Sunoco, Inc. (R&M) v Enbridge Energy, LP
2014 NY Slip Op 33221(U)
December 8, 2014
Supreme Court, New York County
Docket Number: 601461/09
Judge: Saliann Scarpulla

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 39

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SUNOCO, INC. (R&M),

Plaintiff,

-against-

ENBRIDGE ENERGY, LIMITED PARTNERSHIP,

Defendant.

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DECISION and ORDER
Index No. 601461/09
Mot. Seq. Nos. 007 and 008

ENBRIDGE ENERGY, LIMITED PARTNERSHIP

Third-Party Plaintiff,

-against-

SHELL TRADING (US) COMPANY and
SHELL PIPELINE COMPANY LP,

Third-Party Defendants.

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Index No. 590711/09

SALIANN SCARPULLA, J.:

In this accounting dispute over crude oil shipped via pipeline, plaintiff Sunoco, Inc. (R&M) ("Sunoco") asserts three causes of action against defendant Enbridge Energy Limited Partnership ("EELP") for breach of duties as a bailee, conversion and negligence, and seeks to recover damages in excess of $2.5 million. EELP asserts a third-party claim for common law indemnification against third-party defendants Shell Trading (US) Company ("Shell Trading") and Shell Pipeline Company LP ("Shell Pipeline" and, together with Shell Trading, "Shell"). EELP now moves under motion sequence no. 007 for summary judgment dismissing Sunoco's claims pursuant to CPLR 3212. Shell moves separately, under motion sequence no. 008, for summary judgment in its favor on the claim asserted against the Shell entities. Both motions are consolidated for disposition herein.

Background

Sunoco alleges that during the period from December 2000 through October 2001, EELP short delivered to Sunoco[1] approximately 27,000 barrels of crude oil from the Lakehead Pipeline, which EELP owns and operates. This "short delivery" consisted of both physical non-delivery and accounting adjustments that purportedly deprived Sunoco access to and possession of crude oil of which it was the rightful owner (the "27,000 Barrels Claim"). Complaint, ¶ 6. The short deliveries allegedly took place in December 2000, and June, September and October 2001. *Id.*

Deliveries of Sunoco's crude oil to Lakehead Pipeline were to be made from Equilon Pipeline. These two pipelines connect in Lewiston, Michigan, where Equilon Pipeline operated a custody transfer meter and wrote meter tickets that were given to Lakehead Pipeline and split tickets that were given to the various shippers. Notably, volume on Lakehead Pipeline is measured in cubic meter units, while volume on Equilon Pipeline is measured in barrel units. Thus, allocations of crude oil transported from Equilon Pipeline into Lakehead Pipeline were converted from barrels into cubic meters. EELP admits that for the four months involved in the 27,000 Barrels Claim, it used incorrect barrels to cubic meters conversion factors.

In addition, Sunoco alleges that in December 2003, EELP made crude oil accounting adjustments, deducting approximately 58,000 barrels from shipments and/or pipeline inventory due for delivery to Sunoco, in effect redirecting the oil to third parties and causing short delivery to Sunoco (the "58,000 Barrels Claim"). Complaint, ¶ 8.

The shipments at issue are all governed by rate tariffs and rules and regulations filed with the Federal Energy Regulatory Commission ("FERC"). Pursuant to the Interstate

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[1] The parties vary somewhat in their calculations of the short delivery. Sunoco claims that it was short delivered 27,079.24 barrels. EELP calculates that Sunoco was short delivered 27,079.30 barrels, and Shell Trading was over delivered 24,318.80 barrels. Shell concedes that it was over delivered at least 23,795.55 barrels and Sunoco was short delivered at least 27,425.97. Shell thus admits that it received at least 23,795.55 barrels of Sunoco's oil. Memo. in Support, p. 4 (mot. seq. no. 007), citing Statement of Material Facts ("SMF"), ¶¶ 6, 10-12.

Commerce Act and the Carmack Amendment thereto, FERC approves and publishes the applicable tariffs, which govern a carrier's liability. The rules and regulations relevant here were set forth in FERC No. 29 and FERC No. 3, which provide in Rule and Regulation No. 17 as follows:

> CLAIMS, SUITS AND TIME FOR FILING: (a) A Shipper shall advise the Carrier **in writing** of any claim for delay, damage or loss resulting from the transportation of such Shipper's Crude Petroleum by the Carrier or, **in the case of a failure to make delivery, then within nine months after a reasonable time for delivery has elapsed.** (b) A Shipper shall institute any action arising out of any claim against the Carrier within two years from the date that written notice is given by the Carrier to such Shipper that the Carrier has disallowed such claim or any part of such claim. © **If a Shipper fails to comply with the provisions of paragraph (a) or paragraph (b) of Rule 17 of this tariff, then such Shipper waives all rights it has to bring an action against the Carrier with respect to such claim.** (Emphasis added).

Discussion - Motion Seq. No. 007

The 27,000 Barrels Claim

EELP argues that the claims Sunoco asserts against it are barred because Sunoco failed to submit timely written claims as required under Rule and Regulation No. 17. Sunoco generally conducted crude oil reconciliations of pipeline transactions on a monthly basis and it received from EELP Shippers Balance Statements for December 2000, June 2001, September 2001 and October 2001 no later than the middle of the following month. EELP contends that, based on Sunoco's receipt of these Shippers Balance Statements, Sunoco had

in its possession all the documents it needed to determine if there was a discrepancy on the pipeline for any particular month no later than the middle of the following month. As such, EELP maintains that Sunoco was required to submit its written notices of claim no later than mid-October 2001 for the December 2000 short delivery, by mid-April 2002 for the June 2001 short delivery, and mid-August 2002 for the October 2001 short delivery.[2]

The Interstate Commerce Act ("ICA") governs interstate carriage of oil in pipelines. *See generally* 18 CFR 341.0 *et seq*. Under the Carmack Amendment to the ICA, carriers are liable for loss, damage, or injury to property they transport. 49 U.S.C. § 14706(a)(1).[3] The ICA and implementing FERC Regulations require pipeline carriers to publish tariff rules. *See* 18 C.F.R. § 341(b). A carrier's valid tariff rules govern the nature and extent of the carrier's liability, as well as the extent of the shipper's right of recovery. *N. Am. Phillips Corp. v. Emery Air Freight Corp.*, 579 F.2d 229, 233 (2d Cir. 1978). Under the Carmack Amendment, a carrier may provide by rule, contract or otherwise, a period of time in which a shipper must file a damages claim against the carrier, but the period may not be less than nine months. 49 U.S.C. § 14706(e)(1). Courts have "strictly applied the claim-filing requirements contemplated by the Carmack Amendment...." *Mafcote Indus., Inc. v. Milan*

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[2] EELP does not specifically address the filing deadline for the September 2001 short delivery.

[3] Although the ICA was repealed in 1978, and authority for regulation of transportation of oil was transferred from the Interstate Commerce Commission to FERC, Congress provided that the 1977 provisions of the ICA would continue to govern FERC's regulation of oil pipelines. *See ExxonMobil Oil Corp v. FERC,* 487 F3d 945, 956 (D.C. Cir. 2007).

Exp. Co., Inc., 2011 WL 3924188, at *4 (D.Conn. Sept. 7, 2011). "Where Plaintiffs have failed to meet the minimum filing requirements for any claim within the time prescribed by the governing contract or tariff, Plaintiffs will have surrendered any cause of action to recover damages on that claim." *Id.*

Under Rule and Regulation No. 17, Sunoco had "nine months after a reasonable time for delivery has elapsed" to file its claim. Sunoco argues that its claims are not time-barred because the tariffs are ambiguous and subject to multiple interpretations. It emphasizes that the tariffs do not specify what constitutes a "failure to make delivery" or a "reasonable amount of time," do not define a "claim for delay, damage or loss," and do not indicate when such claims accrue.

"Whether a contract is ambiguous is a question of law and extrinsic evidence may not be considered unless the document itself is ambiguous." *South Road Assocs., LLC v. Int'l Bus. Machines Corp.*, 4 N.Y.3d 272, 278 (2005). "Ambiguity is present if language was written so imperfectly that it is susceptible to more than one reasonable interpretation." *Brad H. v. City of New York*, 17 N.Y.3d 180, 186 (2011). "[A] contract is not rendered ambiguous just because one of the parties attaches a different, subjective meaning to one of its terms." *Bajraktari Management Corp. v. American Intern. Group, Inc.*, 81 A.D.3d 432 (1st Dep't 2011)(citation omitted). The ordinary and natural meaning of the agreement's words are dispositive. *Banco Espirito Santo, S.A. v. Concessionária Do Rodoanel Oeste S.A.*, 100 A.D.3d 100, 107 (1st Dep't 2012). Here, considering the tariff as a whole, the terms

"failure to make delivery," "reasonable amount of time," and "claim for delay, damage or loss" are unambiguous and are not susceptible to more than one reasonable interpretation. Accordingly, I will enforce the "nine months after a reasonable time for delivery has elapsed" time limitation set forth in the tariff to Sunoco's claims.

EELP argues that Sunoco was in possession of all of the documents and information that it needed to submit a written claim to EELP on the 27,000 Barrels Claim by mid-November 2001. *See* Pompilii Dep. at 11:15-12:3, 19:22-20:4, Ex. 11, Menchini Aff. in Support (mot. seq. no. 007). It was Sunoco's practice and procedure to conduct monthly reconciliations using the Shippers Balance Statements received from EELP and to advise EELP by email before the end of the following month regarding any accounting discrepancies. Pompilii Dep. at 10:22-11:20, 14:9-15:3, 20:5-10.

Moreover, Sunoco actually received the Shippers Balance Statements for the four months involved in the 27,000 Barrels Claim by the middle of each following month. *Id.* at 22:22-23:21. Joseph Pompilii, who conducted Sunoco's monthly reconciliations, testified that all he required in order to conduct a reconciliation and to identify the existence of a short delivery generally would be in his possession within two weeks following the end of the month in question. *Id.* at 19:22-20:4 ("Q: And just so I understand, all the documents that you would need to determine whether or not there was a short delivery or over-delivery in any particular month on the Enbridge pipeline, you would have no later than the 15th of the following month? Is that fair to say? A: That's – yes, correct."). Under these circumstances,

the 9-month notice period for a given month began to run at Sunoco's receipt of that month's Shippers Balance Statement. Specifically, the cut-off for Sunoco to file a claim with EELP was mid-October 2001 for the December 2000 short delivery, mid-April 2002 for the June 2001 short delivery, mid-July 2002 for the September 2001 short delivery, and mid-August 2002 for the October 2001 short delivery.

The earliest documentary evidence of a possible claim made by Sunoco is a December 21, 2004 email exchange between Pompilii of Sunoco and Andrea Wong of EELP (the "December 2004 Email"). Ex. 13, Menchini Aff. in Support (mot. seq. no. 007). Even assuming, *arguendo,* that the December 2004 Email is a sufficient notice of claim, it is dated two to three years after the above-stated deadlines and, as such, is untimely.

As the party moving for summary judgment, EELP, bears the burden of establishing its entitlement to judgment as a matter of law. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). EELP has met its burden by establishing the lack of a timely written notice of claim by Sunoco. The burden now shifts to Sunoco to produce evidentiary proof in admissible form sufficient to establish triable issues of fact as to whether a claim was timely made. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

Sunoco has not produced proof of a timely written claim and Sunoco's explanation for this failure is unpersuasive: it claims that Pompilii's computer hard drive was damaged in an office move and, thus, the email notice that he sent to EELP was irretrievable. However, Sunoco's own Manager of International Compliance and Crude Accounting,

Patricia Eberfeld, testified that if a notice of claim had been emailed to EELP, Sunoco's operations group would have been copied on the email and would have been involved in the resolution of the claim along with its accounting group. Eberfeld Dep. at 21:17-23:17, 24:16-25:6, Ex. 12, Menchini Aff. in Support (mot. seq. no. 007). Eberfeld was not aware of any such emails between Sunoco's accounting and operations groups, or between Sunoco and EELP dating prior to 2003. *Id.* at 25:7-10, 29:14-18, 30:10-14. Likewise, Pompilii had no recollection of sending emails to EELP regarding the months involved in the 27,000 Barrels Claim. Pompilii Dep., 160:19-161:3. Moreover, the December 2004 Email appears to be an initial or early-stage contact regarding the accounting discrepancies and does not reflect an ongoing discussion dating back two to three years, as Sunoco insists.

Further, for all of the foregoing reasons, I reject Sunoco's estoppel argument, as well as its argument that its claim did not accrue until EELP discovered the *cause* of the discrepancy or how to rectify it. After considering all of the evidence submitted by the parties, Sunoco has failed to meet its burden of establishing that it filed a timely, written claim with EELP related to the 27,000 Barrels Claim and, thus, that claim is time-barred.

The 58,000 Barrels Claim

EELP argues that Sunoco's 58,000 Barrels Claim is also time-barred because Sunoco failed to submit a timely claim. While there exist Interstate Commerce Commission regulations setting forth the claim-filing requirements for railroads, express companies, motor carriers, water carriers and freight forwarders subject to the ICA, these regulations do

not apply to oil pipeline carriers. *See* 49 C.F.R § 1005.1. Instead, federal common law continues to govern oil pipeline claims. *See, e.g., Pathway Bellows, Inc. v. Blanchette,* 630 F.2d 900, 903 n.5 (2d Cir. 1980)(explaining the history of the claim-filing standard under the common law and the promulgation of the current regulations).

A written notice of claim does not require a document in any particular form. *Georgia, Florida & Alabama Ry. Co. v. Blish Milling Co.,* 241 U.S. 190, 198 (1916)("Blish"). However, the notice "must possess the characteristics of a demand for compensation or amount to a notice of intention to claim compensation for loss suffered." *Browning, King & Co. v. Davis,* 120 Misc. 520, 521 (Sup. Ct., N.Y. Co. 1923), aff'd, 208 A.D. 780 (1st Dep't 1924), aff'd, 238 N.Y. 607 (1924). "Notice of damage is no notice of claim for damage, and the [carrier's] knowledge that damage has occurred does not remove the necessity of giving notice of claim." *Dworsky v. Penn. R. Co.,* 160 Misc. 360, 362 (Sup. Ct., Tompkins Co. 1936).

The accounting adjustments which are the basis of the 58,000 Barrels Claim took place in December 2003. Sunoco does not dispute that it received the Shippers Balance Statement for that month by the middle of January 2004. Accordingly, Sunoco had until October 2004 to submit a written claim to EELP.

By email dated March 18, 2004, Joseph Pompilii of Sunoco advised Rosmin Madhani of EELP of an accounting discrepancy for December 2003 and requested that she "[p]lease advise if an adjustment is being processed to our account." Ex. 23, Menchini Aff. in Support

(mot. seq. no. 007). During March and April 2004, an email exchange took place between Pompilii and Madhani in which Madhani explained that the discrepancy resulted from "a split that Shell has given us" and Pompilii ultimately responded "[t]hankyou [sic], this helps greatly." Ex. 24, Menchini Aff. in Support (mot. seq. no. 007).

Thereafter, on April 8, 2004, Pompilii forwarded this email exchange with Madhani internally within Sunoco, asking "[h]ow would you like to handle this. Please advise." *Id.* By email dated April 27, 2004, Edward Liszewski ("Liszewski") of Sunoco responded to Pompilii that "[o]n this end, it appears that Shell P/L over-delivered to Sunoco in Feb. 2002 and reversed this amount in 12/03." Ex. 26, Menchini Aff. in Support (mot. seq. no. 007). Sixteen (16) months later, on August 25, 2005, Sunoco's Manager of Crude Oil Accounting, David C. Biddle, Jr., emailed Madhani about the accounting discrepancy, requesting further supporting documentation from EELP and stating that "I have been reviewing the discrepancies noted on Joseph Pompilii's Shell P/L to Enbridge P/L reconciliation in a last effort to resolve these discrepancies before everything is turned over to our operational group for their handling." Ex. 27, Menchini Aff. in Support (mot. seq. no. 007).

Relying on the Blish case, (241 U.S. at 198), Sunoco argues that the March and April 2004 email exchange between Pompilii and Madhani, despite its form, constituted a timely claim. This argument is unavailing, however, because the email exchange does not reflect Sunoco's "demand for compensation or amount to a notice of intention to claim compensation for loss suffered." *Browning, King & Co. v. Davis,* 120 Misc. at 521; *see also*

Dworsky v. Penn. R. Co., 160 Misc. at 362. Indeed, following his exchange with Madhani, Pompilii sought direction within Sunoco on how to proceed, wholly undermining Sunoco's assertion now that it had already made a claim for compensation.

Moreover, Liszewski's April 27, 2004, response to Pompilii reflects his belief that in fact the December 2003 accounting adjustments were an off-set for an earlier over-delivery by Shell. As discussed *supra*, Sunoco involved its operations group in any claims as a matter of course; yet, in Biddle's email dated August 25, 2005, Sunoco indicated its intention of *prospectively* involving its operations group, again vitiating its argument that it had already asserted a claim. For the foregoing reasons, Sunoco has failed to establish that it filed a timely claim related to the 58,000 Barrels Claim and, therefore, that claim is also time-barred.

Motion Seq. No. 008

The Shell entities move for summary judgment in their favor on the common law indemnification claim asserted against them. "[A] party cannot obtain common-law indemnification unless it has been held to be vicariously liable...." *McCarthy v. Turner Const., Inc.*, 17 N.Y.3d 369, 377-78 (2011). Because the underlying claims asserted by Sunoco against EELP have been dismissed, it follows that the indemnification claims asserted by EELP against Shell must also be dismissed.

Finally, Sunoco's request for an order deeming certain facts as established under CPLR 3212(g) is denied.

Based on the foregoing, it is

ORDERED that Enbridge Energy Limited Partnership's motion (seq. no. 007) for summary judgment dismissing Sunoco's complaint is granted, and the complaint is dismissed in its entirety; and it is further

ORDERED that Shell Trading (US) Company and Shell Pipeline Company LP's motion (seq. no. 008) for summary judgment in their favor on the claim asserted against them is granted in its entirety; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of this Court

Date: New York, New York
December 8, 2014

ENTER:

Saliann Scarpulla, J.S.C