NO. 12-10-00272-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

ANN O. VAUGHN, APPELLANT	***§***	***APPEAL FROM THE 114TH***
V.	***§***	***JUDICIAL DISTRICT COURT***
UNITED PARCEL SERVICE OF AMERICA, INC., APPELLEE	***§***	***SMITH COUNTY, TEXAS***

MEMORANDUM OPINION

Ann O. Vaughn appeals the trial court's summary judgment entered in favor of Appellee United Parcel Service of America, Inc. (UPS). In one issue, Vaughn argues that the trial court erred in granting summary judgment in UPS's favor. We affirm.

BACKGROUND

On or about November 17, 2008, Vaughn sent a package via UPS ground delivery service from Tyler, Texas, to a recipient named Emmanuel Nieves in Antelope, California. According to Vaughn, the package contained various garments and pieces of artwork she created, some of which contained pieces of jewelry she owned. In contracting the shipment with UPS, Vaughn did not declare that the value of the package's contents exceeded one hundred dollars.

Vaughn's package was lost during shipment. UPS notified her of the loss and issued a "Request for Claim Payment." But Vaughn refused any claim payment.

On December 7, 2009, Vaughn filed the instant suit against UPS alleging that UPS was liable to her for damages for breach of duty of trust, contribution, and negligence. UPS filed a motion for summary judgment, to which Vaughn responded. On July 26, 2010, the trial court granted UPS's motion for summary judgment. This appeal followed.

SUMMARY JUDGMENT

In her sole issue,[1] Vaughn argues that trial court erred in granting summary judgment in UPS's favor.

Standard of Review

The movant for traditional summary judgment has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); ***Nixon v. Mr. Prop. Mgmt. Co.***, 690 S.W.2d 546, 548 (Tex. 1985). When the movant seeks summary judgment on a claim in which the nonmovant bears the burden of proof, the movant must either negate at least one essential element of the nonmovant's cause of action or prove all essential elements of an affirmative defense. *See* ***Randall's Food Markets, Inc. v. Johnson***, 891 S.W.2d 640, 644 (Tex. 1995). When the movant seeks summary judgment on a claim in which the movant bears the burden of proof, the movant must prove all essential elements of the claim. ***Winchek v. Am. Express Travel Related Servs. Co.***, 232 S.W.3d 197, 201 (Tex. App.–Houston [1st Dist.] 2007, no pet.). Once the movant has established a right to summary judgment, the burden of proof shifts to the nonmovant to respond to the motion and present to the trial court any issues that would preclude summary judgment. *See* ***City of Houston v. Clear Creek Basin Auth.***, 589 S.W.2d 671, 678–79 (Tex. 1979).

We review de novo the entire record in the light most favorable to the nonmovant, indulging every reasonable inference and resolving any doubts against the motion. ***Sudan v. Sudan***, 199 S.W.3d 291, 292 (Tex. 2006); ***KPMG Peat Marwick v. Harrison Cnty. Hous. Fin. Corp.***, 988 S.W.2d 746, 748 (Tex. 1999). All theories in support of or in opposition to a motion for summary judgment must be presented in writing to the trial court. *See* TEX. R. CIV. P. 166a(c).

Carmack Amendment to Interstate Commerce Act

The Carmack Amendment governs a motor carrier's liability to a shipper, consignor, holder of bill of lading, persons beneficially interested in the shipment although not in possession of the actual bill of lading, buyers or consignees, or assignees thereof for the loss of, or damage

[1] Vaughn raises a host of arguments, many of which were not presented to the trial court in her response to UPS's motion for summary judgment. Having considered each argument and having construed them liberally in the interest of justice, we have consolidated the arguments in a single issue concerning the propriety of the trial court's grant of summary judgment in UPS's favor. *See* TEX. R. APP. P. 38.1(f), 38.9.

to, an interstate shipment of goods. *See* ***Harrah v. 3M***, 809 F. Supp. 313, 318 (D.N.J. 1992); ***Tallyho Plastics, Inc. v. Big M Const. Co.***, 8 S.W.3d 789, 792 (Tex. App.–Tyler 1999, no pet.). A pertinent provision of the Amendment holds that a carrier or freight forwarder and any other common carrier that delivers the property and is providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under subchapter I, II, or IV are liable to the person entitled to recover under the receipt or bill of lading. ***Tallyho Plastics***, 8 S.W.3d at 792. The liability imposed under this paragraph is for the actual loss or injury to the property. *See* 49 U.S.C. § 14706 (West 2012).

The United States Court of Appeals for the Fifth Circuit has held that the purpose of the Carmack Amendment is to "substitute a paramount and national law as to the rights and liabilities of interstate carriers subject to the Amendment." ***Moffit v. Bekins Van Lines***, 6 F.3d 305, 306 (5th Cir. 1993) (citing ***Air Products and Chemicals v. Illinois Cent. Gulf R.R.***, 721 F.2d 483, 486 (5th Cir. 1983), *cert. denied*, 469 U.S. 832, 105 S. Ct. 122, 83 L. Ed. 2d 64 (1984)). The Carmack Amendment subjects a motor carrier transporting cargo in interstate commerce to absolute liability for "actual loss or injury to property." *See* ***Mo. Pac. R.R. Co. v. Elmore & Stahl***, 377 U.S. 134, 137, 84 S. Ct. 1142, 1144, 12 L. Ed. 2d 194 (1964). By limiting a carrier's liability to the actual loss or injury to the transported property, Congress intended to provide certainty to both shippers and carriers, and to enable carriers to assess their risks and predict their liability for damages. ***Hughes v. United Van Lines***, 829 F.2d 1407, 1415 (7th Cir. 1987), *cert. denied*, 485 U.S. 913, 108 S. Ct. 1068, 99 L. Ed. 2d 248 (1988); ***Counter v. United Van Lines, Inc.***, 935 F. Supp. 505, 507 (D.C. Vt. 1996); ***Tallyho Plastics***, 8 S.W.3d at 793.

The Carmack Amendment represents the shipper's exclusive remedy against a carrier for goods lost or damaged during shipment. *See* ***Hoskins v. Bekins Van Lines***, 343 F.3d 769, 773–78 (5th Cir. 2003); ***Celadon Trucking Svcs., Inc. v. Titan Textile Co., Inc.***, 130 S.W.3d 301, 304 (Tex. App.–Houston [14th Dist.] 2004, pet. denied). If a transaction is governed by the Carmack Amendment, state and common law causes of action involving the same transaction are preempted by the Amendment. *See* ***Accura Systems, Inc. v. Watkins Motor Lines, Inc.***, 98 F.3d 874, 876 (5th Cir. 1996); ***Moffit***, 6 F.3d at 307; ***Tallyho Plastics***, 8 S.W.3d at 793. For instance, state law claims that are preempted by the Carmack Amendment include the tort of outrage, intentional and negligent infliction of emotional distress, breach of contract, breach of implied warranty, breach of express warranty, violation of the Texas Deceptive Trade Practices Act

(DTPA), slander, misrepresentation, fraud, negligence, and gross negligence.[2] *See* ***D.M. Diamond Corp. v. Dunbar Armored, Inc.***, 124 S.W.3d 655, 661 (Tex. App.–Houston [14th Dist] 2003, no pet.).

Under the Carmack Amendment, a "carrier" or "motor carrier" is "a person providing motor vehicle transportation for compensation." *See* 49 U.S.C.A. § 13102(14) (West 2012); ***AIG Europe (Netherlands), N.V. v. UPS Supply Chain Solutions, Inc.***, 765 F. Supp. 2d 472, 483 (S.D.N.Y. 2011). The summary judgment evidence in the case at hand establishes that UPS is a "motor carrier." Moreover, the summary judgment record conclusively demonstrates that Vaughn contracted with UPS to deliver a package via ground delivery service from Tyler, Texas, to a recipient named Emmanuel Nieves in Antelope, California, which, according to Vaughn, contained various garments and pieces of artwork she created. Based on this evidence, we conclude that the Carmack Amendment represents Vaughn's exclusive remedy against UPS for her package lost during shipment. *See* ***Hoskins***, 343 F.3d at 773–78.

Because the Carmack Amendment preempts Vaughn's state law claims for breach of duty of trust, contribution, and negligence, we hold that the trial court properly granted summary judgment on those claims. Vaughn's sole issue is overruled.

DISPOSITION

Having overruled Vaughn's sole issue, we ***affirm*** the trial court's judgment.

BRIAN HOYLE
Justice

Opinion delivered June 13, 2012.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.

(PUBLISH)

[2] The Texas Supreme Court has held that the Carmack Amendment does not preempt a DTPA claim based on a misrepresentation made prior to the contract. *See* ***Brown v. Am. Transfer and Storage Co.***, 601 S.W.2d 931, 939 (Tex. 1980).

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

JUNE 13, 2012

NO. 12-10-00272-CV

ANN O. VAUGHN,

Appellant

v.

UNITED PARCEL SERVICE OF AMERICA, INC.,

Appellee

Appeal from the 114th Judicial District Court
of Smith County, Texas. (Tr.Ct.No. 09-3214-B)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that all costs of this appeal are hereby adjudged against the appellant, **ANN O. VAUGHN**, and that this decision be certified to the court below for observance.

Brian Hoyle, Justice.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.