

MOSES S. WALKER, Appellant

v.

ROBERT KINNEY, Appellee

Civil Appeal No. 57

Appellate Division of the High Court

Mariana Islands District

February 3, 1970

Trial Court Opinion—5 T.T.R. 149

Before **TURNER, Associate Justice**, **BURNETT, Associate Justice**

TURNER, Associate Justice

When an appeal is taken and it is neither briefed nor argued by the appellant, this Court should not be required to search the record to ascertain whether or not there is a valid appeal, and we decline to do so.

The appeal herein is dismissed for want of prosecution and for failure to comply with Rule 31c of the Rules of Criminal Procedure (also applicable in civil actions).

GUERRERO FAMILY INC., Appellant

v.

MICRONESIAN LINE INC., Appellee

Civil Appeal No. 61

Appellate Division of the High Court

April 6, 1970

Trial Court Opinion—5 T.T.R. 156

(Cases not reported)

Appeal from decision of Trial Division of High Court upholding limitation of action contained in bill of lading. The Appellate Division of the High Court, D. Kelly Turner, Associate Justice, held that parties could properly contract for a shorter period for limitation of action than that contained in statute and that where they had done so they would be bound by such agreement.

Affirmed.

1. Civil Procedure—Limitation of Actions

The bar of limitations need not be ascertained upon the face of the complaint, it may be raised by facts in affidavit or exhibit for the purpose of summary judgment.

2. Civil Procedure—Limitation of Actions

Since a motion to dismiss challenges the pleadings without supplementation the bar of the statute of limitations must be apparent on the face of the complaint before the dismissal motion can raise the bar.

3. Civil Procedure—Generally

A motion to dismiss and a motion for summary judgment are not the same either procedurally or in the results reached.

4. Civil Procedure—Motion to Dismiss—Federal Rules

Rule 12b of the Federal Rules of Civil Procedure authorize a motion to dismiss for failure to state a claim for relief or for other listed grounds. (Fed. Rules of Civil Proc., Rule 12b)

5. Judgments—Summary Judgment—Federal Rules

If it becomes necessary to supplement a motion to dismiss with matters outside the pleadings; such as depositions, affidavits, admissions and exhibits; then the motion to dismiss is treated as one for summary judgment under Federal Rules of Civil Procedure, Rule 56. (Fed. Rules of Civil Proc., Rule 56)

6. Judgments—Summary Judgment—Federal Rules

Where the motion for summary judgment was made under Federal Rule 56 and documents showing the bar of limitations were filed in support, it became incumbent upon opposing party under Rule 56 to controvert the motion by presenting facts indicating the limitation was not applicable. (Fed. Rules of Civil Proc., Rule 56)

7. Judgments—Summary Judgment—Federal Rules

When a motion for summary judgment is made and supported as provided in Rule 56, an adverse party may not rest upon the mere allegation or denials of his pleading, but his response, by affidavits or otherwise, must set forth specific facts showing that there is a genuine issue for trial and if he does not so respond, summary judgment, if appropriate, will be entered against him. (Fed. Rules of Civil Proc., Rule 56(e))

8. Civil Procedure—Limitation of Actions

Summary judgment is appropriate as a matter of law to raise the bar of limitations.

GUERRERO FAMILY INC. v. MICRONESIAN LINE INC.

9. Carriers—Bills of Lading—Acceptance

Acceptance of a bill of lading without objection is assent to it.

10. Carriers—Bills of Lading—Generally

A bill of lading is an instrument of two-fold character and is at once a receipt and a contract.

11. Carriers—Bills of Lading—Generally

As a receipt a bill of lading is an acknowledgment of the receipt of the property on board his vessel by the owner of the vessel.

12. Carriers—Bills of Lading—Generally

As a contract a bill of lading is a contract to carry safely and deliver.

13. Carriers—Bills of Lading—Generally

The receipt of goods lies at the foundation of the contract to carry and deliver, thus if no goods are actually received there can be no valid contract to carry or to deliver.

14. Carriers—Bills of Lading—Liability

Bills of lading when signed by the master, duly executed in the usual course of business, bind the owners of the vessels if the goods were laden on board or were actually delivered into the custody of the master, but it is well settled law that the owners are not liable if the party to whom the bill of lading was given had no goods or the goods described in the bill of lading were never put on board or delivered into the custody of the carrier or his agent.

15. Carriers—Bills of Lading—Liability

A bill of lading imports a receipt of goods to be transported and delivered at the place of destination, but it extends only to the goods actually received or within the control of the carrier or their representatives.

16. Carriers—Bills of Lading—Liability

The carrier is not responsible for a deficiency in the quality, as compared to that described in the bill of lading, if he safely delivers the very goods he actually received for transportation.

17. Carriers—Contract of Carriage

A contract of carriage is entire and indivisible; it is made for one cargo and for one voyage.

18. Civil Procedure—Limitation of Actions

The policy of statutes of limitations is to encourage promptness in the bringing of action, that the parties shall not suffer by loss of evidence from death or disappearance of witnesses, destruction of documents, or failure of memory.

19. Carriers—Bills of Lading—Limitation of Actions

There is nothing in the policy of statutes of limitations, or object of such statutes, which forbids the parties to an agreement to provide for a shorter period of limitation, provided the time is not unreasonably short, which is a question of law for determination of the court, and

shorter periods of limitation in bills of lading are very customary and have been upheld in a multitude of cases.

Counsel for Appellant: ROGER ST. PIERRE, ESQ., *Public Defender*

Counsel for Appellee: E. R. CRAIN, ESQ.

Before BURNETT, *Associate Justice* and TURNER, *Associate Justice*

TURNER, *Associate Justice*

Appellant, a Micronesian corporation, sued appellee, a common carrier doing business in the Trust Territory, for alleged breach of a contract of carriage of scrap metal from Saipan to Okinawa.

Before answering, appellee filed a motion for summary judgment on the ground appellant's claim was barred by the terms of the contract of carriage contained in the bill of lading which, among other things, required suit for "loss or damage" be brought within one year after the delivery of the goods. With the motion appellee filed copies of the bill of lading and of the ship's log showing discharge of the cargo of scrap metal completed May 18, 1967. Suit was filed May 28, 1968.

The record shows some confusion as to the nature of the proceedings before the trial court. Appellant filed a "Memorandum in Opposition to Motion to Dismiss" with the trial court and before this court briefed questions of law appropriate to an adverse ruling on a motion to dismiss.

Appellant submitted argument on the question whether or not the "bar of the statute of limitations [must] clearly appear from the face of the complaint" before a motion to dismiss may be granted. The question is not before this court since the adverse ruling appealed from was entry of summary judgment and not a dismissal.

[1,2] The rule is clear that the bar of limitations need not be ascertained upon the face of the complaint but that

it may be raised by facts in affidavit or exhibit for the purpose of summary judgment. Since a motion to dismiss challenges the pleadings without supplementation the bar of the statute must be apparent on the face of the complaint before the dismissal motion can raise the bar.

[3-5] Attention is called to these procedural questions because the motion to dismiss and the motion for summary judgment are not the same either procedurally or in the results reached. Under Rule 9b, Trust Territory Rules of Civil Procedure, we are referred to the Federal Rules of Civil Procedure as controlling proceedings in this court. Rule 12b of the Federal Rules authorizes a motion to dismiss for failure to state a claim for relief or for other listed grounds. If, however, it becomes necessary to supplement the motion to dismiss with matters outside the pleadings; such as depositions, affidavits, admissions and exhibits; then the motion is treated as one for summary judgment under Rule 56.

[6] In this case the motion was for summary judgment, not to dismiss, under Federal Rule 56 and documents showing the bar of limitations were filed in support. Thereupon it became incumbent upon Appellant under Rule 56 to controvert the motion by presenting facts indicating the limitation was not applicable. Appellant made no showing of this nature although it argued estoppel.

A similar procedural situation occurred in *Reynolds v. Needle*, 132 F.2d 161, in which the Court said:

“Appellant contends there were issues of material fact because there might possibly be facts which would toll the statute of limitations and avoid the plea. But he alleged no such facts and raised no such issues. If he had such facts to allege he might have amended his complaint, served affidavits, or asked permission to reply. He did none of these things.”

[7] Had the appellant in the case before this court submitted facts, if available, which would prevent application

of the time bar to the claim, it could have avoided its extensive argument on the rule that a complaint need not anticipate a defense. An amended complaint, an affidavit or other reply to appellee's motion could have been employed. Appellant's position was not jeopardized merely because an affirmative defense was not anticipated and avoided in the complaint. Under Federal Rule 56(e) all the plaintiff need do to meet his obligation is to submit factual allegations controverting application of the bar:

"When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegation or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

[8] This appeal, then, must be concerned only with whether or not summary judgment was appropriate as a matter of law because no factual issues were raised by appellant which would have precluded application of the limitations bar. We first note that summary judgment is appropriate as a matter of law to raise the bar. An extensive annotation on the subject is found at 61 A.L.R.2d 341.

Because a genuine factual controversy as to the availability of the defense of limitations has not been raised, the Court therefore only considers appellant's arguments on the law in which it is urged the defense is insufficient as a matter of law. It also is observed argument in support of the merits of appellant's claim is not material to the decision. The court is not concerned with whether or not appellant had a valid claim against appellee. The sole question on appeal is whether or not appellant lost the right to assert that claim because of its failure to bring its action within one year from the date of final discharge of the cargo.

Appellant approaches the question from two directions:

1. That the bill of lading issued by appellee for the carriage of the cargo in question with its one year limitation did not bind the appellant; and

2. That "partial performance" of an "entire and indivisible" contract of affreightment, evidenced by the bill of lading, did not start time running within which suit could be brought.

As to the first of these questions, it is argued that the bill of lading is not binding as a contract because the appellant did not assent to it because "plaintiff" was "an uneducated, unlettered, trusting and dependent Micronesian of Chamorro descent" and that:

"Under the circumstances, the probability that plaintiff knowingly assented to the term on the reverse of the bill of lading is non-existent."

We do not believe appellant intended to mislead this court by such arguments. It is abundantly evident the appellant is a Micronesian corporation "duly organized and doing business under the laws of the Trust Territory" according to paragraph 1 of appellant's complaint and not an individual, Chamorro or otherwise. Much more serious than careless argument that appellant, as an individual did not accept the bill of lading and therefore was not bound by it, is the insistence that appellee was bound by the bill of lading to deliver one thousand tons of scrap to Okinawa and that the appellee was not "at liberty" to treat delivery "of one third of the cargo as full delivery and elect to breach his contract, and arbitrarily elect that the limitation of which plaintiff was unaware would commence to run." The court rejects any suggestion the bill of lading was not binding upon the shipper but did obligate the carrier.

[9] Acceptance of a bill of lading without objection is assent to it. *Wells Fargo & Co. v. Neiman-Marcus Co.*, 227 U.S. 469, 33 S.Ct. 267; 13 Am. Jur. 2d, Carriers, Sec.

273. The record shows the bill of lading contained on its face the customary provision that upon accepting the bill the shipper agrees "to be bound by all of its stipulations, exceptions and conditions."

Since the bill of lading was the contract between the parties, regardless of the physical and mental condition of a corporate agent or employee, is it proper to argue that "partial performance," that is delivery of part of the scrap metal described on the face of the bill, did not permit the appellee to start the time limitation running?

The bill of lading provided for shipment from Saipan to Okinawa:

"One lot said to be 1,000 S/T of scrap metal, 2,000,000 lbs. F.I.O."

Delivery of "one lot" was full performance and started time running. But assuming, as appellant argues, that delivery of the cargo carried was only a portion of one thousand tons (and there is nothing in the record to substantiate this); either one-third or one-fourth or some other portion; did the time within which suit could be brought start to run when performance was complete by delivery of "one lot" or when appellee notified appellant it intended to breach the contract at the time of partial performance or at the time performance should have been complete? This argument—which clearly is one of law rather than on an issue of fact—is not only a contradiction in terms as to the nature of a suit for breach of contract but, more importantly, misconstrues the nature of a bill of lading as a contract for carriage.

[10-13] In *Pollard v. Vinton*, 105 U.S. 7, 26 L.Ed. 998, the United States Supreme Court speaking of the nature and effect of a bill of lading said:

"It is an instrument of two-fold character. It is at once a receipt and a contract. In the former character, it is an acknowledgment of the receipt of the property on board his vessel by the owner

of the vessel; in the latter, it is a contract to carry safely and deliver. The receipt of the goods lies at the foundation of the contract to carry and deliver. If no goods are actually received, there can be no valid contract to carry or to deliver.”

[14] In an earlier decision the same Court said in *The Delaware v. Oregon Iron Co.*, 81 U.S. 579, 20 Fed. 779 at 783:

“Bills of lading when signed by the master, duly executed in the usual course of business, bind the owners of the vessels if the goods were laden on board or were actually delivered into the custody of the master, but it is well settled law that the owners are not liable if the party to whom the bill of lading was given had no goods or the goods described in the bill of lading were never put on board or delivered into the custody of the carrier or his agent. Citing.”

[15] Again it is said in *Strohmeyer v. American Lines SS Corp.*, 97 F.2d 360:

“The bill of lading delivered has not the legal effect contended for by the appellant. It imports a receipt of goods to be transported and delivered at the place of destination, but it extends only to the goods actually received or within the control of the carrier or their representatives.”

[16] And finally, from *St. Louis I. M. & S. Ry Co. v. Knight*, 122 U.S. 79, 7 S.Ct. 1132:

“. . . the carrier is not responsible . . . for a deficiency in the quality, as compared to that described in the bill of lading, if he safely delivers the very goods he actually received for transportation.”

[17] Regardless of how many tons of scrap metal “one lot” might be, the contract, evidenced by the bill of lading, provided for delivery of the cargo loaded on board. A contract of carriage is “entire and indivisible” as appellant suggests. It is made for one cargo for one voyage. There is no provision in the bill nor evidence of an understanding between the parties that there be more than one shipment nor more than one bill of lading. To suggest the time bar provisions of the contract did not begin to run

when the cargo was discharged ignores the applicable law.

Appellant also offers the theory equitable estoppel should prevent appellee's employment of the time bar. The trial court could find no allegations raising issues of facts pertaining to estoppel. Appellant seeks to remedy this oversight by arguing before the court:

" . . . the allegations of plaintiff clearly specify the unconscionable conduct of the defendant, viz., entering into a contract which he (sic) had no intention of performing; demanding, receiving, accepting pre-paid freight; refusal to perform; refusal to refund the unearned portion of the prepaid freight and his unconscionable attempt to invoke the assistance of the law to ratify his conduct and insure the unjust enrichment to the damage and prejudice of the plaintiff; etc., etc.,"

These allegations are argumentative conclusions as to appellant's entitlement to recover for breach of contract. Assuming these conclusions were capable of proof as facts, and further assuming that if it ever became necessary to do so appellee would dispute them, they would, indeed, be issues of fact on the merits. They are not issues applicable to estoppel against the employment of the time bar. They relate to the merits, whereas the estoppel applicable here, if it exists, depends upon some unconscionable conduct by appellee which prevented or deterred appellant from bringing suit within the time limit. Such conduct is neither alleged nor suggested. Clearly, estoppel is not applicable.

In its complaint appellant alleged the customary conclusions found in tort action to support punitive damages. The facts, if any, upon which were founded the conclusions that "defendant's conduct was wilful, wanton, and unjustified" were not presented to the trial court nor here. If this were a tort action, rather than a suit for breach of a contract of carriage, and if the conclusions were supported by provable facts, punitive damages might lie. But there is

no relationship between these allegations and a showing of facts creating an estoppel against employment of the time limitation bar. These allegations relate to the claim not to estoppel.

Whatever merits there may have been to the claim appellant waited too long to assert it and a court may not consider it until it is shown the time bar may be avoided. This court, nor for that matter the trial court, was not in a position to consider appellant's claims nor appellee's answers to the claims. The bar of limitations which appellee is not shown to be estopped to employ is decisive. A similar holding was made by Justice Holmes in *Ellis v. Davis*, 260 U.S. 682, 43 S.Ct. 243, when he said:

"We find it unnecessary to consider other defenses besides the contract limitation, as we agree with the court below that that disposes of the case."

Appellant urges that the contract limitation in the bill of lading issued by appellee is invalid. It also argued it is not binding upon appellant, but that theory has been demonstrated to be untenable. The question, therefore, to be decided is whether or not the one-year limitation in the bill of lading is invalid or whether it bars an action on the contract.

[18, 19] Appellant suggests that the time bar is a foreign statute of limitations since it is the same time limitation provided in the Federal Carriage of Goods by Sea Act, Title 46, U.S.C.A., Sec. 1300 *et seq.* and that the Federal act is not applicable to the Trust Territory. The limitation appellee relies upon is contained in the contract between the parties not in any Federal statute. That this is appropriate is pointed out by the U.S. Supreme Court in *Missouri, K. & T. R. Co. v. Harriman Brothers*, 227 U.S. 657, 33 S.Ct. 397 at 401:

"The policy of statutes of limitations is to encourage promptness in the bringing of action, that the parties shall not suffer by loss of

evidence from death or disappearance of witnesses, destruction of documents, or failure of memory. But there is nothing in the policy or object of such statutes which forbids the parties to an agreement to provide a shorter period, provided the time is not unreasonably short. That is a question of law for the determination of the Court. . . . Such limitation in bills of lading are very customary and have been upheld in a multitude of cases. Citing."

Finally, appellant asserts it is entitled to refund of prepaid freight because there was not a carriage of the quantity of scrap metal for which freight was paid. Applicant interprets the limitation in the contract for recovery for "loss or damage (including misdelivery or conversion) unless suit is brought within one year after the delivery of the goods" to apply only to loss of goods or damage to goods. It is too narrow an interpretation. All loss or damage under the contract is involved, not just loss or damage to the goods. All claims arising out of the contract between the parties are barred by the failure to bring suit within one year from the date of the discharge of the cargo.

The five questions presented and argued by appellant are necessarily answered adversely to it. Paraphrased these are:

I. Whether a foreign statute of limitations is applicable and, if so, is a one-year period in contrast to the Trust Territory six-year period reasonable?

No foreign statute is involved, the time limitation is a contractual provision. A one year and even shorter limitation has been found reasonable in many cases.

II. Whether the complaint and memorandum raised issues of fact precluding summary judgment.

The only question of fact to be considered concerned the application of the time bar. None was raised as to the propriety of its employment. As a matter of law summary judgment based upon the bar was appropriate.

III. A statute of limitations must appear on the face of the complaint to be subject to attack by a motion to dismiss.

The motion employed was for summary judgment, not to dismiss. There is a significant difference between the two.

IV. Whether wrongful conduct which has been relied upon gives rise to estoppel precluding employment of the time bar.

No conduct was shown which appellant relied upon to justify its failure to bring suit. Whatever appellee said, did or thought, if any, to mislead appellant it did not relate to appellant's delay in filing suit.

V. Whether the limitation upon suit for "loss or damage" prevented claim for refund of unearned prepaid freight. Loss or damage applies to all claims under the contract including a payment of alleged unearned prepaid freight, if any. Aside from pleading the point, no facts were presented to substantiate the pleader's conclusion.

The Judgment below was correct as a matter of law. It is Affirmed.

YUSHIN KANESHIMA, Appellant

v.

TRUST TERRITORY OF THE PACIFIC ISLANDS, Appellee

Criminal Appeal No. 31

Appellate Division of the High Court

May 4, 1970

Trial Court Opinion—4 T.T.R. 340

Appeal from conviction of unlawful entry into Trust Territory waters and unlawful removal of marine resources. The Appellate Division of the High Court, Robert K. Shoecraft, Chief Justice, H. W. Burnett, Associate Justice, held that appellant's absence from the jurisdiction precluded court's consideration of his appeal.

Appeal dismissed.