*2009 U.S. Dist. LEXIS 64334, **

OSCAR KASHALA, Plaintiff, vs. MOBILITY SERVICES INTERNATIONAL, LLC, McCOLLISTER'S TRANSPORTATION GROUP, and UNITED VAN LINES, INC., Defendants.

CIVIL ACTION NO. 07-40107-TSH

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

2009 U.S. Dist. LEXIS 64334

May 12, 2009, Decided
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CORE TERMS: carrier, Carmack Amendment, transportation, summary judgment, shipment, household goods, interstate, delivery, preemption, broker, bill of lading, nonmoving party, transport, shipper's, preempt, preemptive, transportation services, transported, storage, damaged, interstate shipments, emotional distress, preempted, van, law claims, claims of negligence, arranging, packing, pound, matter of law

COUNSEL: **[*1]** For Oscar Kashala, Plaintiff: David S. Reservitz, LEAD ATTORNEY, Stacey Klein Verde, Reservitz Law Offices, Brockton, MA.

For Mobility Services International, LLC, McCollister's Transportation Group, Inc., United Van Lines, Inc., Defendants: Wesley S. Chused, LEAD ATTORNEY, Looney & Grossman LLP, Boston, MA.

JUDGES: TIMOTHY S. HILLMAN, UNITED STATES MAGISTRATE JUDGE.

OPINION BY: TIMOTHY S. HILLMAN

OPINION

MEMORANDUM AND ORDER ON DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

HILLMAN, M.J.

I. Nature of the Proceeding

By Order of Reference dated September 25, 2007, and by consent of the parties, this case was referred to me for all purposes, including trial and entry of final judgment in accordance with 28 U.S.C. § 636(c) and Fed. R. Civ. P. 73. This Memorandum of Decision and Order for Judgment addresses the following motions:

1. Defendant United Van Lines, LLC's Motion for Summary Judgment (Docket No. 22);

2. Defendant Mobility Services International, LLC's Motion for Summary Judgment (Docket No. 27); and

3. Defendant McCollister's Moving and Storage, Inc.'s Motion for Summary Judgment (Docket No. 30).

A hearing was held on all motions and I took the matters under advisement. For the reasons that follow, all Defendants' motions **[*2]** are granted consistent with the terms set forth in this Memorandum.

This case involves Plaintiff's, Oscar Kashala ("Mr. Kashala" or "Plaintiff"), claims of negligence against the Defendants, Mobility Services International, LLC ("Mobility"), McCollister's Moving & Storage, Inc. ("McCollister's") and United Van Lines, LLC ("United") and a breach of contract claim against Mobility, for damage to Mr. Kashala's household goods shipment that was transported from North Carolina to Massachusetts between September and December 2003.

II. Statement of Facts [1]

FOOTNOTES

[1] The plaintiff has failed to respond as required by this Court's Local Rule 56(c) to the statement of material facts submitted by the defendant with its motion. Accordingly, all of the facts included in the defendants' statement, to the extent that they are appropriately supported by citations to the record, are deemed admitted. Local Rule 56(e).

Oscar Kashala is an individual residing at 40 Upton Road, Westborough, Massachusetts 01581. *Complaint*, P1; *Deposition of Oscar Kashala* (hereafter, "*Kashala Dep*."), 5. Mobility is a corporation headquartered at 260 Merrimac Street, Newburyport, Massachusetts and operated as an interstate transportation **[*3]** broker at all times material to this action. *Complaint*, P 2; *Affidavit of Jennifer A. Roman in Support of Defendant Mobility Services International, LLC's Motion for Summary Judgment* (hereinafter, "*Roman Aff*."), P1. United is a corporation headquartered in Fenton, Missouri. *Complaint*, P4; *Affidavit of Mark Caldwell in Support of Defendant United Van Lines, LLC's Motion for Summary Judgment* (hereinafter, "*Caldwell Aff*."), P1. United operates as an interstate motor carrier of household goods pursuant to authority granted to United by the Federal Motor Carrier Safety Administration ("FMCSA"). *Caldwell Aff*., P 6. McCollister's is a corporation with an office at 900 Aviation Parkway, Morrisville, North Carolina and at all times material operated as the disclosed interstate household goods agent of United, that is, McCollister's does the packing and moving of the goods. *Affidavit of Stephen Vanderhoof in Support of Defendant McCollister's Moving & Storage, Inc.'s Motion for Summary Judgment* (hereinafter, "*Vanderhoof Aff*."), P1.

As an interstate transportation broker, Mobility arranges for the transportation of its customers' interstate shipments via duly certificated interstate motor carriers **[*4]** such as, in this case, United. *Roman Aff*., P5. Mobility does not operate any motor vehicles or physically transport or handle any freight in this business; rather, it relies on the operating authority, motor vehicle equipment and manpower of interstate motor carriers such as United to pick up, transport and deliver its customers' shipments. *Roman Aff*., P5.

Mr. Kashala is a cancer research doctor, and prior to March 2003 he worked for EMD Pharmaceuticals in North Carolina. *Kashala Dep*., 5, 9 and 10. Beginning in April 2003, while he was living in Durham, North Carolina, Mr. Kashala began working for Millennium Pharmaceuticals ("Millennium") of Cambridge, Massachusetts. *Id*., 10. In September 2003, Mr. Kashala and his family moved from North Carolina to Westborough, Massachusetts. *Id*., 13, 19. At this time, Mr. Kashala made the arrangements for the move through the human resources department of his Massachusetts employer, Millennium. *Kashala Dep*., 34 - 35. Millennium then contacted Mobility to arrange for the transportation of Mr. Kashala's household goods shipment from North Carolina to Massachusetts. *Roman Aff*., at P 5. Mobility, acting as agent for Millennium, arranged insurance for **[*5]** Mr. Kashala's shipment through a third-party insurance company, UNIRISC, in the amount of $ 150,000. *Roman Aff*., P 6.

On August 27, 2003 Mobility arranged with United to transport Mr. Kashala's household goods shipment from North Carolina to Massachusetts. *Roman Aff*., P 6, and United picked up the shipment on September 4, 2003. *Caldwell Aff*., P 12. Pursuant to a transportation agreement between Mobility and United, United agreed to transport interstate shipments of goods brokered by Mobility. *Caldwell Aff*., P7, 8; *Roman Aff*., P 6. Under the terms of the United/Mobility Transportation Agreement, in consideration for the discounted rates and charges to be paid by Mobility to United for United's interstate transportation services, any goods to be transported were released to United at a value of $ 2.00 per pound per article, unless a higher value was declared. This meant that in the event any goods were lost or damaged in transit, and in the absence of a declaration of value by the shipper, United's liability would be limited to the sum of $ 2.00 per pound per article of the lost or damaged goods, which is common in the industry. *Roman Aff*., P 8 and Exhibit 1, "Schedule of Contract Rates, **[*6]** Page 2 of 3;" *Caldwell Aff*., P 8 and Exhibit 2, "Schedule of Contract Rates, Page 2 of 3."

Mr. Kashala had no communications or dealings with United or Mobility in making the arrangements for his household goods move. *Kashala Dep*., 35, 42. United dealt only with Mobility in arranging and booking the transportation of Mr. Kashala's household goods from North Carolina to Massachusetts and billed and was paid by Mobility for transporting the shipment. *Caldwell Aff*., P 11. United then contacted McCollister's for the packing and moving of Mr. Kashala's household items.

McCollister's undertook the packing, loading, transportation and delivery of Mr. Kashala's household goods shipment on behalf of United, as United's disclosed interstate household goods agent, under United's bill of lading. *Caldwell Aff*., P10; *Vanderhoof Aff., P* 5, 7, 12. Mr. Kashala was aware that Mobility's function was only to hire "a company (i.e., the moving van line) to carry my goods to my place." *Kashala Dep*., 78. Although he was not present when the truck was physically loaded with his household goods in North Carolina, Mr. Kashala confirmed his wife's signature on United's bill of lading. *Kashala Dep*., 48, 53, 56. **[*7]** No valuation was declared on the bill of lading for Mr. Kashala's shipment; it was left blank. *Caldwell Aff*., P 8, 9 and Exhibit 2. Mr. Kashala's shipment was delivered to him on December 4, 2003, following at least one prior attempted delivery in November at which time Mr. Kashala did not accept delivery. *Caldwell Aff*., P12.

In late January 2004, Mr. Kashala filed a written loss and damage claim with Millennium in the sum of $ 43,259. *Kashala Dep*., 94, 128 and Exhibit 4. In early February 2004, Mobility was notified by UNIRISC that UNIRISC had received a claim from Mr. Kashala, in which he sought $ 43,259 in damages for various articles that he claimed were lost or damaged during the move. *Roman Aff*., P 1. Mr. Kashala subsequently received three checks, totaling $ 8,810, from UNIRISC in response to his claim: a check for $ 4,140 dated March 5, 2004; a check for $ 4,020 dated April 8, 2004 and a check for $ 650 dated October 27, 2004. *Kashala Dep*., 134 - 135, 146, 152 and Exhibits 7, 8, 10, 11 and 12. Notably, Mr. Kashala dealt only with Millennium concerning booking his shipment and filing his claim. *Kashala Dep*., 41, 42 and 297.

On February 2, 2004, United received correspondence dated **[*8]** January 30, 2004 from UNIRISC enclosing a copy of Mr. Kashala's claim to Millennium with a handwritten demand for the payment of $ 2,780, calculated on the basis of the $ 2.00 per pound limitation specified in the United-Mobility Transportation Agreement. *Caldwell Aff*., P 13 and Exhibit 3; *Roman Aff*., P12. The United/Mobility Transportation Agreement adopts United's 400 Series tariff as a governing publication, Item 43, Section 6 of which provides as follows:

> As a condition precedent to recovery, a claim for any loss or damage, injury or delay, must be filed in writing with carrier within nine (9) months after delivery to consignee as shown on face hereof, or in case of failure to make delivery, then within nine (9) months after a reasonable time for delivery has elapsed; and suit must be instituted against carrier within two (2) years and one (1) day from the date when notice in writing is given by carrier to claimant that carrier has disallowed the claim or any part or parts thereof specified in the notice. Where a claim is not filed or suit is not

> instituted thereon in accordance with the foregoing provisions, carrier shall not be liable and such a claim will not be paid.

Caldwell **[*9]** *Aff.*, P 20 and Exhibit 9.

On June 9, 2004 United wrote to UNIRISC stating United's calculation of its liability on the claim was $ 1,330, based on the $ 2.00 per pound limitation in the United - Mobility Transportation Agreement. *Caldwell Aff.*, P 15 and Exhibit 2, "Schedule of Contract Rates, Page 2 of 3." United paid UNIRISC $ 1,330 for the claim submitted by UNIRISC on Mr. Kashala's shipment and otherwise denied further payment on the claim. *Caldwell Aff.*, P P 15 and 16 and Exhibits 5 and 6.

UNIRISC, by letter dated June 17, 2004, requested United to pay an additional $ 1,450 on the claim. *Caldwell Aff.*, P 17 and Exhibit 7. By reply letter dated June 21, 2004 to UNIRISC, United explained again the basis for its calculation of its liability totaling $ 1,330 and affirmed its denial of further payment on the claim. *Caldwell Aff.*, P 18 and Exhibit 8. Since its June 21, 2004 letter to UNIRISC, United did not hear of any further claim pertaining to Mr. Kashala's shipment until it was served with the Summons and Complaint in this lawsuit in October 2006. *Caldwell Aff.*, P 19.

Mr. Kashala filed this action in the Westborough District Court on or about October 19, 2006 and the matter was removed **[*10]** to this Court on April 12, 2007. *Notice of Removal*, (Docket No. 1). Defendants moved for summary judgment on all claims; each will be considered seriatim.

III. Discussion

Summary Judgment Standard

A party shall be entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). When deciding a motion for summary judgment, the Court must review the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in the nonmoving party's favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997).

Summary judgment involves shifting burdens between the moving and the nonmoving parties. Initially, the burden requires the moving party to aver "an absence of evidence to support the nonmoving party's case." *Garside v. Osco Drug, Inc.*, 895 F.2d 46, 48 (1st Cir. 1990) (*quoting Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). Once the moving party meets this burden, the burden falls upon the nonmoving party, who must oppose the **[*11]** motion by presenting facts that show a genuine "trial-worthy issue remains." *Cadle Co.*, 116 F.3d at 960 (*citing National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995); *Maldonado-Denis v. Castillo-Rodriguez*, 23 F.3d 576, 581 (1st Cir. 1994)). An issue of fact is "genuine" if it "may reasonably be resolved in favor of either party." *Id.* (citing *Maldonado-Denis*, 23 F.3d at 581).

To oppose the motion successfully, the nonmoving party must present affirmative evidence to rebut the motion. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). "Even in employment discrimination cases where elusive concepts such as motive or intent are at issue, summary judgment is appropriate if the nonmoving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation." *Benoit v. Technical Mfg. Corp. 331 F.3d 166, 173* (1st Cir. 2003). Moreover, the "evidence illustrating the factual controversy cannot be conjectural or problematic; it must have substance in the sense that it limns differing versions of the truth which a fact finder must resolve." *Id.* (quoting *Mack v. Great Atl. & Pac. Tea Co.*, 871 F.2d 179, 181 (1st Cir. 1989)). Therefore, **[*12]** to defeat a properly supported motion for summary judgment, the nonmoving party must establish a trial worthy issue by presenting "enough competent evidence to enable a finding favorable to the nonmoving party." *Goldman v. First Nat'l Bank of Boston*, 985 F.2d 1113, 1116 (1st Cir. 1993)

(citing *Anderson v. Liberty Lobby*, 477 U.S. at 249). In deciding a motion for summary judgment, the court is required to view the facts in the light most favorable to the non-moving party.

1. Mobility's Motion for Summary Judgment

A. Count I - Negligence Claim

In Count I of his Complaint, Mr. Kashala alleges that Mobility "failed to exercise due care and negligently transported" Mr. Kashala's shipment. Mobility contends that as a transportation broker, it cannot be liable in negligence for loss or damage to Mr. Kashala's shipment as a matter of law, while Mr. Kashala argues that Mobility is not shielded from liability as a broker and that the Carmack Amendment does not provide protection.

The ICC Termination Act of 1995 ("ICCTA") distinguishes between the terms "broker" and "motor carrier." It defines the term "motor carrier" as "a person providing commercial motor vehicle (as defined in 49 U.S.C. §31132) **[*13]** transportation for compensation." 49 U.S.C., §13102(14). The ICCTA defines the terms "broker" as follows: the term "broker" means a person, other than a motor carrier or an employee or agent of a motor carrier, that as a principal or agent sells, offers for sale, negotiates for, or holds itself out by solicitation advertisement, or otherwise as selling, providing or arranging for, transportation by motor carrier for compensation. 49 U.S.C. §13102(2).

Any negligence claim against Mobility in its capacity as a broker is preempted by another section of the ICCTA, namely, 49 U.S.C. §14501(b)-(c), which provides as follows:

> (c) Motor carriers of property. (1) General rule. Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

Even if 49 U.S.C. §14501(b)-(c) did not apply, **[*14]** the Carmack Amendment would preempt all state and common law claims, as is discussed *infra*.

B. Count IV - Breach of Contract

In Count IV of his Complaint, Mr. Kashala also alleges that Mobility is liable to Mr. Kashala for breaching the contract that Mobility had with Mr. Kashala's employer, Millennium and argues in his opposition to summary judgment that he can recover as a third party beneficiary to that contract. Mobility moves for summary judgment on this claim, arguing that Mr. Kashala has no contract with Mobility, and therefore has no right to enforce a breach of contract claim.

Mr. Kashala has neither plead sufficient facts in his complaint nor has he produced a shred of evidence on the record to support even an argument for a third party beneficiary claim. Notably, Mr. Kashala cites the standard by which he must prove that theory, that is he must show that the direct parties to the contract intended to give him the benefit of the contract, *Plaintiff's Opp. To Mobility*, p. 5, **[*15]** but did not produce the contract or evidence to support that theory. Mr. Kashala's Count IV breach of contract claim against Mobility fails because he has shown no contract or breach of any contract by Mobility's.

2. McCollister's Motion for Summary Judgment

In Count II of his complaint, Mr. Kashala alleges that McCollister's "failed to exercise due care and negligently transported the personal property" belonging to Mr. Kashala and in the process, "the property was damaged, destroyed or disappeared." McCollister's seeks summary judgment on Mr. Kashala's claim of negligence and relies on the fact that McCollister's is a disclosed agent of

United's pursuant to 49 U.S.C. § 13907, which provides, in relevant part:

> (a) Carriers responsible for agents.-- Each motor carrier providing transportation of household goods shall be responsible for all acts or omissions of any of its agents which relate to the performance of household goods transportation services … and which are within the actual or apparent authority of the agent from the carrier or which are ratified by the carrier.
>
> (b) Standard for selecting agents.--Each motor carrier providing transportation of household goods shall use due diligence **[*16]** and reasonable care in selecting and maintaining agents who are sufficiently knowledgeable, fit, willing, and able to provide adequate household goods transportation services … and to fulfill the obligations imposed upon them by this part and by such carrier.

"Household goods agents" are defined at 49 C.F.R. § 375.14 to include "agents who are permitted or required under the terms of any agreement or arrangement with a principal carrier to provide any transportation service for or on behalf of the principal carrier, including the selling of or arranging for any transportation service …." Mr. Kashala suggests that because he had direct contact with McCollister's and because McCollister's name was on the household goods inventory sheet, it is not protected by its agency status and is liable for negligence.

McCollister's insists that, as a disclosed agent, it cannot be liable to the shipper, Mr. Kashala, because it was United that issued the bill of lading, or contract for transportation. While 49 U.S.C. § 13907 creates liability for principle carrier, here United, it simultaneously relieves the carrier's agents of any liability, provided the transaction occurred pursuant to a valid bill **[*17]** of lading. *See id.; Taylor v. Mayflower Transit, Inc.*., 161 F. Supp. 2d 651, 658 (W.D.N.C. 2000); *Werner v. Lawrence Transp. Sys., Inc*., 52 F.Supp.2d 567, 568-69 (E.D.N.C. 1998). Courts have regularly held that the agents of disclosed principals are not liable for damages arising under § 13907(a), and that these agents are not parties to the bill of lading as a matter of law. *See, e.g., Taylor*, 161 F. Supp. 2d at 658; *O'Donnell v. Earle W. Noyes & Sons*, 98 F.Supp.2d 60, 63 (D.Me. 2000); *Werner*, 52 F.Supp.2d at 568-69 ; *Fox v. Kachina Moving & Storage*, 1998 U.S. Dist. LEXIS 17121, 1998 WL 760268, at 1 (N.D.Tex. Oct.21, 1998) ; see also Restatement (Second) of Agency § 320 (1957) ("[A] person making or purporting to make a contract with another as agent for a disclosed principal does not become a party to the contract."). Consequently, there is no material fact in dispute that McCollister's was a disclosed household goods agent and cannot be liable for negligence in this case.

3. *United's Motion for Summary Judgment*

In Count III of his complaint, Mr. Kashala alleges that United failed to exercise due care in the process of moving his belongings and damaged or destroyed his property while doing so. United seeks summary judgment **[*18]** on Mr. Kashala's claim of negligence on the basis that it is preempted by the Carmack Amendment, or in the alternative, that United's liability is limited or is time-barred.

The Carmack Amendment provides sweeping preemptive power over state or common law claims arising out of property loss or damage that occurred as a result of interstate transport. Since Mr. Kashala's shipment was transported from North Carolina to Massachusetts, the shipment and the parties rights, duties and liabilities with respect thereto are governed exclusively by the Carmack Amendment to the ICCTA, 49 U.S.C. § 14706. That statute defines the scope and extent to which an interstate motor carrier -- United -- can be liable to a shipper -- Mr. Kashala -- on a claim of loss or damage to an interstate shipment of goods. The provisions of the Carmack Amendment supersede all the regulations and policies of a particular state and govern exclusively in determining the liability of a carrier transporting freight (including household goods) in interstate commerce. *See Adams Express Co. v. Croninger*, 226 U.S. 491, 505-06, 33 S.Ct. 148,

57 L. Ed. 314 (1913) (observing that the Carmack Amendment covers "[a]lmost every detail of the subject **[*19]** … so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersede all state regulation with reference to it"). No state law can be applied in determining the existence or scope of liability of an interstate motor carrier under the Carmack Amendment. *Id* ; *Intech, Inc. v. Consolidated Freightways*, 836 F.2d 672, 677 (1st Cir. 1987); *Rini v. United Van Lines, Inc*., 104 F. 3d 502 (1st Cir. 2007), *cert. denied*, 522 U.S. 809, 118 S. Ct. 51, 139 L. Ed. 2d 16 (1997).

The Carmack Amendment

Section 14706(a)(1) of Title 49 of the United States Code, routinely referred to as the Carmack Amendment, in pertinent part provides:

> A carrier providing transportation … shall issue a receipt or bill of lading for property it receives for transportation…. That carrier and any other carrier that delivers the property and is providing transportation or service … are liable to the person entitled to recover under the receipt or bill of lading. The liability imposed under this paragraph is for the actual loss or injury to the property caused by (A) the receiving carrier, (B) the delivering carrier, or (c) another carrier over whose line or route the property is transported **[*20]** in the United States….

49 U.S.C. § 14706(a)(1).

The Carmack Amendment "provides shippers with the statutory right to recover for actual losses or injuries to their property caused by carriers involved in the shipment." *Roberts v. North American Van Lines, Inc*., 394 F.Supp.2d 1174, 1179 (N.D.Cal. 2004); *Gordon v. United Van Lines, Inc*., 130 F.3d 282, 285-86 (7th Cir. 1997). Prior to its enactment, "the liability of carriers for loss of, or damage to interstate shipments was determined by common law or the law of the states." *Roberts*, 394 F.Supp.2d at 1179. Upon the passage of the Carmack Amendment, however, the "regulations and policies of particular States upon the subject of the carrier's liability for loss or damage to interstate shipments and the contracts of carriers with respect thereto," became superceded by federal law. *Charleston & W. Carolina Ry. Co. v. Varnville Furniture Co*., 237 U.S. 597, 603, 35 S.Ct. 715, 59 L. Ed. 1137 (1915).

The principle purpose of the Carmack Amendment was "to achieve national uniformity in the liability assigned to carriers." *Rini*, 104 F. 3d at 504; see, e.g., *New York, New Haven & Hartford R.R. Co. v. Nothnagle*, 346 U.S. 128, 131, 73 S.Ct. 986, 97 L. Ed. 1500 (1953); *Atchison, Topeka & Santa Fe Ry. Co. v. Harold*, 241 U.S. 371, 378, 36 S.Ct. 665, 60 L. Ed. 1050 (1916). **[*21]** Through the enactment, "Congress intended to adopt a uniform rule and relieve such contracts from the diverse regulation to which they had been theretofore subject." *Rini*, 104 F.3d at 504. The Carmack Amendment exists to provide "a measure of predictability for interstate carriers in the exposure to damages they face." *Gordon*, 130 F.3d at 287. To accomplish this goal, "the Carmack Amendment preempts state law claims arising from failures in the transportation and delivery of goods." *Smith v. United Parcel Service* 296 F.3d 1244, 1246 (11th Cir. 2002). "The notion that federal law reigns supreme and preempts state law when uniformity on a national level is required is one of long standing." *Cleveland v. Beltman North American Co., Inc*., 30 F.3d 373, 378 (2nd Cir. 1994). In that vein, the preemptive scope of the Carmack Amendment is far-reaching. *See Adams Express at* 505-06; *see also Southeast. Express Co. v. Pastime Amusement Co*., 299 U.S. 28, 57 S.Ct. 73, 81 L. Ed. 20 (1936) (preempting a claim for negligence for failure to deliver a film reel on time).

The Carmack Amendment, with few exceptions, provides the exclusive cause of action for loss or damage to goods arriving from the interstate transportation **[*22]** of those goods by a common carrier. However, though "the Carmack Amendment's preemptive scope is broad, … it is not all-inclusive." *Schwarz v. Nat'l Van Lines, Inc*., No. 03 C 7096, 2004 U.S. Dist. LEXIS 9398, 2004 WL 1166632 at *4 (N.D.Ill. May 21, 2004). There is an exception to the Amendment's seemingly overarching preemptive powers, such that "liability arising from separate harms-apart from the

loss or damage of goods-is not preempted." *Rini*, 104 F.3d at 506. This exception has been embraced widely, resulting in the general rule that while "situations may exist in which the Carmack Amendment does not preempt all state and common law claims … only claims based on conduct separate and distinct from the delivery, loss of, or damage to goods escape preemption." *Smith*, 296 F.3d at 1248-49; *see also Gordon*, 130 F.3d at 289 ("the Carmack Amendment does not preempt those state law claims that allege liability on a ground that is separate and distinct from the loss of, or the damage to, the goods that were shipped in interstate commerce"); *Morris v. Covan World Wide Moving, Inc*., 144 F.3d 377, 383 (5th Cir. 1998). [2]

FOOTNOTES

[2] Some courts have recognized that claims for intentional torts, and specifically intentional infliction **[*23]** of emotional distress, may, under certain circumstances, be separate and distinct enough to escape the preemptive powers of the Carmack Amendment. *See generally Rini*, 104 F.3d at 506 ("a claim for intentional infliction of emotional distress alleges a harm to the shipper that is independent from the loss or damage to goods and, as such, would not be preempted"); *Gordon*, 130 F.3d at 286; *Hubbard v. All States Relocation Servs., Inc*., 114 F.Supp.2d 1374, 1380 (S.D.Ga. 2000); but *see Moffit v. Bekins Van Lines Co*., 6 F.3d 305, 307 (5th Cir. 1993) (holding that the Carmack Amendment preempts state law claims including those for intentional and negligent infliction of emotional distress); *Glass v. Crimmins Transfer Co*., 299 F.Supp.2d 878, 887 (C.D.Ill. 2004) (where claims for emotional distress and personal injury "arose directly from the carrier's mis-handling of the property and the subsequent claims," preemption applied). However, there is little explicit guidance as to what other claims may reside outside the reach of the Amendment.

Based on the reasoning in *Rini*, the any exception to the Carmack Amendment is a narrow one, as preemption applies not only to claims arising out of the physical **[*24]** transport of goods, but also from the claims process itself. *Rini*, 104 F.3d at 506 (Carmack preemption covers "all liability stemming from damage or loss of goods, liability stemming from the claims process, and liability related to the payment of claims"). Thus, to avoid preemption a party must allege conduct on the part of the carrier that is independent from the shipping and transportation of goods at issue, and even from the claims process that may follow -- something akin to an allegation of assault and injury inflicted by the carrier upon the shipper. *Rini*, 104 F.3d at 506; see also *Smith*, 296 F.3d at 1249 ("separate and distinct conduct rather than injury must exist for a claim to fall outside the preemptive scope of the Carmack Amendment"); *Roberts*, 394 F.Supp.2d at 1180 ("the Carmack Amendment preempts claims based on loss or damage to goods shipped in interstate commerce while claims based on conduct separate and distinct from the delivery, loss of, or damage to goods survive preemption").

Mr. Kashala argues that the harms he complains of involved more than a loss of property, but the damage of personal items lead to emotional damage which bring it outside the scope of the **[*25]** Carmack Amendment, and that as a result, preemption does not apply. However, Mr. Kashala does not present evidence of any conduct separate and apart from the transport of their goods and from the claims process undertaken, nor in fact does he specifically allege claims of emotional distress in his complaint. Mr. Kashala's damages stem directly from the shipment and delivery of their goods, and accordingly, fall under the Carmack umbrella.

Courts consistently have found that Carmack preemption covers nearly all damages arising out of the transportation and claims process. *See York v. Day Transfer Co*., 525 F.Supp.2d 289, 300 (D.R.I. 2007). Even claims based on lingering and consequential effects of conduct performed in the transportation, shipment, and claims process are subject to preemption, regardless of whether the alleged harm is to the person or to the property. *See id., citing Glass, 299 F.Supp.2d at 887 (where all claims relating to plaintiffs' household goods becoming moldy while stored by moving company all preempted by Carmack); see also Strike v. Atlas Van Lines, Inc*., 102 F.Supp.2d 599, 601 (M.D.Pa. 2000) (where gasoline spilled on goods during transport and exposed

shippers **[*26]** to noxious fumes causing lingering health problems, and where damages went beyond the loss of or value of the property itself, plaintiffs' claims were "not separate from the matter of the alleged damage or injury to the goods," and thus were within the scope of the Carmack Amendment); *Alessandra v. Mullen Bros.*, No. 98-5967, 1999 Mass. Super. LEXIS 399, 1999 WL 959684 (Mass. Super. Ct. Sept. 22, 1999) (dismissing shipper's claims, in reliance on *Rini*, where plaintiff suffered disabling health problems as a direct result of pesticide that had been spilled on her belongings while in storage by the defendant mover, and finding that because the plaintiff's injuries were so closely related to the performance of the shipping contract, preemption applied).

None of the facts alleged by Mr. Kashala give rise to conduct or harm sufficiently separate and distinct from the shipment and claims process as to warrant exemption from the preemptive reach of the Carmack Amendment. Mr. Kashala's claims against United all relate to the damage or loss of damaged goods or to his reaction to the ordeal, therefore they are not separate and apart from the Carmack Amendment's exclusive method of recovery." *See Rini*, 104 F.3d at 506. **[*27]** Furthermore, United's role as carrier falls squarely into the Carmack Amendment, particularly where the Amendment defines covered transportation services as being "services related to that movement, including arranging for, receipt, delivery, elevation, transfer in transit, … storage, handling, packing, [and] unpacking." *See* 49 U.S.C. § 13102(23)(B).

Because the Carmack Amendment preempts Mr. Kashala's claim of negligence against United, the Court need not reach Mr. Kashala's arguments that United's liability is not limited to $ 2.00 or the issue of whether Mr. Kashala's action is time-barred.

V. Conclusion

For the reasons set forth herein and after reviewing the summary judgment record in its entirety, the following motions are **GRANTED**:

1. Defendant United Van Lines, LLC's Motion for Summary Judgment (Docket No. 22);

2. Defendant Mobility Services International, LLC's Motion for Summary Judgment (Docket No. 27); and

3. Defendant McCollister's Moving and Storage, Inc.'s Motion for Summary Judgment (Docket No. 30).

/s/ Timothy S. Hillman

TIMOTHY S. HILLMAN

MAGISTRATE JUDGE

In