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United States District Court,
S.D. New York.
AMERICAN HOME ASSURANCE CO. a/s/o Crown Equipment Corporation, Plaintiff,
v.
PANALPINA, INC. and A.P. Moller-Maersk A/S d/b/a Maersk Sealand and/or Maersk L, Defendant.
A.P. Moller-Maersk A/S, Third-Party Plaintiff,
v.
BNSF Railway Company, Third-Party Defendant.

No. 07 CV 10947(BSJ).
Feb. 16, 2011.

MEMORANDUM and ORDER

BARBARA S. JONES, District Judge.

***1** This case involves the international intermodal carriage of three containers of forklifts and forklift parts from the Midwest United States to Australia. While en route to its destination, the train transporting the containers derailed on December 22, 2006 at Newberry Springs, California. The contents of the containers were allegedly damaged as a result.

Plaintiff American Home Assurance Company, as the subrogee of Crown Equipment Corporation ("Crown" or "Plaintiff"), filed, suit against Defendant A.P. Moller-Maersk A/S ("Maersk") to recover for damage to the cargo. Maersk impleaded **BNSF** Railway Company ("**BNSF**") who was contracted by Maersk to transport the containers by rail from Elwood, Illinois to Los Angeles, California where they were to be loaded onboard ocean going vessels to Australia. Plaintiff seeks recovery for damage to the cargo as a result of the derailment.

On November 13, 2009, Maersk moved for partial summary judgment and declaratory judgment. Maersk seeks a determination that it is entitled to (1) declaratory judgment finding that to the extent that Maersk has any liability, Maersk is entitled to indemnity for all such liability from **BNSF**; (2) partial summary judgment that in the event liability is found against Maersk, such liability is subject to limitation based upon the applicable contracts and governing law; (3) judgment declaring that any limitation on liability applicable to Plaintiff's claim against Maersk will be at least as favorable to Maersk as the limitation of liability **BNSF** is entitled to maintain; and (4) a judgment declaring that Maersk is entitled to indemnification from **BNSF** for its attorneys' fees and expenses incurred in defending the claim of Plaintiff in this action.

On November 13, 2009, Third-party Defendant **BNSF** moved for Partial Summary Judgment. **BNSF** seeks a determination that its liability is limited to the Carriage of Goods by Sea Act ("COGSA") $500 per package limitation of liability as incorporated by the International Transportation Agreement between **BNSF** and Maersk, **BNSF's Intermodal Rules** & Policies Guide, and Maersk's Multimodal Transport Bill of Lading.

BNSF's motion is denied. The Court finds that in this case the Carmack Amendment and the Staggers Rail Act apply to the domestic rail portion of a continuous intermodal shipment originating in the United States. Maersk's motion is premature and is denied as there has been no determination of liability in this action.

Background[FN1]

FN1. The following uncontested facts are drawn from the parties' Rule 56.1 statements.

Crown Equipment is in the business of manufacturing, marketing, and selling forklift machinery and mechanical parts. In or about December, 2006, Crown booked the shipment of three individual containers containing forklifts and forklift parts under three separate Booking Notes with Panalpina, its freight forwarder.[FN2] The containers were to be shipped from Crown facilities in the Midwest United States to three locations in Australia.

FN2. The parties disagree about whether there was a single shipment of three containers or three separate shipments of individual containers. **BNSF** Rule 56.1 Stmt. ¶ 1; Pl.'s Rule 56.1 Stmt. ¶ 1. For the purposes of

resolving these motions, the Court need not determine whether there is a single subject shipment or three separate shipments at issue in the case.

Panalpina engaged the services of John Cheesman Trucking & BTT to transport the three containers by tractor trailer from Crown facilities in Greencastle, Indiana and New Breman, Ohio to the **BNSF** Logistic Park in Elwood, Illinois. Crown loaded and secured the shipments into their respective containers at its facilities in Indiana and Ohio.

***2** Panalpina contracted with A.P. Moller-Maersk A/S to arrange transport from Illinois to California and then on to Australia. Maersk, the ocean carrier, contracted with **BNSF** Railway Company, the overland carrier, to transport the containers by rail from Illinois to California. The rail transportation was booked under the terms of an existing International Transportation Agreement between **BNSF** and Maersk. The Maersk/ **BNSF** Agreement incorporates the terms and conditions of the **BNSF Intermodal Rules** & Policies Guide. There was no shipping document issued by **BNSF** to Crown.

While en route from Illinois to California, **BNSF's** train derailed causing damage to several containers including the three containers containing Crown Equipment forklifts and forklift parts. As of the date of this Order there has been no determination of liability as to the cause of the derailment. Following the derailment, Panalpina filed a cargo claim against Maersk on behalf of Crown Equipment. The claim amounted to $372,329.92 based upon loss and damage to 13 forklifts and 24 boxes of forklift parts.

LEGAL STANDARD

To prevail on a motion for summary judgment, a party must establish that there is no genuine issue of material fact in dispute such that it is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The Court must view all evidence in the light most favorable to the non-moving party and resolve all ambiguities and draw all permissible factual inferences in the nonmovant's favor. *Terry v. Ashcroft*, 336 F.3d 128, 137 (2d Cir.2003).

Uncertainty regarding the true state of any material fact is enough to defeat a motion for summary judgment. *United States v. One Tintoretto Painting*, 691 F.2d 603, 606 (2d Cir.1982). However, "the mere existence of some alleged factual dispute between the parties," without more, will not defeat a properly supported motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). There must be enough evidence in support of the non-moving party's case such that "a reasonable jury could return a verdict" in its favor. *Id.* at 248 (internal citation omitted).

A party seeking summary judgment bears the burden of establishing that no genuine issue of material fact exists. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Segal v. City of New York*, 459 F.3d 207, 211 (2d Cir.2006). Once the movant has sustained its initial production burden, "the burden shifts to the nonmovant to point to record evidence creating a genuine issue of material fact." *Salahuddin v. Goord*, 467 F.3d 263, 273 (2d Cir.2006). "[T]he nonmovant cannot rest on allegations in the pleadings and must point to specific evidence in the record to carry its burden on summary judgment." *Id.*

DISCUSSION

This case concerns a through bill of lading covering cargo for the entire course of an intermodal shipment beginning at an inland location in the United States and continuing to three locations in Australia.[FN3] In the two pending motions before the Court, the first issue is whether and to what extent **BNSF** may limit its liability to COGSA's $500 per package maximum limitation or whether the Carmack Amendment governs **BNSF's** liability in this case and, if so, whether the intermodal through bill meets the Staggers Rail Act prerequisite for limiting a rail carrier's Carmack liability. The second issue is whether Maersk may seek indemnification from **BNSF** and whether and to what extent it may limit its liability.

FN3. A bill of lading is defined as a "document acknowledging the receipt of goods by a carrier or by the shipper's agent and the contract for the transportation of those goods." (Black's Law Dictionary 9th ed.2009). "Through" bills of lading specifically cover both oceanic and inland legs of a journey in a single document. *See Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 25-26 (2004). "Intermodal" or "multimodal" refers to the use of more than one method of transport

during a single shipment. *See* id. at 25.

I. BNSF's Motion for Partial Summary Judgment

A. The Applicability of the Carmack Amendment

***3** Congress added the Carmack Amendment to the Interstate Commerce Act in 1906. 49 U.S.C. § 11706 *et seq.* Carmack governs the terms of bills of lading issued by domestic rail carriers. Its purpose was to create a national scheme of interstate carrier liability for property loss. *See Shao v. Link Cargo (Taiwan) Ltd.*, 986 F.2d 700, 704 (4th Cir.1993). Congress ultimately vested regulatory responsibility for this in the Surface Transportation Board ("STB"). *See* ICC Termination Act of 1995, Pub.L. No. 104-88, 109 Stat. 803. The Carmack Amendment provides, in relevant part:

> "(a) A rail carrier providing transportation or service subject to the jurisdiction of the [STB] under this part shall issue a receipt or bill of lading for property it receives for transportation under this part. That rail carrier and any other carrier that delivers the property and is providing transportation or service subject to the jurisdiction of the [STB] under this part are liable to the person entitled to recover under the receipt or bill of lading. The liability imposed under this subsection is for the actual loss or injury to the property caused by-
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> "(1) the receiving rail carrier;
>
> "(2) the delivering rail carrier; or
>
> "(3) another rail carrier over whose line or route the property is transported in the United States or from a place in the United States to a place in an adjacent foreign country when transported under a through bill of lading.
>
> "Failure to issue a receipt or bill of lading does not affect the liability of a rail carrier."

49 U.S.C. § 11706.

BNSF argues that Carmack is inapplicable here. Rather, **BNSF** claims that the COGSA limitation of liability in the Maersk through bill of lading applies to inland cargo damage where COGSA would apply to the ocean leg of the journey and a proper Himalaya Clause exists to extend the benefits of COGSA to **BNSF** as the overland carrier.

As an initial matter, COGSA applies to "[e]very bill of lading or similar document of title which is evidence of a contract for the carriage by sea to or from ports of the United States, in foreign trade." 46 U.S.C. § 1300. The limitation of liability provision of COGSA is applicable to damage which occurs "from the time when the goods are loaded on to the time when they are discharged from the ship." *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 29 (2004), (*quoting* 46 U.S.C. app. § 1301(e)) (internal quotation marks omitted).

This is not where the damage occurred in this case. However, a carrier and a shipper can extend the scope of COGSA to cover "the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea." 46 U.S.C. § 1307; *Hartford Fire Ins. Co. v. Orient Overseas Containers Lines, Ltd.*, 230 F.3d 549, 557 (2d Cir.2000). In other words, the parties to a bill of lading, in this case Crown and Maersk, may contractually expand COGSA coverage, including maritime liability to a third party, here **BNSF**, with the inclusion of a so called "Himalaya Clause," so long as the third party is clearly identified. *Kirby*, 543 U.S. at 20. "A Himalaya Clause extends contractual protections that would otherwise apply only to the entity issuing the bill of lading to the subcontractors of the issuing entity as well." *Royal & Sun Alliance Ins., PLC v. Ocean World Lines, Inc.*, 612 F.3d 138, 142 (2d Cir.2010). BSNF argues that this occurred when Maersk, the ocean shipping company, issued a through bill of lading that extended COGSA's terms to the inland segment and the property was damaged during the inland portion. (**BNSF's** Reply Mem. at 4).

***4** The interplay of COGSA and Carmack was recently addressed by the Supreme Court in *Kawasaki Kisen Kaisha Ltd., et al. v. Regal-Beloit Corp et al.*, 130 S.Ct. 2433 (2010). In Regal-Beloit, the rail carrier performed under a general contract with the ocean carrier, not under its own bill of lading. The issue before the Court was only "whether the terms of a through bill of lading issued abroad by an ocean carrier can apply to the domestic part of the import's journey by a rail carrier, despite prohibitions or limi-

tations in [Carmack]." *Id.* at 2439.

The Supreme Court held that the Carmack Amendment "does not apply to a shipment originating overseas under a single through bill of lading." *Id.* at 2442. The Court reasoned, "[i]f Carmack's bill of lading requirement did not refer to the initial carrier, but rather to any rail carrier that in the colloquial sense 'received' the property from another carrier, then every carrier during the shipment would have to issue its own separate bill," which would be contrary to the purpose of Carmack. *Id.* at 2443. Instead, the Carmack Amendment only applies "to transport of property for which Carmack requires a receiving carrier to issue a bill of lading, regardless of whether that carrier erroneously fails to issue such a bill." *Id.* at 2444. In *Regal-Beloit,* the Court determined that Union Pacific served as the "delivering" carrier, not the receiving carrier, and was thus not required by Carmack to issue a bill of lading. *Id.* at 2444-45.

As the Second Circuit explained in *Royal & Sun,* the Supreme Court crafted a two-part test to determine whether a Carmack bill of lading must be issued:

> First, the rail carrier must "provid[e] transportation or service subject to the jurisdiction of the [STB]." Second, that carrier must "receiv[e]" the property "for transportation under this part," where "this part" is the STB's jurisdiction over domestic rail transport. Carmack thus requires the receiving rail carrier-but not the delivering or connecting rail carrier-to issue a bill of lading.
>
> *Royal & Sun,* 612 F.3d at 144.

Thus, under *Regal-Beloit,* "the pertinent question is whether the carrier functioned as a receiving rail carrier." *Mitsui Sumitomo Ins. Co., Ltd. v. Evergreen Marine Corp.,* 621 F.3d 215, 219 n. 4 (2d Cir.2010); *see KITO Group, Ltd., v. RF Int'l, Ltd.,* No. 09 Civ. 1371, 2010 WL 2712138, at *2 (D.Conn. July 6, 2010) (noting Carmack Amendment governs bills of lading issued by receiving carriers inside the United States). The Supreme Court defined "receiving rail carrier" as "the initial carrier, which 'receives' the property for domestic rail transportation at the journey's point of origin." *Regal-Beloit,* 130 S.Ct. at 2443. When making this determination, "ascertaining the shipment's point of origin is critical to deciding whether the shipment includes a receiving rail carrier." *Id.*

The plain language of the statute makes clear that Carmack applies when the first rail carrier in the chain of transportation accepted the cargo at the shipment's point of origin.[FN4] It is also clear that **BNSF** "received" the cargo at the **BNSF** Logistic Park in Elwood, Illinois for domestic transportation to California. It is immaterial whether **BNSF** actually issued a "bill of lading" or just a "movement waybill" upon receipt of the cargo. *Regal-Beloit,* 130 S.Ct. at 2443-44. Carmack provides the default legal regime governing the inland leg of a multimodal shipment originating within the United States and traveling on a through bill of lading. Thus, **BNSF** is subject to Carmack because **BNSF** " 'receiv[ed]' the property 'for transportation under this part,' where 'this part' is the STB's jurisdiction over domestic rail transport." *Id.* at 2442-43 (quoting 49 U.S.C. § 11706(a)).

> FN4. There is no question that **BNSF** is a "rail carrier" that is "subject to the jurisdiction of the Board." § 11706(a).

B. Contracting for Alternative Terms Under Carmack

***5 BNSF** argues that even if the Carmack amendment applies, **BNSF** may still limit its liability to $500 per package because Maersk's Terms and Conditions in the Bill of Lading afforded Crown the opportunity to receive full Carmack liability coverage before accepting alternative liability terms. (**BNSF's** Reply Mem. at 4-5). The contractual extension of COGSA to the inland leg cannot, however, supersede the requirements imposed by the Carmack Amendment unless the parties properly agree to opt out of Carmack.

Under Carmack, rail carriers are liable "for the actual loss or injury to the property." Section 11706(c)(1) provides that:

> A rail carrier may not limit or be exempt from liability imposed under subsection (a) of this section except as provided in this subsection. A limitation of liability or of the amount of recovery or representation or agreement in a receipt, bill of lading, contract, or rule in violation of this section is void.

However, the Staggers Rail Act of 1980, Pub.L. No. 96-448, 94 Stat. 1895 (codified at 49 U.S.C. § 11706), authorized the ICC "to exempt transportation

that is provided by a rail carrier as part of a continuous intermodal movement." 49 U.S.C. § 10502(f). Pursuant to this authority, the ICC exempted from regulation rail carriers, like **BNSF**, that operate one leg of a continuous intermodal movement. See 49 C.F.R. § 1090.2. Staggers further provides that: "Nothing in this subsection or section 11706 of this title shall prevent rail carriers from offering alternative terms." 49 U.S.C. § 10502(e).

The combined effect of § 10502(e) and § 11706(a) is that exempt rail carriers may limit their liability under Carmack by negotiating "alternative terms." However, in order for a rail carrier to limit its liability, the ocean bill of lading must give the shipper independent notice of the applicability of Carmack and the option of selecting full Carmack liability as well as the option of selecting alternative liability terms and lower shipping rates. *Sompo Japan Ins. Co. v. Norfolk S. Ry. Co.*, 540 F.Supp.2d 486, 493-501 (S.D.N.Y.2008). This burden to offer full Carmack liability is on the rail carrier. *See Tokio Marine and Fire Ins. Co., Ltd. v. Amato Motors, Inc.*, 996 F.2d 874, 879 (7th Cir.1993). As a result, a shipper and a carrier may bargain for alternative terms, but only if the shipper is first presented with the option of receiving Carmack coverage. *Tamini Trasformatori S.R.L. v. Union Pac. R.R.*, No. 02 Civ. 129, 2003 WL 135722, at *4 (S.D.N.Y. Jan. 17, 2003); *see also Sompo Japan Ins. Co. of Am. v. Union Pac. R.R. Co.*, 456 F.3d 54, 59-60 (2d Cir.2006) (collecting cases), abrogated by *Regal-Beloit*, 130 S.Ct. 2433.

BNSF argues that Maersk's Terms and Conditions of the Bill of lading afford Crown the opportunity to receive full Carmack liability coverage. (**BNSF** Reply Mem. at 5.) Maersk's Terms and Conditions of the Bill of Lading provide:

> **7. *COMPENSATION AND LIABILITY PROVISIONS***
>
> ***6 7.3** The Merchant agrees and acknowledges that the Carrier has no knowledge of the value of the Goods and higher compensation than that provided for in this bill of lading may be claimed only when, with the consent of the Carrier, the value of the Goods declared by the Shipper upon delivery to the Carrier has been stated in the box marked "Declared Value" on the reverse of this bill of lading and extra freight paid. In that case, the amount of the declared value shall be substituted for the limits laid down in this bill of lading. Any partial loss or damage shall be adjusted pro rata on the basis of such declared value.
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> (Joseph Dec. Ex 11.)

BNSF's argument that full Carmack coverage was offered is without merit. Though Paragraph 7.3 provided the option of coverage under COGSA, it did not give Crown independent notice of Carmack applicability and did not give Crown the choice to retain or opt out of Carmack coverage as required by *Staggers.* Crown was never offered full Carmack liability by either Maersk or **BNSF**. Thus, **BNSF**, as the receiving rail carrier, has not contracted out of Carmack and may not limit its liability to COGSA's $500 per package maximum limitation provision. As a result, Carmack applies and **BNSF's** motion for summary judgment is DENIED.

II. Maersk's Motion for Partial Summary Judgment and Declaratory Judgment

In its moving papers, Defendant Maersk seeks declaratory judgment requiring **BNSF** to indemnify Maersk for all liability it may have to the Plaintiff in this action. Maersk seeks a determination that it is entitled to (1) declaratory judgment finding that to the extent that Maersk has any liability, Maersk is entitled to indemnity for all such liability from **BNSF**; (2) partial summary judgment that in the event liability is found against Maersk, such liability is subject to limitation based upon the applicable contracts and governing law; (3) judgment declaring that any limitation on liability applicable to Plaintiff's claim against Maersk will be at least as favorable to Maersk as the limitation of liability **BNSF** is entitled to maintain; and (4) a judgment declaring that Maersk is entitled to indemnification from **BNSF** for its attorneys' fees and expenses incurred in defending the claim of Plaintiff in this action.

Maersk argues that

> "**BNSF** admitted that this not a *force majeure* event and that stowage and securing of goods within the containers on the train had nothing to do with the derailment. **BNSF** conceded that none of the defenses listed in the "Loss of Damage" section of the **BNSF** Rules applied to this derailment and, in essence, concede that it was not contesting liability for

the loss, but rather the issue of which limitation of liability would apply.

(Maersk Mem. at 5)

In opposition, **BNSF** counters that Maersk's motion for partial summary Judgment and Declaratory Judgment for indemnification and attorneys' fees and expenses is premature because there has been no liability determination.[FN5]

FN5. **BNSF** claims that the improper stowage and securing of the goods within the containers contributed to the damage sustained in the crash. Maersk argues that this claim is entirely speculative and that there is overwhelming evidence that the damage to the Crown equipment is solely a result of the derailment in California.

***7** In reply, Maersk admits that "**BNSF** is certainly correct when it states that no liability determination has yet been made in this case." And, for the first time asks the Court to "render summary judgment on liability against **BNSF**." (Maersk Reply Mem. at 7)

It is well established that where a claim is first raised in a reply brief the court need not consider it. *Cantor Fitzgerald v. Lutnick*, 313 F.3d 704, 711 n. 3 (2d Cir.2002). In its Motion for Summary Judgment and Declaratory Judgment, Maersk did not seek a determination of liability. Thus, Maersk has not properly submitted a motion for summary judgment on liability.

As there has been no determination of liability, any determination regarding indemnification owed by **BNSF** to Maersk must await the outcome of trial. *See Starkey v. Capstone Enterprises of Portchester*, No. 06-CV-1196, 2008 WL 4452366, at *12 (S.D.N.Y. Sept. 30, 2008) (collecting cases); *Altman v. Bayliss*, No. No. 95-CV-0734, 1997 WL 436711, at *2 (S.D.N.Y. July 22, 1997) ("Inasmuch as there has been no liability determination, [co-defendant's] motion is premature and must be denied without prejudice."). Thus, Maersk's motion for indemnification, legal fees and other expenses is premature and is DENIED without prejudice.

CONCLUSION

For the reasons set forth above, **BNSF's** Motion for Partial Summary Judgment is DENIED. Maersk's Motion for Partial Summary Judgment and Declaratory Judgment is DENIED without prejudice.

SO ORDERED:

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American Home Assur. Co. v. Panalpina, Inc.
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