April 6, 2004

Brian E. Lutness, Esquire
Silverman & McDonald
1010 N. Bancroft Parkway, Ste 22
Wilmington, DE 19805
Attorney for Plaintiff

Michael B. McCauley, Esquire
Palmer, Biezup & Henderson
1223 Foulk Road
Wilmington, DE 19803
Attorney for Defendant

Re: ***Ramon Grau v. Independence Shipping Lines, Ltd.***
Civil Action No.: 2002-02-364

LETTER OPINION

Dear Counsel,

Trial in the above captioned matter took place on Thursday, February 12, 2004. Following the receipt of evidence and testimony, the Court reserved decision. This is the Court's final decision and order.

The sole issue before the Court is whether plaintiff has proven by a preponderance of the evidence that he is entitled to $9,100 for breach of a shipping contract[1]. Plaintiff contends that the Defendant charged him $1,100 to ship his 1987 GMC Truck to Honduras but the truck never arrived in Honduras. Plaintiff further contends that his truck, valued at $8,000, was totaled in an

[1] The Court ordered post-trial briefing in this matter to address specific issues. Upon reviewing counsels' arguments the Court finds negligence is not an issue currently before the it. The complaint only sought damages in the amount of $9,100.00 for breach of contract and breach of a bailment relationship. Plaintiff has failed to amend his complaint to add negligence and has never sought leave to do so. The Court does not find Plaintiff's Court of Common Pleas Civil Rule 15(b) persuasive since negligence must be pled with particularity under Rule 9(b). Regardless, negligence was not proven by a preponderance of the evidence at trial. Plaintiff also did not seek damages for destruction of a highway sign in the complaint. As a result, the Court does not have the authority to decide those issues.

automobile accident while in the possession of Defendant. Plaintiff alleged in his complaint that Defendant also breached its duties under its bailment relationship with Plaintiff. The bailment issue was never argued at trial and therefore not established. Defendant contends that its liability is limited to $500 for loss of the truck under the Carriage of Goods by Sea Act ("COSGA"), 46 U.S.C.§§1300-1315, and that Plaintiff is barred by the doctrine of waiver and estoppel for failing to procure insurance to cover losses in excess of the $500 limit. For the reasons set forth below, the Court enters judgment in favor of the Plaintiff.

THE FACTS

Following trial, the Court finds the relevant facts as follows:

On or about July 24, 2001, Plaintiff Ramon Grau ("Grau") entered into a contract with Independence Shipping Lines, LTD ("Defendant") to ship his 1987 GMC truck to Honduras. (Joint Exhibit "1"). The truck was delivered to the Plaintiff for shipping. Unbeknownst to Grau, his truck was going to be driven to Port Manatee, Florida, before being loaded upon a ship bound for Honduras. An employee of Plaintiff drove the truck and was involved in a single vehicle accident in North Carolina, damaging a highway sign. (Plaintiff's Exhibit "4"). The truck never arrived in Honduras.

Grau testified that he was not given any special instructions upon signing the shipping contract nor was the contract explained to him. He further testified he was not told the truck would be driven to Florida and was not asked any questions regarding insurance on the truck. He testified it was indeed his signature next to a line on the contract that read "Customer declines insurance (see reverse)." He further testified no information was printed on the reverse side of the contract. Grau testified that he cancelled the temporary insurance on the truck since it was being shipped to Honduras by ship, not driven, and therefore not necessary.

On cross-examination, Grau testified he was not aware that a small box marked "inland" had been checked "yes" on the contract. When shown the contract, he testified it showed Florida to be the Port of Loading.

Daniel Cabellos ("Cabellos"), president of Independence Shipping, testified that it is company policy to require insurance on all vehicles being shipped. He testified this is explained to all customers. He further testified customers are advised of the $500 liability limit pursuant to COSGA. According to Cabellos, the limit on Independence's liability and the insurance requirement were made clear to Grau, who in turn represented the truck was insured. Cabellos testified that Grau was aware his truck was going to be driven to Florida.

On cross-examination, Cabellos testified there is nothing printed in the contract that states vehicles must be insured. He testified the contract required Grau to certify his truck would have less than a quarter tank of gas when delivered to Independence Shipping.

Walter Ortiz, an employee of Independence Shipping, testified he spoke with Grau and was present when Grau signed the contract. He testified that Grau told him he carried insurance on the truck. He also testified he told Grau to read the contract before signing.

THE LAW

When there is a written contract, the plain language of a contract will be given its plain meaning. *Phillips Home Builders v. The Travelers Ins. Co.,* Del. Super., 700 A.2d 127, 129 (1997). The party first guilty of material breach of contract cannot complain if the other party subsequently refuses to perform. *Hudson v. D.V. Mason Contractors, Inc.*, Del. Super. 252 A.2d 166, 170 (1969). In order to recover damages for any breach of contract, plaintiff must demonstrate substantial compliance with all the provisions of the contract. *Emmett Hickman Co. v. Emilio Capano Developer, Inc.*, Del. Super., 251 A.2d 571, 573 (1969). Damages for breach

of contract will be in an amount sufficient to return the party damaged to the position that the party would have been in had the breach not occurred. *Delaware Limousine Service, Inc. v. Royal Limousine Svc., Inc.*, 1991 Del. Super., LEXIS 130, Del. Super., C.A. No. 87-C-FE-104, Goldstein, J. (April 5, 1991).

At the same time, however, a party has a duty to mitigate once a material breach of contract occurs. *Lowe v. Bennett*, Del. Super., 1994 WL 750378, Graves, J. (December 29, 1994). Whether a breach is material and justifies non-performance is a matter of degree and is determined by weighing the consequences in light of the contract. *Eastern Electric & Heating v. Pike Creek Professional enter*, Del. Super., 1987 WL 9610 (April, 7, 1987). Notwithstanding a material failure to perform, the complaining party, may nevertheless, recover the value of benefit conferred upon the other party. *Hurt v. Sayers*, Del. Super., 32 Del. 207, 121 A.2d 225 (1923).

Finally, if there is an ambiguity in the terms or drafting of the contract, that ambiguity will be resolved against the party who drafted the contract. *See. E.g., E.I. dupont de Nemours & Co. v. Shell Oil Co.*, Del. Super., 498 A.2d 1108 (1995).

OPINION AND ORDER

It is clear from the testimony and evidence by a preponderance of the evidence in the trial record that Defendant breached the instant contract. There is no dispute that Defendant did not deliver Plaintiff's truck to Honduras nor is it disputed the truck was involved in a collision while being driven to Florida. The dispute surrounds the amount of damages Plaintiff should receive as a result of Defendant's breach.

The Court finds that the contract is ambiguous as to the following: (1) insurance requirements, (2) whether the truck was to be driven prior to boarding, and (3) limits on Independence Shipping's liability. Grau was not asked in the contract to certify that his truck

was insured. He did sign the line declining insurance; however, the contract states to "see reverse" in regards to insurance. There is nothing on the back of the contract. Additionally, the contract does not state the truck was to be driven to Florida. While the box marked "inland" was checked, it would not be unreasonable for one to assume the truck may have been transported via railcar. The contract called for Grau to certify his truck contained less than a quarter tank of gas, leading him to believe the car was not going to be driven. Based on the foregoing, Plaintiff is not barred from recovering damages for failure to procure insurance.

The contract also lacks any mention of the $500 limit on liability. The Court understands that the $500 COSGA limit would typically apply to the current action, but a careful review of section 1304(5) of the statute reveals that the limit applies "unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading." Here, the $8,000 value of the truck was inserted into the contract. The Defendant's argument that the parties agreed to apply COSGA to overland segments of travel lacks merit. Therefore, the Court finds that the $500 limit on liability does not apply to the loss of the truck while in Defendant's possession.

In the present case, the Court finds by a preponderance of the evidence at trial that Plaintiff has proven the damages as plead in his Complaint in the amount of Nine Thousand One Hundred Dollars ($9,100). Therefore, the Court enters judgment in favor of Plaintiff against Defendant in the amount of $9,100 plus costs and prejudgment interest from the date of the filing of the instant complaint, as well as post-judgment interest. 6 *Del. C.* §2301 *et seq.*

IT IS SO ORDERED this 6th day of April, 2004.

_____
John K. Welch
Associate Judge