*2012 U.S. Dist. LEXIS 96974, *; 2012 AMC 1934*

HARTFORD FIRE INSURANCE CO. a/s/o EVERGREEN SOLAR, INC., Plaintiff, -v- EXPEDITORS INTERNATIONAL OF WASHINGTON, INC., et al., Defendants.

10 Civ. 5643 (KBF)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2012 U.S. Dist. LEXIS 96974; 2012 AMC 1934

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CORE TERMS: carrier, container, bill of lading, transport, loaded, Lading, carriage, shipper, Carmack Amendment, freight forwarder, undisputed, loading, summary judgment, transportation, delivery, shipment, solar, cargo, sea, good condition, damaged, sealed, facie, material fact, bill of lading, maritime, domestic, freight, authenticity, delivering

COUNSEL: **[*1]** For Hartford Fire Insurance Co., as subrogor of Evergreen Solar, Inc., Plaintiff: Raymond A. Selvaggio, LEAD ATTORNEY, Pezold, Smith, Hirschmann & Selvaggio, LLC, Huntington, NY; Gerard Frank Smith, PRO HAC VICE, Pezold Smith Hirschmann & Selvaggio, LLC (NJ), Denville, NJ.

For Intransit Container, Inc., also known as ICI Trucking, Inc., Defendant, Cross Defendant: Barry Neil Gutterman, Barry N Gutterman & Associates, P.C, Bedford Hills, NY.

JUDGES: KATHERINE B. FORREST, United States District Judge.

OPINION BY: KATHERINE B. FORREST

OPINION

MEMORANDUM & ORDER

KATHERINE B. FORREST, District Judge:

On July 23, 2010, plaintiff Hartford Fire Insurance Co. ("plaintiff" or "Hartford") (as subrogee for the insured--Evergreen Solar, Inc. ("Evergreen")) commenced this action, seeking recovery from, inter alia, defendant Intransit Container, Inc. ("Intransit") for certain freight damaged in transit--specifically, 81 solar panels. (See Compl. (Dkt. No. 1); Am. Compl. (Dkt. No. 3) ¶ 7.)[1] Hartford asserted claims for breach of contract and negligence against Intransit. (See Am. Compl. ¶¶ 3-8). Jurisdiction in this action is premised upon Rule 9(h) of the Federal Rules of Civil Procedure alleging a maritime claim, as well as under **[*2]** 46 U.S.C. § 30701 et seq. (the Carriage of Goods by Sea Act ("COGSA")) and/or 49 U.S.C. § 14706 (the Carmack Amendment) . (Id. ¶ 1.)

FOOTNOTES

1 Hartford voluntarily dismissed this action with prejudice against defendants Expeditors International of Washington, Inc. and Expeditors International Ocean, Inc. (Dkt. No. 45.)

After the close of discovery, Intransit moved for summary judgment on all claims against it. (Dkt. No. 29.) The motion was fully submitted as of April 5, 2012. (Dkt. No. 41.) For the reasons set forth below, Intransit's motion for summary judgment is GRANTED.

BACKGROUND[2]

FOOTNOTES

2 The following facts are undisputed unless otherwise noted.

Expeditors International of Washington ("Expeditors") hired Intransit to transport an empty ocean container (known as HJCU 422816) to Evergreen in Devens, Massachusetts and after having the container loaded by Evergreen, to deliver it to the APM Terminal in Elizabeth, New Jersey. (Def. 56.1 Stmt. ("Def. 56.1") (Dkt. No. 33) ¶ 5.)

Evergreen loaded container HJCU 4222816 and subsequently sealed it with seal NA 313039. (Gutterman Decl. Ex. F (Pl.'s Responses to Intransit's RFAs) ¶ 10.) On June 29, 2009, Intransit issued a "Pickup/Delivery Receipt," listing Intransit's **[*3]** "client" as Expeditors and the entity that delivered the container as Evergreen. (Decl. of Barry N. Gutterman in Support of Mot. for Summ. J. ("Gutterman Decl.") (Dkt. No. 31) Ex. C.)[3] That receipt bears the certification, "Container received in good condition. Seal number for import container was verified and intact." (Id.) No exceptions were noted on the delivery receipt. (Gutterman Decl. Ex. F ¶ 12; see also Gutterman Decl. Ex. C.)

FOOTNOTES

3 Plaintiff disputes the authenticity of the documents attached to the Gutterman Declaration, except for Exhibit F (Hartford's Responses to Intransit's RFAs), "for purposes of trial and leaves Defendant to its proof." (See Pl.'s Resp. to Def.'s Rule 56.1 Stmt, of Material Facts ("Pl. 56.1 Resp.") (Dkt. No. 39) ¶¶ 6-10.) Hartford fails to support that statement with admissible evidence creating a triable issue of fact over the authenticity of the documents. Accordingly, the Court accepts those documents as true and correct copies of what they purport to be.

As an aside, although Hartford disputes the authenticity of Exhibit B to the Gutterman Declaration--the straight bill of lading, Hartford itself attaches the identical straight bill of lading as Exhibit **[*4]** 1 to the Affirmation of Raymond A. Selvaggio submitted in opposition to the summary judgment motion. (See Aff. of Raymond A. Selvaggio in Opp'n to Mot. for Summ. J. ("Selvaggio Aff.") (Dkt. No. 37) Ex. 1.)

On July 2, 2009, Intransit's driver delivered HJCU 4222816 with seal "NA 313039" intact. (Id. ¶ 11.) Intransit avers that (1) Evergreen sealed the container; (2) at no time during Intransit's transport of HJCU 4222816 was the container open and visible for inspection by Intransit's driver; (3) and Intransit had no knowledge of how the container was loaded and secured. (Defs. 56.1 ¶¶ 13, 17.) There is no evidence that HJCU 4222816 had any damage to its exterior. (Defs. 56.1 ¶ 17.)

Expeditors issued a Bill of Lading on July 6, 2009 (the "Bill of Lading"), listing Evergreen as the Shipper and Soleil Energie SAS ("Soleil") as the consignee. (Gutterman Decl. Ex. A at 1; see also id. ¶ 6.) (Expeditors is the "Carrier" as defined in the Bill of Lading. (Gutterman Decl. Ex. A ¶ 1 (a).) The Bill of Lading lists the place of Evergreen's receipt as Devens, the port of loading as New York, NY and the place of delivery to Soleil as Fos-Sur-Mer, France. (Gutterman Decl.

Ex. A at 1.) The Bill of **[*5]** Lading contains a choice of law provision, stating that it "has effect subject to," inter alia, COGSA. (Id. at 3.)

The Bill of Lading contains three other provisions which bear on the instant motion. First, it contains a "Limitation of Liability" provision which reads, in pertinent part,

> LIMITATION OF LIABILITY. (1) All claims for which the Carrier may be liable shall be adjusted and settled on the basis of Shipper's net invoice cost plus freight and insurance premium, if paid. In no event shall the Carrier be liable for any loss of profit and any consequential loss. (2) As far as the loss of or damage to or in connection with the Goods occurred during part of the carriage to which [COGSA] . . . appl[ies] (a) the Carrier shall not be liable for loss or damage in an amount exceeding $500.00 . . . per package or per customary freight unit as the case may be . . . , and (b) where the cargo has been either packed into containers(s) [sic] or unitized into similar article(s) of transport by or on behalf of the Shipper it is expressly agreed that the number of such container(s) or similar article(s) of transport shown on the face hereof shall be considered as the number of package (s) or unit(s) **[*6]** for the purpose of the application of the limitation of liability provided herein. . . .

(Gutterman Decl. Ex. A ¶ 22.)

The Bill of Lading also limits liability "[w]here the stage of carriage during which the loss of or damage to the Goods cannot be provided"--in that instance, "it will be presumed that the loss or damage occurred during that portion which is considered sea carriage under this bill . . . ." (Id. ¶ 2(b).)

Third, the Bill of Lading contains a sub-contracting provision which reads, in pertinent part:

> SUB-CONTRACTING: EXEMPTIONS AND IMMUNITIES OF SERVANTS, AGENTS & SUB-CONTRACTORS. The Carrier shall be entitled to sub-contract on any terms the whole or any part of the handling, storage or carriage of the Goods and any and all duties whatsoever undertaken by the Carrier in relation to the Goods. The Shipper [i.e., Evergreen] shall indemnify the Carrier against any claims, which may be made upon the Carrier by any servant, agent or sub-contractor of the Carrier in relation to the claim against any such person made by the Shipper. . . .

(Id. Ex. A ¶ 26.)

The manner in which HJCU 4222816 was loaded by Evergreen is contested. The facts relating to loading are contained exclusively **[*7]** in an affidavit submitted by plaintiff in opposition to the motion--i.e., the Affidavit of Christian M. Ehrbar, the current President and Chief Executive Officer of Evergreen and Evergreen's former General Counsel during the time period relevant to the instant action. (Aff. of Christian M. Ehrbar ("Ehrbar Aff.") (Dkt. No. 36) ¶¶ 1, 6.) The Ehrbar Affidavit recounts the facts related to loading based upon Ehrbar's "oversight and review [of] Evergreen's operations, as well as insurance matters on behalf of Evergreen." (Id. ¶ 6.) The affidavit, however, does not lay a foundation for Mr. Ehrbar's personal knowledge of the loading for HJCU 4222816. Rather, Mr. Ehrbar provides a description of the loading from "review of documents, prior discussions with other employees, and/or opinions based on my experience and knowledge of the operations [at] Evergreen"--not on any direct work loading HJCU 4222816. The Court thus finds that plaintiff's additional facts regarding loading supported by the Erbhar Affidavit (see Pl.'s Resp. to Def.'s Rule 56.1 Stmt. of Material Facts ("Pl. 56.1 Resp.") (Dkt. No. 39) ¶¶ 22-26, 28, 30) are not admissible for purposes of this motion. See Sec. Ins. Co. of Hartford v. Old Dominion Freight Line, Inc., 391 F.3d 77, 84 (2d Cir. 2004) **[*8]** (discounting a similar affidavit because the affiant "made no such claim of personal familiarity with respect to this particular shipment").

Plaintiff has also submitted a copy of the Report of Survey conducted on August 31, 2009 (the "Survey") by Gerard Gruez--a claims administrator for Hartford. (See Aff. of Raymond A. Selvaggio in Opp'n to Mot. for Summ. J. ("Selvaggio Aff.") (Dkt. No. 37) Ex. 5.) Intransit does not dispute either the authenticity or the contents of the Survey, but disputes that Gruez can be presented as an expert (which plaintiff does not assert it is doing) to assess the condition or extent of the damaged panels. (See Def. Resp. to Pl.'s Rule 56.1 Stmt. ("Def. 56.1 Resp.") (Dkt. No. 40) ¶ 32.) The Court accepts the facts in the Survey as facts only--not as the assessment of an expert. See Fed. R. Evid. 702, 703.

The Survey states that HJCU 4222816 was loaded on June 7, 2009 in New York and was delivered on the Genin Logistique premises (part of Soleil) on August 6, 2009. (Selvaggio Aff. Ex. 5 at 4.) At the time of receipt, the receiver (presumably a Soleil employee) noted that there was "glass on the pallets" and that "[a]11 pallets are damaged." (Id.) The receiver **[*9]** further noted that there were "broken panels [and] defective packaging." (Id.) Gruez noted, however, that the remark regarding "defective packaging" was "inappropriate." (Id.) The Survey contains a detail of broken panels and concludes that "81 panels" total sustained damage. (Id. at 6.) That finding is in direct contradiction to Hartford's assertion (supported only by the Erhbar Affidavit) that all 392 panels were damaged in transit. (See Pl. 56.1 Resp. ¶ 4.) Gruez surmised that the damage occurred as a result of the container "bump[ing] on the ground and/or [being] shake[n], while handling." (Selvaggio Aff. Ex. 5 at 7.) He concluded, however, "It is not possible to know on which place the matter happened," but that "[p] ackaging is not involved. The other containers have been delivered without damage inside." (Id.)

DISCUSSION

A. Legal Standard

Summary judgment may not be granted unless all of the submissions taken together "show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R Civ. P. 56(c). The moving party bears the burden of demonstrating "the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). **[*10]** In making that determination, the court must "construe all evidence in the light most favorable to the nonmoving party, drawing all inferences and resolving all ambiguities in its favor." Dickerson v. Napolitano, 604 F.3d 732, 740 (2d Cir. 2010).

Once the moving party has asserted facts showing that the non-movant's claims cannot be sustained, the opposing party must "set out specific facts showing a genuine issue for trial," and cannot "rely merely on allegations or denials" contained in the pleadings. Fed. R. Civ. P. 56 (e); see also Wright v. Goord, 554 F.3d 255, 266 (2d Cir. 2009). "A party may not rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment," as " [m]ere conclusory allegations or denials cannot by themselves create a genuine issue of material fact where none would otherwise exist." Hicks v. Baines, 539 F.3d 159, 166 (2d Cir. 2010) (citations omitted). In addition, self-serving affidavits, sitting alone, are insufficient to create a triable issue of fact and defeat a motion for summary judgment. See BellSouth Telecommc'ns, Inc. v. W.R. Grace & Co.-Conn., 77 F.3d 603, 615 (2d Cir. 1996). Only disputes relating **[*11]** to material facts--i.e., "facts that might affect the outcome of the suit under the governing law"--will properly preclude the entry of summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); see also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) (stating that the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts").

B. Carmack Amendment versus COGSA

The parties dispute whether COGSA or the Carmack Amendment applies to this action. Intransit

argues that COGSA, not the Carmack Amendment, applies to the shipment at issue because Carmack "does not apply to cargo moving under a through bill of lading to or from a nonadjacent foreign country." (Mem. of Law in Support of Mot. for Summ. J. ("Def. Mem.") (Dkt. No. 30) at 14; see also Def. Reply Mem. to Pl.'s Opp'n ("Reply Mem.") (Dkt. No. 41) at 5-8.) Plaintiff argues that Carmack does indeed apply, relying exclusively on Judge Jones' decision in American Home Assurance Co. v. Panalpina, Inc., No. 07 CV 10 947, 2011 U.S. Dist. LEXIS 16677, 2011 WL 666388 (S.D.N.Y. Feb. 16, 2011). (Mem. of Law in Support of Pl.'s Opp'n to Def. Mot. for Summ. J. ("Pl. Opp'n") **[*12]** (Dkt. No. 38) at 8.)[4] It is worth noting that plaintiff asserted jurisdiction for this action under both COGSA and Carmack. (Am. Compl. ¶ 1.)

FOOTNOTES

4 Plaintiff likely argues for application of Carmack because "the Carmack Amendment provides shippers, such as Evergreen, a strict liability remedy without the need to prove fault or which carrier was responsible for the loss." (See Pl. Opp'n at 7.)

The Carmack Amendment governs the terms of bills of lading issued by domestic rail carriers. See 49 U.S.C. § 11706(a).[5] Carmack imposes liability for damage caused during the rail route under the bill of lading against "receiving rail carrier[s] " and "delivering rail carrier[s]," irrespective of which of the two caused the damage. 49 U.S.C. § 11706(a). "Carmack's purpose is to relieve cargo owners of the burden of searching out a particular negligent carrier from among the often numerous carriers handling an interstate shipment of goods." Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp. ("Regal-Beloit") (130 S. Ct. 2433, 2441, 177 L. Ed. 2d 424 (2010) (quotation marks omitted). It is undisputed that Carmack applies to motor carriers, in addition to rail carriers. Royal & Sun Alliance Ins., PLC v. Ocean World Lines, Inc., 612 F.3d 138, 145 (2d Cir. 2010).

FOOTNOTES

5 Carmack **[*13]** provides, in pertinent part,

> (a) A rail carrier providing transportation or service subject to the jurisdiction of the [Surface Transportation Board (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--
>
> > (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.

49 U.S.C. § 11706; see also 49 U.S.C. § 14706(a) (motor carriers).

COGSA, on the other hand, 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; **[*14]** see also Regal-Beloit, 130 S. Ct. at 2440. However, carriers may only be liable under COGSA for damage occurring "when the goods are loaded on to the time when they are discharged from the ship." 46 U.S.C. § 1301(e). COGSA liability expands--only upon the agreement of the carrier and the shipper--"for loss or damage to or in connection with 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; see also Hartford Fire Ins. Co. v. Orient Overseas Containers Lines, Ltd., 230 F.3d 549, 557 (2d Cir. 2000).

In Regal-Beloit, the Supreme Court examined the relationship between COGSA and the Carmack Amendment--i.e., "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 limitations in another federal statute [i.e., the Carmack Amendment]." 130 S. Ct. at 2439. It found that "[a]pplying **[*15]** Carmack's provisions to international import shipping transport would undermine the purpose of COGSA, to facilitate efficient contracting in contracts for carriage by the sea." Id. at 2447. Thus, the Supreme Court held that "[Congress] has not imposed Carmack's regime, textually and historically limited to the carriage of goods received for domestic rail transport, onto what are essentially maritime contracts." Id. at 2449.

Regal-Beloit also established a two-part test for determining whether Carmack applied to a specific transport of goods:

> 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. As explained below, ascertaining the shipment's point of origin is critical to deciding whether the shipment includes a receiving rail carrier.

Id. at 2443.

The bottom line in determining Carmack's applicability is whether "the carrier functioned as a receiving **[*16]** rail carrier," Mitsui Sumitomo Ins. Co., Ltd. v. Evergreen Marine Corp., 621 F.3d 215, 219 n.4 (2d Cir. 2010)--i.e., "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. However, the Carmack Amendment makes clear that

> [a] freight forwarder is both the receiving and delivering carrier. When a freight forwarder provides service and uses a motor carrier providing transportation subject to jurisdiction under subchapter I of chapter 135 to receive property from a consignor, the motor carrier may execute the bill of lading or shipping receipt for the freight forwarder with its consent. With the consent of the freight forwarder, a motor carrier may deliver property for a freight forwarder on the freight forwarder's bill of lading, freight bill, or shipping receipt to the consignee named in it, and receipt for the property may be made on the freight forwarder's delivery receipt.

49 U.S.C. § 14706(a)(2).

The facts before the Court on Intransit's role in the transport of HJCU 422816 are undisputed. Expeditors contracted with Evergreen for the through movement from the U.S. to Soleil in France. **[*17]** It is undisputed that Expeditors is the freight forwarder for the transport at issue. (See Gutterman Decl. Ex. A at 1.) It is further undisputed that Intransit transported HJCU 422816 (i.e., an empty ocean container) to Evergreen in Devens, Massachusetts and, then delivered the container after it was loaded by Evergreen to the APM Terminal in Elizabeth, New Jersey. (Def. 56.1 ¶ 5.) In other words, Expeditors only "contracted a small portion of the move to Intransit, and instructed and permitted Intransit to pick up the cargo from the consignee in

Massachusetts pursuant to Expeditors bill of lading and Shipping receipt"--i.e., Intransit was an intermediate carrier for the freight forwarder. (Def. Reply at 8, 9.)

On those facts, it is undisputed that Expeditors--not Intransit--is the receiving carrier. See 49 U.S.C. § 14706(a)(2). Because Carmack does not apply to "mere delivery carrier[s]," Royal & Sun Alliance Ins., 612 F.3d at 146, it cannot--and thus does not--apply to Intransit.

There are two additional reasons why Carmack does not apply in this instance.

First, plaintiff sued based upon the Bill of Lading issued by Expeditors and thus, is bound by its terms. See A.P. Moller-Maersk A/S v. Ocean Express Miami, 550 F. Supp. 2d 454, 464 (S.D.N.Y. 2008). **[*18]** The Bill of Lading clearly states that COGSA applies to Expeditors and its subcontractors. (Gutterman Decl. Ex. A ¶ 2.)

Second, as discussed above, "[Congress] has not imposed Carmack's regime . . . onto what are essentially maritime contracts." Regal-Beloit, 130 S. Ct. at 2449. Where a bill of lading "requires substantial carriage of goods by sea, its purpose is to effectuate maritime commerce--and thus it is a maritime contract." Nofolk Southern Railway Co. v. Kirby, 543 U.S. 14, 27, 125 S. Ct. 385, 160 L. Ed. 2d 283 (2004). The Bill of Lading--and the undisputed facts regarding the transport--evidence that a "substantial part" depended carriage of the goods to France via sea.

For all of those reasons, the Court finds that COGSA, not the Carmack Amendment, applies to the question of liability before the Court.

C. Intransit's Liability Under COGSA

To establish a prima facie case of liability against a carrier under COGSA, the shipper (here, Hartford standing in Evergreen's shoes) must prove "'both delivery of the goods to the carrier . . . in good condition, and outturn by the carrier . . . in damaged condition.'" Atl. Mut. Ins. Co., Inc. v. CSX Lines, L.L.C., 432 F.3d 428, 433 (2d Cir. 2005) (quoting Transatlantic Marine Claims Agency, Inc. v. M/V OOCL Inspiration, 137 F.3d 94, 98 (2d Cir. 1998)). **[*19]** Although the issuance of a clean bill of lading is typically "prima facie evidence of receipt of the goods described," 46 U.S.C. § 30703 (c); see also Atl. Mut. Ins. Co., 432 F.3d at 433, it does not constitute such prima facie evidence "of the condition of the goods shipped in sealed packages where the carrier is prevented from 'observing the damaged condition had it existed when the goods were loaded," Bally, Inc. v. M.V. Zim Am., 22 F.3d 65, 69 (2d Cir. 1994) (quoting Caemint Foods Inc. v. Brasileiro, 647 F.2d 347, 352 (2d Cir. 1981) (Friendly, J.)); see also Sec. Ins. Co. of Hartford, 391 F.3d at 83 ("[W]here the contents of a shipment are not visible or open for inspection, as may be the case when cargo is transferred to the carrier in a sealed container, a clean bill of lading is not sufficient to establish delivery of the goods in good condition."). In the case of a sealed container, the shipper must present evidence other than the clean bill of lading to demonstrate that the goods were delivered to the carrier in good condition. Bally, Inc, 22 F.3d at 69; Sec. Ins. Co. of Hartford, 391 F.3d at 84 ("[W]hen a carrier is prevented from independently inspecting cargo, the plaintiff **[*20]** must present additional evidence, either direct or circumstantial, in order to establish the initial contents and condition of the cargo.").

Only after the plaintiff has established a prima facie case does the burden shift to the carrier-to prove one of the statutory COGSA exceptions to liability. Atl. Mut. Ins. Co., 432 F.3d at 433. Those defenses include where the alleged loss or damage arose from "act or omission of the shipper or owner of the goods or their agent," or where the loss or damage arose from "insufficiency of package." 46 U.S.C. §§ 30706(b)(6)-(7).[6]

FOOTNOTES

[6] As stated in the Survey (and not contradicted by Intransit), "Packaging is not

involved" (Selvaggio Aff. Ex. 5 at 7), and thus, that exception does not apply here.

It is undisputed that Evergreen provided HJCU 422816 sealed with seal NA 313039--i.e., that Intransit did not have an opportunity to inspect the goods contained in HJCU 422816 upon receipt for transport. Thus, Hartford bears the burden of proving by undisputed, admissible evidence that the solar panels were packaged and then provided to Intransit in good condition. See Bally, Inc, 22 F.3d at 69; Sec. Ins. Co. of Hartford, 391 F.3d at 84. Hartford has failed to do **[*21]** so here.

The only "evidence" adduced by Hartford in support of its contention that the solar panels were loaded in good condition--and provided to Intransit as such--are the facts contained in the Ehrbar Affidavit regarding how the solar panels were loaded. As discussed above, the Ehrbar Affidavit, based upon Mr. Ehrbar's second-hand knowledge of how panels were typically loaded by Evergreen and upon his assertion that "this was the only freight damage claim that Evergreen filed with its insurer" during Ehrbar's "entire employment at Evergreen" (see Ehrbar Aff. ¶¶ 9, 20),[7] is inadmissible on this motion.

FOOTNOTES

[7] Ehrbar does concede that "[d]uring [his] entire employment at Evergreen, [he] was aware that a few shipments occasionally sustained minor damages to one or two panels." (Ehrbar Aff. ¶ 21.)

Plaintiff also asserts that the Survey's contention that "packaging was not involved" is prima facie evidence that the goods were delivered by Evergreen to Intransit in good condition. That, however, is not enough to sustain plaintiff's burden on this motion. What the Survey does conclude is that it is that "[i]t is not possible to know on which place the matter happened." (Selvaggio Aff. Ex. 5 at **[*22]** 7.) The Survey does not support the contention that improper loading by Evergreen of HJCU 422816 did not cause the damage to the 81 solar panels at issue.

Without more, plaintiff has failed to adduce evidence regarding the condition of the solar panels at the time of delivery from Evergreen to Intransit, and thus, cannot make out a prima facie case of liability against Intransit. See Bally, 22 F.3d at 69. Accordingly, summary judgment in Intransit's favor is appropriate.

CONCLUSION

For the aforementioned reasons, defendant Intransit Container, Inc.'s motion for summary judgment is GRANTED. Judgment shall be entered in Intransit' s favor.

The Clerk of the Court is directed to terminate the motion at Docket No. 29 and to terminate this action.

SO ORDERED:

Dated: New York, New York

July 9, 2012

/s/ Katherine B. Forrest

KATHERINE B. FORREST

United States District Judge

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