

Federal Court



Cour fédérale

Date: 20170508

Docket: T-1376-14

Citation: 2017 FC 460

Ottawa, Ontario, May 8, 2017

PRESENT: Madam Prothonotary Mireille Tabib

BETWEEN:

**CERTAIN UNDERWRITERS AT LLOYD'S
AND SOLINE TRADING LTD.**

Plaintiffs

and

**MEDITERRANEAN SHIPPING COMPANY
S.A.**

Defendant

and

**4103831 CANADA INC. (OPERATING AND
DOING BUSINESS UNDER THE TRADE
NAME OF TRANS SALONIKIOS**

Third Party

ORDER AND REASONS

[1] The Third Party, 4103831 Canada Inc., d.b.a. Trans Salonikios (“Trans Salonikios”), makes this motion to dismiss the third party claim made against it by Mediterranean Shipping

Company S.A. (“MSC”) on the basis that it discloses no reasonable cause of action over which this Court has jurisdiction. For the reasons that follow, the motion will be granted.

[2] The following are the facts set out in the pleadings and over which there is no contestation.

[3] The Defendant, MSC, is a transportation company offering transportation of goods by sea. In June 2013, pursuant to a contract of carriage evidenced by a bill of lading, MSC agreed to carry a container said to contain frozen shrimp from the Port of Guayaquil, Ecuador, to the Port of Montreal, Canada.

[4] The container was discharged in Montreal on June 26, 2013 and stored at Termont Terminal’s yard in Montreal, awaiting pick-up. On that same date, Trans Salonikios, a trucking company, showed up at Termont to take possession of the container. Termont released the cargo to Trans Salonikios. However, Trans Salonikios had not been mandated by the consignee of the cargo, the Plaintiff Soline Trading Ltd., but had either unlawfully obtained the release code for the purpose of stealing the cargo or had been dispatched by person or persons unknown who had unlawfully obtained the release code. The cargo was never delivered to its rightful owner. The Plaintiff therefore sues MSC, as carrier, holding it liable for wrongful delivery of the cargo.

[5] MSC denies that it is liable for the loss. It alleges – although the Plaintiff vehemently contests this – that the contract of carriage was at an end the minute the cargo was discharged and placed in the possession of Termont. Nevertheless, MSC has taken a third party action

against Trans Salonikios, seeking indemnity against it for any judgment that might be rendered against MSC in favour of the Plaintiff, on the basis that the loss occurred as a result of the unlawful and negligent actions of Trans Salonikios.

[6] Trans Salonikios asserts that this Court has no jurisdiction over the third party claim made against it by MSC. MSC argues that a determination of the Court's jurisdiction is premature at this stage of the proceedings and that it is not plain and obvious that this Court does not have jurisdiction pursuant to its general jurisdiction over claims arising by virtue of Canadian Maritime Law pursuant to section 22(1) of the *Federal Courts Act*, RSC 1985, c. F-7.

[7] The Plaintiffs take no position on the jurisdictional issues, but caution that the Court should not, in determining the motion, make any determination of fact that would affect their claim against MSC and might be binding on the trial judge. In particular, the Plaintiffs urge that the Court should not purport to determine the merits of MSC and Trans Salonikios' arguments to the effect that the contract of carriage by sea entered into between MSC and the cargo owners had come to an end at the time the cargo was released to Trans Salonikios.

[8] I do not need to determine that issue, as I am satisfied that the Court has no jurisdiction over any claim for indemnity brought by MSC against Trans Salonikios, whether or not the contract of transportation was at an end.

[9] None of the parties to this litigation allege the existence of a contractual relationship between Trans Salonikios on the one hand, and either of the Plaintiffs or MSC on the other hand.

However, counsel from MSC insisted at the hearing on the following factual circumstances, which he says were established at discoveries:

- that Trans Salonikios has recognized that it had a duty to MSC to return the container empty after it had been delivered and unloaded by its recipient and that it would be liable to MSC if it failed to do so;
- that Termont Terminal acts as agent for MSC in releasing cargo to truckers authorized to receive it;
- that the container in which the cargo was stowed was a refer container box, which Termont was required to keep in a designated area and which it had to plug-in and monitor, and that MSC could be held liable to the cargo owner if Termont had failed in its duty to do so; and
- that, as is required by modern methods of sea transportation, of logistics of transit and of movement of containerized cargo, there is a great degree of integration between the operations of Termont and the operations of Trans Salonikios. Truckers like Trans Salonikios must be vetted and certified by Termont; they have access to the terminal's computer system to track the availability of containers and to ensure that they have the correct equipment for pickup.

[10] No evidence of these facts has been adduced on this motion. Nevertheless, I have taken them into consideration as if they were allegations in the pleadings, and will proceed to consider whether, if all alleged facts are taken as proven, it is plain and obvious that this Court has no jurisdiction to hear the third party claim.

[11] Any claim against Trans Salonikios in this matter, whether it had been made directly by the Plaintiffs against Trans Salonikios or by way of MSC's third party claim for indemnity or contribution, can only be based in tort or extra-contractual liability. That liability would be based on Trans Salonikios' role as the trucker mandated by thieves to pick up the cargo from the marine terminal, or as a thief stealing directly from the terminal. Such a cause of action does not pertain to Canadian Maritime Law and does not, by any stretch of the imagination, relate to maritime or admiralty matters.

[12] MSC argues that its third party claim, being based on the theft of cargo from the sea terminal, is indistinguishable from the claim considered in the seminal case of *ITO - International Terminal Operators v Miida Electronics Inc.*, [1986] 1 SCR 752. That claim was for theft of cargo stored at a sea terminal and the Supreme Court of Canada found that it was governed by Canadian Maritime Law and within the jurisdiction of the Federal Court. In making that determination, the Supreme Court found that:

21. (...)

It is clear, in my view, that such incidental storage by the carrier itself or by a third party under contract to the carrier is also a matter of maritime concern by virtue of the "close, practical relationship of the terminal operation to the performance of the contract of carriage" (*per* Le Dain J. in the Court of Appeal). It may then be concluded that cargo handling and incidental storage before delivery and before the goods pass from the custody of a terminal operator within the port area is sufficiently linked to the contract of carriage by sea to constitute a maritime matter within the ambit of Canadian maritime law, as defined in s. 2 of the *Federal Court Act*.

[13] MSC further argues that the present circumstances meet the “three significant factors” that defined the maritime nature of the case in *ITO*:

22. At the risk of repeating myself, I would stress that the maritime nature of this case depends upon three significant factors. The first is the proximity of the terminal operation to the sea, that is, it is within the area which constitutes the port of Montreal. The second is the connection between the terminal operator’s activities within the port area and the contract of carriage by sea. The third is the fact that the storage at issue was short-term pending final delivery to the consignee. In my view, it is these three factors, taken together, which characterize this case as one involving Canadian maritime law.

[14] However, the cause of action asserted here is against Trans Salonikios, a trucker, while the causes of action in *ITO* were asserted against the ocean carrier and the terminal operator. MSC’s claim against Trans Salonikios is not a claim based on the execution of a contract of carriage of goods by sea or a claim based on the duties and liabilities of the operator of a sea terminal. What MSC puts at issue in its claim against Trans Salonikios is not MSC’s obligations as a ship operator or as a carrier of goods by sea, or the obligations of Termont as the operator of a sea terminal, but strictly Trans Salonikios’ obligations as a trucker or its conduct as a thief.

[15] The situation of Trans Salonikios as a land carrier whose negligence causes damage to goods that had previously been carried by sea is much more similar to that of the truckers in *Matsuura Machine Corp. v Hapag Lloyd AG*, [1997] FCJ No. 360, *Sio Export Trading Co. v The “Dart Europe”*, [1984] 1 FC 256 and *Marley Co. v Cast North America (1983) Inc.*, [1995] FCJ No 489 than to that of the terminal operator in *ITO*.

[16] It was determined in *Matsuura* that the transportation by a land carrier, even if under contract to the ocean carrier, and even where the land carrier's part in the carriage forms part of a continuous movement, is not so "integrally connected to maritime matters as to be legitimate Canadian Maritime Law within federal legislative competence".

[17] In *The "Dart Europe"*, negligence of the land carrier was also alleged. There, the packaging of a machine carried in an open top container had been damaged during sea transportation. The ocean carrier had arranged for the machine and container to be sent to a repair shop in Dorval to be repackaged and properly secured prior to continuing with the contract of carriage. The machine was damaged while being carried back from the repair shop to the port of Montreal by a trucker hired by the ocean carrier. The Federal Court held that "the land transport operation undertaken by Godin from the Dorval repair shop to the Port of Montreal cannot be considered so "closely connected" to the voyage by sea as to be "part and parcel" of the marine activities essential to the carriage of goods by sea."

[18] Finally, in *Marley Co.*, where a rail carrier's negligence caused damage to a cargo being transported pursuant to a through bill of lading, the Court found it had no jurisdiction over a claim against the rail carrier:

19. (...) It is not because a contract of carriage by rail or by land is entered into in the context of a through bill of lading, a portion of which calls for carriage by sea, that the former contracts necessarily fall within the jurisdiction of this Court. I am certainly not prepared to accept that a contract to carry goods by rail or by truck in the United States, Canada or Europe is within the maritime jurisdiction of this Court simply because they are part of the ongoing movement of a container between Shiller Park, Illinois, to Tiel, Holland.

(...)

21. In my view, in no way can it be argued that Soo Line's activities are, in the sense that the terminal operator's activities in ITO were, part and parcel of the contract of carriage by sea.

[19] In the circumstances of this case, where Trans Salonikios is not even alleged to be contractually bound to any party to the contract of carriage by sea, it is even clearer that its activities are not part and parcel of the carriage by sea and that an action against it does not fall within the maritime jurisdiction of this Court.

[20] MSC argues that the case at issue is a matter of misdelivery. It submits that the proper delivery of containers is, pursuant to modern methods of transport logistics and movement of containerized cargo, handled by terminal operators on behalf of shipping lines, and requires intricate logistical integration between the terminal operator's activities and the trucker's activities. These facts are at play in this litigation, and the Court must accordingly reassess the limits of Canadian Maritime Law in light of evolving technology and practices.

[21] MSC's argument misses the point. It has already been recognized that terminal operators' activities are integrally connected to maritime matters and that their duties towards shipping lines and cargo owners are thus governed by Canadian Maritime Law; that would include terminal operators' duties to deliver the container to the proper consignee. The integration of the logistics between the terminal operator and truckers does not bring the matter of the trucker's activities within federal jurisdiction by association. The cause of action asserted by MSC against Trans Salonikios in this matter may arise because the terminal operator failed in its duties to ensure proper delivery, but it is not founded on the breach of the terminal operator's duties. It is founded

solely on the extra-contractual responsibility of Trans Salonikios, as trucker or thief, towards MSC.

[22] The integration of activities and logistics between Termont and Trans Salonikios is part of the *res gestae* in this matter, but it does not modify or affect the legal relationship between MSC as ocean carrier and Trans Salonikios as trucker. That relationship remains, as always, a matter governed by the law of the provinces.

[23] Finally, MSC argues that the Federal Court should hear the third party claim as a matter of judicial economy, as it would be wasteful and give rise to the risk of contradictory judgements if the third party claim were determined in a different court when it involves the same facts and evidence. This argument has already been considered and rejected by this Court in *The “Dart Europe”*, above:

12. I am aware, of course, of the desirability of keeping all the parties concerned with the outcome of an action as parties to the action. But, however desirable it may be to have the land carrier joined with the cargo owner, the shipper, the ocean carrier, the vessel and the consignee, in the same action, especially where it is alleged that the land carrier is the negligent party, still desirability or expediency cannot clothe a court with a jurisdiction it does not otherwise possess. Both the imagination of this Court and the Constitution of this country would have to be stretched to the breaking point in order to consider a collision on a highway within a province to be an admiralty matter coming under federal jurisdiction.

[24] MSC’s third party claim against Trans Salonikios is accordingly dismissed, with costs in favour of Trans Salonikios.

[25] The determination of this motion did not turn on the determination of whether or not the contract of carriage between the cargo owners and MSC was at an end, and none of the arguments of MSC or of Trans Salonikios depended or relied on such a determination. As such, the Plaintiffs' concerns and insistence that MSC and Trans Salonikios agree that the Court's findings could not bind the trial Judge were without foundation. The Plaintiffs' participation in this motion was unnecessary. Costs will accordingly not be awarded against or in favour of the Plaintiffs.

ORDER

THIS COURT ORDERS that

1. The motion of the Third Party is granted, with costs against the Defendant;
2. The Third Party Claim against the Third Party is dismissed, with costs against the Defendant.

"Mireille Tabib"

Prothonotary

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-1376-14

STYLE OF CAUSE: CERTAIN UNDERWRITERS AT LLOYD'S AND
SOLINE TRADING LTD. v MEDITERRANEAN
SHIPPING COMPANY S.A. AND 4103831 CANADA
INC. (OPERATING AND DOING BUSINESS UNDER
THE TRADE NAME OF TRANS SALONIKIOS

PLACE OF HEARING: MONTREAL, QUEBEC

DATE OF HEARING: MAY 1, 2017

ORDER AND REASONS: TABIB P.

DATED: MAY 8, 2017

APPEARANCES:

James Manson FOR THE PLAINTIFFS

Giovanni F. De Sua FOR THE DEFENDANT

Jean-François Bilodeau FOR THE THIRD PARTY

SOLICITORS OF RECORD:

FERNANDES HEARN L.L.P. FOR THE PLAINTIFFS
Barristers and Solicitors
Toronto, Ontario

ASTELL LACHANCE DU FOR THE DEFENDANT
SABLON DE SUA
Barristers and Solicitors
Montreal, Quebec

ROBINSON SHEPPARD
SHAPIRO
Barristers and Solicitors
Montreal, Quebec

FOR THE THIRD PARTY