from the Port of Shanghai to the Port of Los Angeles as opposed to from the Port of Los Angeles to its final destination, especially given that the cargo arrived in early August. (Opp'n to Atlantic Specialty MSJ 7–8.) But this argument ignores that the cargo container would not be subject to the type of water damage found while at the port, and there was no indication of rain from August 8 to August 17, 2021. (Bartels Decl. ¶¶ 26–27.) As such, Plaintiff has made out a prima facie case for liability under COGSA, and it is Defendant's burden to show that a COGSA affirmative defense applies. *Taisho Marine & Fire Ins. Co.*, 815 F.2d at 1274.

Rather than attempting to show that a COGSA exception applies, Defendant argues that Plaintiff failed to timely notify Defendant of the damage. (Opp'n to Atlantic Specialty MSJ 6–7.) This is unpersuasive. "[F]ailure to notify the carrier of damage is prima facie evidence that the [cargo] were delivered in the same condition described in the bill of lading," and "[w]hen sufficient evidence indicating that the cargo was damaged prior to discharge is introduced, the prima facie evidence . . . is accorded no special weight." *Harbert Int'l Establishment v. Power Shipping*, 635 F.2d 370, 373 (5th Cir. 1981). Evidence indicating that the cargo was damaged prior to discharge is abundant here. As such, viewing the evidence in the light most favorable to Defendant, the Court finds that Plaintiff is entitled to summary judgment on liability under its first claim for relief.

2. Damages

As part of its motion for summary judgment, Plaintiff asks the Court to enter summary judgment as to the full amount that Plaintiff paid out in insurance coverage, $108,552.88, which is the invoice price plus labor to attempt to make the cargo acceptable less salvage. (Atlantic Specialty MSJ 18.) Plaintiff also seeks prejudgment interest. (*Id.* at 18–19.) The Court denies summary judgment as to damages.

As Plaintiff acknowledges, "[t]he proper measure of damages under COGSA is the difference between the fair market value of the cargo in sound condition and the fair market value of the cargo in its damaged state." *Am. Home Assurance Co. v. Am. President Lines, Ltd.*, 44 F.3d 774, 781 (9th Cir. 1994). Plaintiff urges the Court to use the invoice price to determine the fair market value. The Court sees no reason to do so, especially where the cargo's shipper represented the value of the cargo as $25,195.00 to the United States Customs and Border Patrol. (*See* Chen Decl. ¶ 2 & Ex. 6, at ASIC-0058, ECF No. 53-4.) This discrepancy raises a genuine dispute of material fact as to fair market value. As such, the Court denies summary judgment as to the amount of damages under the first claim for relief.

IV. TOP SEALAND'S MOTION

Defendant moves for summary judgment as to Plaintiff's entire complaint, arguing primarily that Plaintiff lacks standing to bring its claims, (Top Sealand MSJ 9–12), that Plaintiff failed to prove Defendant was at fault in causing the harm, (*id.*

at 15–16), and that damages should be limited, (*id.* at 17–18), among other arguments. The Court considers each ground in turn.

A. Standing

Defendant challenges Plaintiff's standing to bring the complaint because Plaintiff is not the actual shipper of the cargo. (*Id.* at 9–12.) Yet in doing so, Defendant ignores the definitions in its own bill of lading, Ninth Circuit law, and the fact that Plaintiff is the subrogated insurer of the cargo.

While Plaintiff is not specifically named on Defendant's bill of lading, (*see* Wang Decl. Ex. 1, at TSI0025), the bill of lading includes an expansive definition of "Merchant," including "the shipper, the consignee, and the receiver of the Goods, the holder of this Bill of Lading, any person having a present or future interest in the Goods or this Bill of Lading, [and] any person having a present or future interest in the Goods or any person acting on behalf of the Carrier," (*id.* at TSI0001). "Bills of lading are contracts of adhesion, usually drafted by the carrier, and are therefore strictly construed against the carrier." *All Pac. Trading Co.*, 7 F.3d at 1431 (internal quotation marks omitted). Plaintiff's insured is nonparty In-Tec, Ltd., which is named on the bill of lading. (*Compare* Liapis Decl ¶ 7 & Ex. A, at 005, ECF No. 52-5, *with* Wang Decl. Ex. 1, at TSI0025.) In-Tec subrogated its claims to Plaintiff. (Liapis Decl. ¶¶ 8–9 & Ex. B.) Thus, as a subrogated insurer, Plaintiff falls under the bill of lading's "Merchant" definition, as it has a "future [now present] interest in the Goods." Further, INTEC, by signing the subrogation agreement, transferred its claims to Plaintiff. Therefore, Plaintiff has standing to bring the complaint against Defendant. *See All Pac. Trading Co.*, 7 F.3d at 1429 (analyzing claims brought by subrogated insurers, among others).

B. Fault

Defendant also argues that Plaintiff failed to provide notice and cannot prove that Defendant is liable. (Top Sealand MSJ 12–17.) The notice argument is addressed *supra*. Defendant's argument that Plaintiff has failed to prove that Defendant is liable misstates the applicable burden of proof. Once a plaintiff has proved that the cargo was delivered damaged, as Plaintiff has done here, the burden under COGSA shifts to the defendant "to prove that it was eligible for one of the COGSA exceptions." *Am. Home Assurance Co.*, 44 F.3d at 779. Defendant has not attempted to do so.

And as for Defendant's reliance on COGSA § 4(2)(q), which provides that "[n]either the carrier nor the ship shall be responsible for loss or damage arising or resulting from . . . [a]ny other cause arising without the actual fault and privity of the carrier," (*See* Top Sealand MSJ 9, 15–16), Defendant has "the burden 'to explain the unexplained or unexplainable loss,'" *Am. Home Assurance Co.*, 44 F.3d at 780 (quoting *Quaker Oats Co. v. M/V Torvanger*, 734 F.2d 238, 243 (5th Cir. 1984)), which it has again not attempted to do.

As such, the Court declines to grant summary judgment against Plaintiff on this ground.

C. Limitation of Damages

Defendant further argues that damages should be limited to $2 per kilogram of the gross weight of the cargo lost. (Top Sealand MSJ 17–18.) This argument misreads Defendant's own bill of lading. The $2 per kilogram limit applies to "combined transport." (Wang Decl. Ex. 1, at TSI0007 (styling removed).) The bill of lading defines "[c]ombined [t]ransport" as "not a Port to Port shipment." (*Id.* at TSI0001.) Conversely, a "'Port to Port shipment' arises where . . . both the Place of Receipt and the Place of Delivery indicated are ports and the Bill of Lading does not in the nomination of the Place of Receipt or the Place of Delivery . . . specify any place or spot within the area of the port so nominated." (*Id.* at TSI0001–02.) The place of receipt and place of delivery identified on the face of the bill of lading are ports, Shanghai and Los Angeles specifically, and no specific place or spot is identified. (*Id.* at TSI0025.) As such, the bill of lading is for a port-to-port shipment and the $2 per kilogram limitation does not apply. *See All Pac. Trading Co.*, 7 F.3d at 1431 ("Bills of lading are contracts of adhesion, usually drafted by the carrier, and are therefore strictly construed against the carrier." (internal quotation marks omitted)). As such, the Court declines to limit damages to $2 per kilogram of the gross weight of the cargo lost.

D. Other Grounds

Finally, Defendant's motion references but fails to develop two other possible grounds for summary judgment. (*See* Top Sealand MSJ 8–9 (unclean hands); *id.* 9 (indispensable party).) The Court declines to address these arguments, as it is not the role of the Court to make parties' arguments for them. *See Indep. Towers of Wash. v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003); *see also Hibbs v. Dep't of Human*

Res., 273 F.3d 844, 873 n.34 (9th Cir. 2001) (declining to address an "argument . . . too undeveloped to be capable of assessment").

V. CONCLUSION

For the reasons stated above, the Court grants in part and denies in part Plaintiff's motion for partial summary judgment and denies Defendant's motion for summary judgment. Plaintiff has established Defendant's liability under its first claim for relief for breach of contract in violation of COGSA. The remaining issues in this case must be tried.

IT IS SO ORDERED.