Dolphin Holdings, Ltd. v Gander & White Shipping, Inc.
2013 NY Slip Op 32883(U)
October 16, 2013
Sup Ct, Queens County
Docket Number: 701841/2013
Judge: Sidney F. Strauss

SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE SIDNEY F. STRAUSS
Justice

IA PART 11

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DOLPHIN HOLDINGS, LTD.,

Plaintiff,

-against-

GANDER & WHITE SHIPPING, INC.,

Defendant.

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Index No.: 701841/2013

Motion Date: August 29, 2013

Seq, No.: 1

The following papers numbered 1 to 6 were read on the motion of the defendant, seeking an order pursuant to CPLR 3211(a)(7), dismissing plaintiff's cause of action for gross negligence, and pursuant to CPLR 3211(c) and 3212, enforcing the limitation of liability contained in the May 18, 2012 contract between the parties.

FOR A MORE FORMAL MARKING OF THE PAPERS READ ON THIS MOTION, CONSULT E-FILING.

	PAPERS NUMBERED
Notice of Motion - Affirmation - Exhibits.....	1 - 3
Opposition Affirmation/Memo - Exhibits.....	4 - 5
Reply Affirmation Memorandum.....	6

Plaintiff retained the services of the defendant in the packing of a various pieces of art belonging to its extensive collection, in May of 2012. During the packing process, plaintiff alleges that the defendant caused substantial damage to a valuable painting, and commenced the underlying action to recover its damages.

Defendant brought the instant motion, pre-answer, seeking to dismiss plaintiff's complaint on the grounds that a "limitation of liability" clause protects it from a claim of ordinary negligence. Plaintiff, in opposition, contends that the provision relied upon by the defendant is unenforceable, and further, is inapplicable to the underlying facts. Plaintiff attaches a copy of the amended complaint in response to the instant motion, arguing that this court has the

discretion to apply the instant motion to the amended pleading.

The court, in its discretion, and pursuant to CPLR 3025, determines defendant's motion in light of plaintiff' amended complaint.

Defendant submits, inter alia, a copy of the pleadings, a copy of the contract and affidavits of Michelle Bova, Art Handler/Technician and Michael Jaque, in support of the instant motion. Undisputed is that the agreement referred to is unsigned by the plaintiff, although defendant submits a portion of the agreement wherein it appears that plaintiff checked off "no" as to having the defendant arrange insurance. The affidavit of Ms. Bova is vague at best in the description of the events of the date in question when plaintiff asserts a valuable piece of art was damaged during the packaging for removal to storage.

In opposition, although plaintiff submits the affirmation of counsel along with a copy of the amended complaint, a copy of defendant's qotation for packing, transport and storage of the contents of plaintiff's Fifth Avenue apartment, signed by plaintiff with the provision referencing transit insurance crossed out, in direct contravention of the same document submitted by the defendant, wherein such provision is not crossed out, and further, the agreement is unsigned.

"On a motion to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (See, *Parekh v Cain,* --- N.Y.S.2d ----, 2012 WL 2125829 [2d Dept.2012]; *Breytman v Olinville Realty, LLC,* 54 AD3d 703 [2d Dept. 2008]; see *Moore v Liberty Power Corp.*, LLC, 72 A.D.3d 660[2d Dept. 2010], lv. denied 14 N.Y.3d 713, 2010 N.Y. Slip Op. 73808, 2010 WL 2301693 [2010]). "However, bare legal conclusions, as well as factual claims flatly contradicted by the record, are not entitled to any such consideration." (*Garner v China Natural Gas, Inc.*,71 AD3d 825 [2d Dept. 2010]; *Riback v Margulis*, 43 AD3d 1023 [2d Dept. 2007].)

The court need not determine whether or not there is evidentiary support for the complaint, merely but rather, to determine if the plaintiff has alleged a cause of action. It is not the function of the court to evaluate the merits of the case on a motion to dismiss for legal insufficiency (See, *Parekh v Cain*, supra; *Leon v Martinez*, 84 NY2d 83 [1994]; *219 Broadway Corp. v Alexander's Inc.*, 46 NY2d 506 [1979]; *Carbillano v Ross*, 108 AD2d 776 [2d Dept. 1985].)

The complaint alleges "gross negligence" in addition to ordinary negligence. "Gross negligence" consists of conduct that "evinces a reckless disregard for the rights of others or 'smacks' of intentional wrongdoing." (*Colnaghi U.S.A. v Jewelers Protection Servs.*, 81 NY2d 821 [1992] quoting *Sommer v Federal Signal Corp.*, 79 NY2d 540 [1992]; *Haire v Bonnell*, 57 A.D3d 354 [3d Dept 2008]; *Sutton Park Dev. Corp. Trading Co. v Guerin & Guerin Agency,*

Inc., 297 AD2d 430, 431 [3d Dept. 2002][citations omitted].) A party is "grossly negligent" when it fails to exercise even slight care or slight diligence. (See, *Food Pageant, Inc. v Consolidated Edison Co.*, 54 NY2d 167, 172 [1981]; *Ryan v IM Kapco Inc.*, 88 AD2d3d 682 [2d Dept. 2011].)

Here, the complaint as amended fails to set forth any factual averments alleging such conduct of such aggravated character. (*Mancuso v Rubin*, supra.) There are no facts alleged from which this Court can infer, that defendant's conduct was grossly negligent. Where a complaint does not allege facts sufficient to construe gross negligence, dismissal of gross negligence claims is appropriate. (See, *Chan v Counterforce Cent. Alarm Services Corp.*,88 AD3d 758 [2d Dept. 2011]; *Lemoine v Cornwell Univ.*, 2 AD3d 1017, 1020 [3d Dept. 2003].)

As to that branch of defendant's motion seeking to dismiss plaintiff's complaint pursuant to CPLR 3212, defendant contends that plaintiff submits only an attorney's affirmation, and as such, absent any other corroborating evidence, is of no probative value. However, plaintiff submits a copy of the amended complaint along with a copy of the quote. Defendant submits an unsigned quote with no deletions, as well as a partially signed standard transportation/storage handling agreement, signed only by the plaintiff, and contends that based upon the parties' prior relations, as described in its supporting affidavits, the court can determine that there was a meeting of the minds and that upon such an agreement, the plaintiff is limited in its recovery, thus warranting dismissal of the underlying action. However, plaintiff argues, that the document defendant relies upon to prove its argument that plaintiff agreed to a limitation of liability, such document is applicable solely to the storage of the artwork once it was delivered to the defendant's warehouse, and not to the packing of the artwork and the subsequent transport of same.

"A familiar and eminently sensible proposition of law is that, when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms. Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing." (*W.W.W. Assocs. v Giancontieri*, 77 NY2d 157 [1990].) In this instance multiple documents are submitted, with and without signature, for the court to determine and hold, as defendant argues, as a valid agreement between the parties. "The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent" (*Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562 [2002].) The "best evidence of what parties to a written agreement intend is what they say in their writing" (*Id.* [internal quotation marks and citation omitted]). "A contract is unambiguous only if the language it uses has a definite and precise meaning, unattended by danger or misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion" ' (*id.* at 569 [citation omitted]). "Extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous, which is an issue of law for the courts to decide" (id.). Clearly, existence of a binding contract is not dependent upon the subjective intent of the parties. (See, *Minelli Constr. Co., Inc. v Volmar Constr., Inc.*, 82 AD3d 720 [2d Dept. 2011].)

Based upon the submissions with the moving papers, the court finds that the evidence is insufficient to determine, as a matter of law, the agreement between the parties. Absent any other discovery, such as the depositions of the parties, the affidavits in support of the motion are insufficient to establish, as a matter of law, the agreement as intended. Accordingly, inasmuch as defendant has not established its prima facie entitlement, the balance of the motion herein is denied.

Dated: October 16 2013

SIDNEY F. STRAUSS, J.S.C.