UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 24-3369 PA (MARx)	Date	December 12, 2024
Title	CMA CGM, S.A. v. BNSF Railway Company		

Present: The Honorable	PERCY ANDERSON, UNITED STATES DISTRICT JUDGE	
Kamilla Sali-Suleyman	N/A	N/A
Deputy Clerk	Court Reporter	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
None	None

Proceedings: IN CHAMBERS – COURT ORDER

Before the Court is a Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b) for Failure to State a Claim ("Motion to Dismiss") filed by defendant BNSF Railway Company ("Defendant" or "BNSF"). (Docket No. 18). Plaintiff CMA CGM, S.A. ("Plaintiff" or "CMA") filed an Opposition. (Docket No. 23.) Additionally, the Court requested, and the parties timely filed, supplemental briefs regarding the nature of the claims limitation provision. (Docket Nos. 32-34.) Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court found this matter appropriate for decision without oral argument. The hearing that was calendared for November 18, 2024 was vacated, and the matter taken off calendar.

I. BACKGROUND

This action arises out of the loss or theft of cargo that Plaintiff entrusted to Defendant, its subcontracted railway carrier, for transportation from the Port of Los Angeles to Memphis, Tennessee. The Complaint alleges that Plaintiff, a common carrier of goods by water for hire, was hired to ship 435 cartons of "PEN DISPLAY" devices ("Goods") on December 9, 2021. (Complaint ¶ 6.) The consignee of the Goods was Expediters International of Washington, Inc. ("Expediters"). (Id. ¶ 7.) The owner of the goods was identified by Expediters as Wacom Technology Corporation ("Wacom"). (Id.)

On or about December 9, 2021, Plaintiff issued a Sea Waybill to ship the container of Goods from Shanghai, China to Memphis Tennessee, via the Port of Los Angeles. (Id. ¶ 6.)[1/]

[1/] A sea waybill is like a bill of lading, except that bills of lading are negotiable, while waybills are not. Royal & Sun All. Ins., PLC v. Ocean World Lines, Inc., 612 F.3d 138, 141 (2d Cir. 2010) (citing 1 T. Schoenbaum, Admiralty Law § 10–11 (4th ed.2006)). "A bill of lading is simply an acknowledgment by a carrier that it has received the goods for shipment. Second, it is a contract of carriage; third, if the bill is negotiated, it controls possession of the goods and is one of the indispensable documents in financing the movement of commodities and

Plaintiff subcontracted with BNSF to transport the container by rail once it reached Los Angeles to Memphis, Tennessee. (Id. ¶ 12.). After transporting the Goods in a sealed cargo container from Shanghai to the Port of Los Angeles, Plaintiff transferred the container to the custody of BNSF, who transported the container from Los Angeles to Memphis, Tennessee by rail. (Id. ¶ 14.) On January 26, 2022 the container was delivered by truck to Expediters, who discovered the theft of the Goods upon opening the container. (Id. ¶ 24.) Expediters personnel also observed that the original container seal was no longer affixed, but that a replacement seal had been affixed to the container in its place. (Id. ¶ 25.) Plaintiff alleges that the Goods were compromised while in Defendant's custody. (Id. ¶ 27.)

On January 25, 2023, Wacom filed a Complaint in the United States District Court for the Southern District of New York against Expediters, seeking recovery for the value of the stolen Goods, in the amount of $973,502 ("New York Lawsuit"). (Id. ¶ 28.) On April 13, 2023, Expediters filed a third-party Complaint for indemnity against Plaintiff in the New York Lawsuit (Id. ¶ 29.) Plaintiff tendered its defense in the New York Lawsuit to Defendant, but after Defendant "refused to take appropriate action," Plaintiff filed this indemnity action. (Id. ¶ 30.) Defendant's Complaint asserts three claims for indemnity based on Defendant's alleged negligence (Count One), Defendant's alleged breach of contract (Count Two) and Defendant's alleged breach of bailment obligations (Count Three). Defendant now moves to dismiss the Complaint for failure to state a claim under Federal Rule Civil Procedure 12(b)(6).

II. LEGAL STANDARD

Generally, plaintiffs in federal court are required to give only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). While the Rules allow a court to dismiss a cause of action for 'failure to state a claim upon which relief can be granted," Fed. R. Civ. P. 12(b)(6), they also require all pleadings to be "construed so as to do justice." Fed. R. Civ. P. 8(e). The purpose of Rule 8(a)(2) is to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).

However, in Twombly, the Supreme Court rejected the notion that "a wholly conclusory statement of [a] claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery." Twombly, 550 U.S. at 561. Instead, the Court adopted a "plausibility standard," in which the complaint must "raise a reasonable expectation that discovery will reveal evidence of

merchandise." Id. (citing 1–2 Saul Sorkin, Goods in Transit § 2.01 (footnote and internal quotation marks omitted)).

[the alleged infraction]." Id. at 566. For a complaint to meet this standard, the "[f]actual allegations must be enough to raise a right to relief above the speculative level." Id. at 555 (citing 5 C. Wright & A. Miller, Federal Practice and Procedure §1216, pp. 235-36 (3d ed. 2004) ("[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action ")); see also Daniel v. County of Santa Barbara, 288 F.3d 375, 380 (9th Cir. 2002) ("All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party." (quoting Burgert v. Lokelani Bernice Pauahi Bishop Tr., 200 F.3d 661, 663 (9th Cir. 2000))). "[A] plaintiffs obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555. In construing the Twombly standard, the Supreme Court has advised that "a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009).

III. ANALYSIS

Defendant argues that the Complaint fails to state a plausible claim because Plaintiff failed to comply with BNSF's pre-suit claim filing requirements that any claims for cargo loss or damage be filed within nine months after the delivery date. Defendant contends that the BNSF Intermodal Rules and Policies Guide ("BNSF Rules" or "Rules") are incorporated into the parties' contract to transport the Goods, and are properly considered by the Court in ruling on its Motion to Dismiss. (Docket No. 18 at pp. 6-8.) Generally, district courts may not consider material outside the pleadings when assessing the sufficiency of a complaint under Rule 12(b)(6). Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001). But "[t]here are two exceptions to this rule: the incorporation-by-reference doctrine, and judicial notice under Federal Rule of Evidence 201." Khoja v. Orexigen Therapeutics, Inc., 899 F.3d 998 (9th Cir. 2018); see also Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322 (2007) (noting documents incorporated by reference and "matters of which a court may take judicial notice" are properly considered when ruling on a motion to dismiss).

"Incorporation-by-reference is a judicially created doctrine that treats certain documents as though they are part of the complaint itself." Khoja, 899 F.3d at 1002. A defendant may seek to incorporate a document into the complaint "if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim." U.S. v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003). "The doctrine prevents plaintiffs from selecting only portions of

documents that support their claims, while omitting portions of those very documents that weaken – or doom – their claims." Khoja, 899 F.3d at 1002.

Here, Plaintiff specifically references the BNSF Rules as part of the parties' agreement. (Complaint ¶¶ 3, 12, 44.) Plaintiff also concedes that "[i]n certain circumstances courts may consider documents referenced in a complaint." (Docket No. 23 at p. 11.) "A failure to oppose [moving arguments in] a motion, as to a claim or an issue" may be deemed "a waiver, abandonment, or concession of that claim or issue." Shagoofa v. Eshaqzi, No. 8:22 CV-01824 FWS (JDEx), 2024 WL 1600657, at *3 (C.D. Cal. Feb. 26, 2024) (citing Edelmania Prods., LLC v. Serv., 2023 WL 8114860, at *4 (C.D. Cal. Oct. 23, 2023) (citing Heraldez v. Bayview Loan Servicing, LLC, 2016 WL 10834101, at *2 (C.D. Cal. Dec. 15, 2016), aff'd, 719 F. App'x 663 (9th Cir. 2018))); Star Fabrics, Inc. v. Ross Stores, Inc., No. CV 17-5877 PA (PLAx), 2017 WL 10439691, at *3 (C.D. Cal. Nov. 20, 2017) ("Where a party fails to oppose arguments made in a motion, a court may find that the party has conceded those arguments or otherwise consented to granting the motion.") (citing Zaklit v. Glob. Linguist Sols., LLC, No. CV 13-08654 MMM (MANx), 2014 WL 12521725, at *13 (C.D. Cal. Mar. 24, 2014)).[2/] Accordingly, the Court agrees that it is appropriate to consider the BNSF Rules in determining Defendant's Motion to Dismiss.

The BNSF Rules require that any claim for cargo loss or damage must be in writing, and "received by BNSF within nine (9) months after the delivery date. . . ." (Docket No. 18 at p. 80). Plaintiff did not file this action within nine months of the delivery date (January 26, 2022). (Complaint ¶ 23.) Plaintiff does not attempt to argue that it complied with the claim filing requirements set forth in the BNSF Rules. Instead, Plaintiff argues that its claim for indemnification did not accrue until entry of a judgment or payment of a settlement in the New York litigation, regardless of the limitations period specified in the BNSF Rules. (Docket No. 23 at p. 9.)

The plain language of the BNSF Rules, however, directly contradicts Plaintiff's argument. The BNSF Rules provide that only the shipper may initiate and maintain a claim for

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[2/] Plaintiff does not specifically object to the Court's consideration of the BNSF Rules, but requests that if the Court "elects to consider" them in connection with the Motion to Dismiss, that the Court also consider the Declaration of C. Wiley Grandy ("Declaration of Counsel"), which purportedly demonstrates that it was "not possible" for Plaintiff to comply with pre-suit claim filing requirements. (See Docket No. 3 at pp. 5-6.) Unlike the BNSF Rules, however, the Declaration of Counsel contains material outside the pleadings that is not properly before the Court on a Motion to Dismiss.

cargo loss and damage or a suit against BNSF.[3/] (Docket No. 18 at p. 79) The Rules also contain a blanket time limitation within which to bring any claims relating to such loss or damage. (Id. at p. 80.) The Rules do not carve out an exception for indemnity claims involving loss or damage. Indeed, the Rules do not "speak in cause-of-action specific terms–for example, specifying that it applies to breach-of-contract claims, while omitting reference to indemnification claims." MSC Mediterranean Shipping Co. S.A. v. BNSF Ry. Co., CV 23-09693 JLS (AJRx), 2024 WL 3221534, at *3 (C.D. Cal. May 28, 2024).[4/]

Moreover, the BNSF Rules evidence the intent to limit the rail carrier's liability for all claims for cargo loss or damage. (See Docket No. 18 at pp.77-81 (specifying limitations on who can bring claims, the amount of potential recovery and the time period to file claims and lawsuits).) These blanket limitations demonstrate the intent that the terms of the contract covers all claims – including indemnity claims – by an ocean carrier/shipper such as Plaintiff for loss or damage to cargo. The BNSF Rules simply don't make sense if this were not the case. The Rules prohibit the cargo owner from bringing a claim directly against BNSF for any loss or damage – in order to recover a cargo owner would need to bring its claim against the shipper. Thus, under the terms of the Rules a shipper's only recourse, if the rail carrier were liable, is an indemnity claim. The Court thus concludes that Plaintiff's indemnity claim against BNSF was both contemplated and covered by the BNSF Rules, and is barred by the nine month claims bar provision. See MSC Mediterranean Shipping Co., 2024 WL 3221534, at *3 ("Subject to certain limitations, parties (especially well-resourced and sophisticated ones) are free to limit and allocate risk among themselves by contract. . . . MSC makes no argument that the Intermodal Rules' shortening of the statute of limitations is invalid or unenforceable. . . . Therefore, that provision applies here and bars MSC's contractually untimely action.") (citations omitted).

Plaintiff, relying in part on the inadmissible Declaration of Counsel filed with its Opposition, argues that its non-compliance with the claims filing period should be excused because it was not aware of the loss until February 2023, more than one year after the delivery date. However, even if the Court were to consider the Declaration of Counsel, Plaintiff's excuse for non-compliance does not save its claims, given that the Court, after considering the parties' supplemental briefing, concludes that the BNSF Rules' claims provision operates as

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[3/] The shipper in this case is Plaintiff and not the owner of the Goods. The BNSF Rules define "shipper" as "the party indicated on the BNSF price authority and paying BNSF for the rail transportation." (Docket No. 18 at p. 79).

[4/] In MSC Mediterranean Shipping Co., the district court considered a Motion to Dismiss filed by BNSF that involved the BNSF Rules provision barring lawsuits that are not brought within nine months of BNSF's denial of a claim for loss or damage.

period of repose and not as a statute of limitations period that can be extended through tolling or other equitable means.

"A statue of repose is a fixed, statutory cutoff date, usually independent of any variable, such as a claimant's awareness of a violation." Munoz v. Ashcroft, 339 F.3d 950, 957 (9th Cir. 2003). A period of repose "is not concerned with the plaintiff's diligence; it is concerned with defendant's peace." Underwood Cotton Co. v. Hyundia Merch. Marine (Am.), Inc., 288 F.3d 405, 408-09 (9th Cir. 2002). Once this period expires, the right to bring a claim is extinguished, regardless of whether the harm has been discovered. Id. This is different from a statute of limitations, which typically starts running from the date of injury or discovery of harm and can sometimes be extended under certain circumstances. See CTS Corp. v. Waldberger, 573 U.S. 1, 8 (2014) ("Statutes of repose . . . generally may not be tolled, even in cases of extraordinary circumstances beyond a plaintiff's control") (quotations and citations omitted); 4 C. Wright & A. Miller, Federal Practice and Procedure § 1056, p. 240 (3d ed. 2002) ("[A] critical distinction is that a repose period is fixed and its expiration will not be delayed by estoppel or tolling").

Here, the parties expressly and unequivocally agreed that Plaintiff would have nine months from the date of delivery to file a written claim for loss or damage to the cargo that Plaintiff contracted with Defendant to transport. The parties' contract – the BNSF Rules – thus sets a clear deadline based on the passage of time from a specific date, and not from the date of injury or discovery of the harm, and thus operates as a period of repose. Despite this language, Plaintiff argues that the provision should be interpreted as a statute of limitations, subject to equitable doctrines such as the discovery rule and tolling because the provision doesn't contain the requisite "absolute" language. The Court disagrees. To the contrary, the plain language of the provision provides a clear, definitive cutoff for claims relating to loss or damage to freight, without any conditions or exceptions.

Plaintiff also argues the claims bar applies only to "direct" claims for loss or damage, and that when considered as a whole, the Rules distinguish direct claims for cargo loss from indemnity claims. The BNSF Rules, however, refer to indemnity claims solely in relation to the shipper/carrier's indemnification of BNSF and not in the context of indemnity claims that are asserted against BNSF. Moreover, as explained above, the BNSF Rules, read as a whole, evidence the intent to limit claims and to create a definite period of "repose" for BNSF. This goal is consistent with other maritime and transportation practices and regulatory schemes that exist to protect both carrier, shipper and consumer interests. See e.g., Mid State Horticultural Co. v. Pennsylvania R. Co., 320 U.S. 356, 360-61 (1943) (limitations period not only regulates the relations between carrier and shipper, it serves "the general public interest in adequate, nondiscriminatory transportation at reasonable rates"); B.A. Walternman Co. v. Pennsylvania R. Co., 295 F.2d 627, 628-29 (6th Cir. 1961) (nine-month pre-suit claim requirement of Carmack

Amendment is mandatory, may not be waived or estopped and lack of actual notice does not excuse failure to file of written claim); Hermanos & Cia Ltda. v. Am. Aninline & Extract Co., 285 F. Supp. 424, 425 (E.D. Pa. 1967) (COGSA's limitation clause "has been held to extinguish the cause of action, not merely the remedy"). Indeed, limiting the liability of a carrier by creating a period of repose is critical "in the fast moving area of international trade, where certainty and finality have a very high priority." Underwood Cotton, 288 F.3d at 408-09.

Moreover, repose periods similar to the claims bar in the BNSF Rules are common practice among sophisticated parties involved in business of shipping and transporting cargo. The Carmack Amendment (governing domestic ground transportation) also contains a nine month absolute claims bar, and the Carriage of Goods at Sea Act ("COGSA") (governing the rights and responsibilities among shippers and ship owners) bars any damage claims against an ocean carrier after twelve months from the delivery date. Thus, it should come as no surprise to a sophisticated ocean carrier such as CMA that the BNSF Rules' claims limitation provision also operates as a period of repose, barring any claims after nine months from the delivery date.

Lastly, Plaintiff contends that treating this provision as a statute of repose would lead to an "absurd result" because there would be a three month gap between the time the shipper has to bring a claim against its railway carrier and the time the owner of the cargo would have to bring its claim under COGSA, and that enforcement of an absolute claims bar is unreasonable. But these arguments ignore the clear language of the parties' agreement, the sophisticated nature of the parties and the legal landscape against which they operate. As was the case in MSC Mediterranean Shipping Company, there is simply no reason for the Court to ignore a clear contractual claims bar among sophisticated, experienced parties.

Plaintiff asks for leave to amend its Complaint to add the facts offered in the Declaration of Counsel demonstrating that compliance with the BNSF Rules was "not possible" in this case. (Docket No. 33 at p. 8.) "The decision of whether to grant leave to amend . . . remains within the discretion of the district court." Leadsinger, Inc. v. BMG Music Publ'g, 512 F.3d 522, 532 (9th Cir. 2008). Rule 15 requires that leave to amend "be freely given when justice so requires." Fed. R. Civ. P. 15(a)(2). "This policy is to be applied with extreme liberality." Eminence Cap., LLC v. Aspeon, Inc., 316 F.3d 1048, 1051 (9th Cir. 2003). However "[a] district court acts within its discretion to deny leave to amend when amendment would be futile . . . ." Doe v. Garland, 17 F.4th 941, 950 (9th Cir. 2021) (quoting Chappel v. Lab. Corp. of Am., 232 F.3d 719, 725-26 (9th Cir. 2000)). Here, the Court finds that leave to amend would be futile because the allegation of facts demonstrating Plaintiff's inability to the comply with the claims requirement does not change the Court's analysis.

Conclusion

For all the foregoing reasons, the Court grants Defendant's Motion to Dismiss the Complaint without leave to amend and dismisses the action with prejudice. The Court will enter a Judgment consistent with this order.

IT IS SO ORDERED.