

2012 N.J. Super. Unpub. LEXIS 115, *

BLUE GULF INDUSTRIAL SUPPLY, CO., Plaintiff-Appellant, v. P.J.T. TRANSPORT, INC.,
Defendant/Third Party Plaintiff-Respondent, v. PETER ATUPULAZI, MARY ATUPULAZI, and
MUELLER STREAMLINE CO., Third Party Defendants-Respondents.

DOCKET NO. A-4956-09T3

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

2012 N.J. Super. Unpub. LEXIS 115

July 12, 2011, Argued
January 19, 2012, Decided

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PRIOR HISTORY: [*1]

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-2567-09.

CORE TERMS: shipment, CARMACK AMENDMENT, transportation, summary judgment, interstate carrier, interstate, carrier, shipped, transported, destination, intrastate, shipper, oral argument, storage facility, disputed issues, applicability, supplemental, genuinely, notice, leg, discrepancy, arrived, weighed, missing, copper, pounds

COUNSEL: Emeka Igwe argued the cause for appellant Blue Gulf Industrial Supply, Co. and respondents Peter Atupulazi and Mary Atupulazi (The Killino Firm, attorneys; Mr. Igwe, on the brief).

Randy T. Pearce argued the cause for respondent P.J.T. Transport, Inc. (Pearce Law, L.L.C., attorneys; Mr. Pearce, Lisa DeMarco and Jonah B. Kimmelstiel, of counsel; Mr. Pearce and Mr. Kimmelstiel, on the brief).

JUDGES: Before Judges Sapp-Peterson and Ashrafi.

OPINION

PER CURIAM

In this appeal, plaintiff, Blue Gulf Industrial Supply Company, appeals from the trial court order granting defendant, P.J.T. Transport, Inc., summary judgment and dismissing plaintiff's complaint arising out of a commercial shipping transaction. In dismissing the complaint, Judge Hector Velazquez, in an oral opinion, concluded plaintiff's complaint was barred by the statute of limitations. We affirm.

In August 2006, plaintiff contracted with Mueller Streamline Company ("Mueller") to purchase goods which plaintiff intended to be shipped to Nigeria. The goods originated at Mueller's location in Ansonia, Connecticut, from which they were shipped to defendant's [*2] facility in South Kearny, New Jersey, where they were stored temporarily. From there, the goods were transported to Port Newark and then to Nigeria.

The shipment arrived at defendant's facility on August 21, 2006 and remained there, along with other goods plaintiff shipped to defendant's facility for storage. On November 2, defendant loaded plaintiff's goods in their entirety for shipment to Port Newark and then to Nigeria. The weight of the shipment at that time was 41,587 pounds. However, when the shipment was weighed at Port Newark, the goods weighed 31,180 pounds, reflecting a 10,407-pound discrepancy. The goods were nonetheless shipped to Nigeria, in accordance with plaintiff's directive. The original shipment included sixteen pallets of goods received from Mueller. The shipment arrived in Nigeria later that month, where it was discovered that a significant amount of copper goods were missing from the shipment. The estimated weight of the missing copper was almost identical to the discrepancy in the shipment weight.

Plaintiff filed a claim for its losses with defendant, which defendant denied on April 6, 2007. On May 28, 2009, two years and forty-four days following the notice of **[*3]** disallowance of the claim, plaintiff filed a complaint seeking to recover damages from defendant for the lost or damaged goods. On January 21, 2010, defendant moved for summary judgment dismissing all counts of plaintiff's complaint as being barred by the Carmack Amendment, 49 U.S.C.A. § 14706, and the applicable limitations period.

The court conducted oral argument on March 5, 2010. During the argument, plaintiff's counsel, for the first time, argued that the Carmack Amendment was inapplicable for two reasons: (1) the interstate nature of the transaction ended when defendant took possession of the goods in New Jersey; and (2) defendant is neither a shipper nor interstate carrier. The court rejected both arguments:

In this case, the court rejects the argument that P.J.T. was not an interstate shipper nor interstate carrier. Clearly[,] this defendant was involved as part of the interstate leg of the shipment. The shipment was delivered to P.J.T. [and] held in the warehouse with the intent that P.J.T. was to deliver that shipment to Port Newark for ultimate shipment to Nigeria.

I think under the facts of this case, clearly the defendant P.J.T. qualifies as a shipper and interstate carrier **[*4]** under our federal statute and federal case law.

After concluding the transaction was subject to the Carmack Amendment, the court considered the timeliness of plaintiff's complaint and concluded that under the controlling statute, 49 U.S.C.A. § 14706(e)(1), the two-year period during which plaintiff could have filed a claim commenced on the date defendant gave plaintiff notice that it was disallowing the claim, which in this case was April 6, 2007, well beyond the two-year period. Concluding there were no genuinely disputed issues of fact to preclude the grant of summary judgment, Judge Velazquez granted defendant's motion. The present appeal followed.

On appeal, plaintiff raises the following points for our consideration:

*POINT [I]*THE LOWER COURT ERRED IN GRANTING TRANSPORT'S MOTION FOR SUMMARY JUDGMENT SINCE THERE EXISTED MATERIAL DISPUTED FACTS OF DESTINATION OF GOODS IN QUESTION.

POINT [II]

BLUE GULF'S CAUSES OF ACTION WERE NOT BARRED BY THE TIME PROVISIONS OF THE CARMACK AMENDMENT GIVEN THE NATURE OF THE CONTRACT WITH TRANSPORT.

We affirm the judgment substantially for the reasons expressed by Judge Velazquez in his oral opinion of March 5, 2010. We add the following brief remarks.

"The Carmack Amendment to the Interstate Commerce Act, [*5] 49 U.S.C.A. § 14706, established a national uniform policy governing the liability of interstate carriers for loss or damage to property entrusted to them." *Industrial Risk Ins. v. United Parcel Service*, 328 N.J. Super. 584, 590, 746 A.2d 532 (App. Div. 2000). The scope of its applicability is determined by reference to 49 U.S.C.A. § 13501, which governs the transportation by motor carrier of passengers and property and, in pertinent part, extends the reach of the Carmack Amendment to motor carrier - by transportation of property:

(1) between a place in --

(A) a State and a place in another State; [or] . . .

(E) the United States and a place in a foreign country to the extent the transportation is in the United States

We agree with Judge Velazquez that the underlying shipment is subject to the Carmack Amendment. We find no merit to plaintiff's claim that defendant is not a motor carrier. There is no dispute that after storing plaintiff's goods at its storage facility in Kearny, defendant transported the goods to Port Newark for shipment to its final destination. We note, as defendant sets forth in its brief, that plaintiff, in its supplemental submission to the motion judge, after raising this issue [*6] for the first time during oral argument and being given an opportunity to submit a supplemental brief later that same day, acknowledged defendant transported the goods. Plaintiff argued, however, the shipment was "intrastate" transportation. We therefore reject any attempt by plaintiff, on appeal, to suggest that defendant was not a carrier subject to the Carmack Amendment but simply a storage facility. Likewise, the fact that a portion of the shipment may have been intrastate does not remove the Carmack Amendment's applicability to this transportation. *Project Hope v. M/V IBN SINA*, 250 F.3d 67, 75 (2d Cir. 2001) (noting "if the final intended destination at the time the shipment begins is a foreign nation, the Carmack Amendment applies throughout the entire portion of the shipment taking place within the United States, including intrastate legs of the shipment."). Consequently, there were no genuinely disputed issues of material fact present and Judge Velazquez properly applied the law to the undisputed facts. *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520, 528-29, 666 A.2d 146 (1995).

Affirmed.

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