

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

TAKUMI MANUFACTURING COMPANY,
a Michigan corp.,

Plaintiff,

Case No. 2013-4681-CK

vs.

THE UPS STORE #5418, and
UNITED PARCEL SERVICE, INC.,

Defendants.

OPINION AND ORDER

This matter is before the court on defendant United Parcel Service, Inc.’s (“UPS”) motion for summary disposition. Plaintiff Takumi Manufacturing Company (“Takumi”) has filed a response and requests that the motion be denied. Defendant The UPS Store #5418 (“Store #5418”) has filed a concurrence and joinder to the instant motion.

I. BACKGROUND

Plaintiff Takumi Manufacturing Company uses Store #5418 to ship auto parts. On September 16, 2013, Takumi’s representative, Andrew Batz (“Batz”), brought auto parts to Store #5418 to be shipped to London, Kentucky. The auto parts were shipped using UPS 2nd Day Air service and no value was declared. Store #5418 is an independently owned and operated franchisee of The UPS Store.¹ Store #5418 contracted with UPS to ship the auto parts. Takumi alleges that the auto parts were damaged while in defendants’ custody. Takumi further alleges that the damage resulted in a loss of over \$65,000.00.

¹ Store #5418 (Mailing & More LLC d/b/a UPS Store #5418) is a third-party retailer and not an agent of UPS.

On November 22, 2013, Takumi filed a complaint alleging four counts: (1) Breach of Contract, (2) Negligence, (3) Conversion, and (4) Violation of the Michigan Consumer Protection Act. On September 5, 2014, UPS filed the instant motion for summary disposition. Subsequently, Store #5418 filed a concurrence and joinder as to UPS's motion for summary disposition. Takumi filed a response and requests that the motion be denied.

II. STANDARD OF REVIEW

The instant motion has been filed pursuant to MCR 2.116(C)(5)(8) and (10). A motion for summary disposition is proper when:

- (5) The party asserting the claim lacks the legal capacity to sue. . . .
- (8) The opposing party has failed to state a claim on which relief can be granted. . . .
- (10) Except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.

[MCR 2.116(C).]

A complaint's legal sufficiency is tested under (C)(8). *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). If the nonmoving party's claim "is clearly so unenforceable as a matter of law that no factual development could establish the claim and justify recovery[.]" then the motion for summary disposition pursuant to (C)(8) should be granted. *Id.* Furthermore, "[a]ll well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Id.* The court may only consider the pleadings on a motion under (C)(8). MCR 2.116(G)(5). When a claim or defense is based on contract, "a copy of the instrument or its pertinent parts must be attached to the pleading as an exhibit." MCR 2.113(F). Once attached, the exhibit becomes part of the pleadings. *Id.*

MCR 2.116(C)(10) tests the factual sufficiency of the claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). When evaluating a (C)(10) motion, "a trial court

considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties... in the light most favorable to the party opposing the motion.” *Id.* If the proffered evidence fails to establish a genuine issue of material fact, summary disposition is appropriate. *Id.* There is a “genuine issue of material fact... when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.” *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). When responding to a (C)(10) motion for summary disposition, “an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her.” MCR 2.116(G)(4).

III. ARGUMENTS OF THE PARTIES

In its motion for summary disposition, UPS first argues that Takumi’s breach of contract, negligence, conversion, and Michigan Consumer Protection Act claims are preempted by federal common law, which is analyzed similar to the Carmack Amendment to the Interstate Commerce Act, 49 USC 14706. Under this theory, UPS argues that Takumi does not have standing to sue because Store #5418 is the shipper – not Takumi. UPS next contends that, even if Takumi is able to bring a claim as a third-party beneficiary, Takumi’s recovery is limited to \$100 under the terms of the UPS Tariff because no value was declared for the auto parts.

In response to UPS’s motion, Takumi does not appear to contest that the state-law claims are preempted by federal common law. However, Takumi maintains that they do have standing to sue and are, at least, able to bring a third-party beneficiary claim. Moreover, Takumi contends that the UPS Tariff is not controlling because Takumi did not agree to the terms and

agreement of the tariff. Takumi alleges that they were never given the UPS Tariff or any form that showed it elected to limit damages to any specific amount.

IV. LAW & ANALYSIS

Since Takumi does not dispute the preemption argument, and the prevailing case law supports this position,² the court finds that federal common law preempts Takumi's claims based on alleged breach of contract, negligence, conversion, and violation of the Michigan Consumer Protection Act. Accordingly, the court will now address liability under the federal common law, which is analyzed similar to claims under the Carmack Amendment.³ The Carmack Amendment provides that a "carrier. . . [is] liable to the person entitled to recover under the receipt or bill of lading." 49 USC 14706. "A bill of lading is a contract between the *carrier* and the *shipper*." *OneBeacon Ins Co v Haas Indus, Inc*, 634 F3d 1092, 1098 (CA 9, 2011) (emphasis added).

1. Claims Against Store #5418

With respect to Takumi's potential claims against Store #5418, the relationship between Takumi and Store #5418 is governed by The UPS Store Parcel Shipping Order (PSO) Terms and Conditions, which is signed by Takumi's employee, Batz. Specifically, paragraph three provides:

We do not transport Your parcels. We assume no liability for the delivery of the parcels accepted for shipment or for loss or damage by any cause to the parcels or their contents while in transit. You agree carrier's liability for lost or damaged

² See e.g., *Fuller v Laidlaw, Inc*, unpublished opinion per curiam of the Court of Appeals, issued November 1, 2002 (Docket No. 231601), p. *2 (recognizing that the Carmack Amendment preempts state-law remedies for lost or damaged baggage); see also *Treiber & Straub, Inc v UPS, Inc*, 474 F3d 379, 387 (CA 7, 2007).

³ While the Carmack Amendment applies to motor and railway carriers, "[Congress] has also expressly preempted any state law governing the validity of limited liability contracts of air carriers." *Ins Co of N Am v Fed Exp Corp*, 189 F3d 914, 925 (CA 9, 1999). The federal common law applies to claims against air carriers, and the analysis is "patterned upon the policy of the Carmack Amendment." *First Pennsylvania Bank, NA v E Airlines, Inc*, 731 F2d 1113, 1122 (CA 3, 1984). Additionally, the court's analysis for "deciding when air carriers may contractually limit their liability for loss of or damage to shipped cargo faces neither a 'routine' contract claim. . . nor 'run-of-the-mill' injury claims." *Read-Rite Corp v Burlington Air Express, Ltd*, 186 F3d 1190, 1197 (CA 9, 1999), as amended on denial of reh and reh en banc (Sept. 27, 1999).

parcels is limited by the provisions in this PSO. You agree to all terms and conditions on this PSO whether or not declared value is purchased.

[Store #5418's Exhibit A.]

Accordingly, pursuant to the paragraph three of the PSO, Takumi cannot maintain a claim against Store #5418 for damage caused to the items shipped.

2. *Claims Against UPS*

The court finds that Takumi has standing to bring an action against UPS. The argument that a plaintiff lacks standing to sue in this situation “has been repeatedly rejected by federal and state courts, which have held that the owner of the shipped goods is the undisclosed principal of the store, and may bring an action directly against a common carrier such as UPS. . . . Plaintiff, as customer, stands in the shoes of [The UPS Store], as shipper.” *Tarr Technology Consulting, LLC v United Parcel Service, Inc*, unpublished order of the New York Supreme Court, entered September 2, 2014 (Docket No. 653301/2012) (citing *Gulf & W Indus, Inc v Old Dominion Freight Line, Inc*, 633 F Supp 688 (MDNC 1986); *Elich-Krumplet v United Parcel Serv, Inc*, 13 Misc 3d 1203(A); 824 NYS2d 753 (2006); *United Parcel Serv, Inc v Smith*, 645 NE2d 1 (Ind Ct App, 1994)).

In regards to liability, a carrier may limit its liability “to a value established by written or electronic declaration of the shipper, or by written agreement between the carrier and shipper if that value would be reasonable under the circumstances surrounding the transportation.” 49 USC 14706(c)(1)(A). “Under the federal common law, if a carrier wishes to enforce a limited liability provision, its contract must offer the shipper (1) reasonable notice of limited liability, and (2) a fair opportunity to purchase higher liability.” *Read-Rite Corp v Burlington Air Express, Ltd*, 186 F3d 1190, 1198 (CA 9, 1999), as amended on denial of reh and reh en banc (Sept. 27, 1999). Here, the UPS Tariff gave Store #5418 – the shipper – reasonable notice of the limited liability

and a fair opportunity to purchase higher liability. Store #5418 has knowledge of the tariff; Store #5418 is in the business of contracting with UPS for shipping services, and this interaction includes dealing with the Tariff on a frequent basis. Moreover, courts have held that published tariffs are incorporated into shipping contracts between the shipper and carrier. See e.g., *Natl Small Shipments Traffic Conference, Inc v United States*, 887 F2d 443, 446 (CA 3, 1989) (explaining that there is a “long-standing principle that a shipper is deemed to be aware of, and agrees to be bound by, the tariff under which it is shipping, and that before carriage can begin, the parties enter into a contract of carriage embodied in a bill of lading.”). Therefore, Store #5418 is bound by the terms and conditions of the UPS Tariff.

In the UPS Tariff that binds Store #5418, UPS establishes a value to limit liability:

50.2. Liability Limits

Whenever property is damaged or lost by UPS in the course of transportation, ***UPS’s maximum liability*** per domestic package or international shipment ***shall not exceed the lesser of:***

- \$100, when no value in excess of \$100 is declared on the Source Document or UPS Automated Shipping System used (or when a value in excess of \$100 is declared, but the applicable declared values charges are not paid);
- the declared value on the Source Document or UPS Automated Shipping System used when a value in excess of \$100 is declared and the applicable declared value charges are paid;
- the purchase price paid by the consignee (where the shipped property has been sold to the consignee);
- the actual cost of the damaged or lost property;
- the replacement cost of the property at the time and place of loss or damage; or
- the cost of repairing the damaged property.

[UPS Tariff 50.2; see UPS’s Mot. for Summ. Disp. Exhibit A.]

Under the terms of the UPS Tariff, UPS's maximum liability is \$100. Moreover, the UPS Tariff excludes recovery of consequential damages. UPS Tariff 50.3. Thus, any recovery by Store #5418 is limited to \$100. Since Takumi steps into the shoes of Store #5418, the court agrees that Takumi is bound by the terms of the UPS Tariff.

Takumi relies on *Anton v Greyhound Van Lines, Inc*, 591 F2d 103 (CA 1, 1978) for the proposition that they are not bound by UPS's Tariff. However, as UPS notes, *Anton* was explicitly overruled in *Hollingsworth & Vose Co v A-P-A Transp. Corp*, 158 F3d 617, 620 (CA 1, 1998), which was recognized in *Kemper*, 252 F3d 509, 515 (CA 1, 2001). Moreover, this reliance is misplaced because as a third-party beneficiary, Takumi would step into the shoes of Store #5418. *Kemper, supra* at 512 (holding that the subrogee of the shipper steps into the shippers shoes; thus, when the shipper had reasonable notice of the limitation of liability, the subrogee does not also need to have 'fair opportunity' to opt for higher coverage). In *Anton*, the shipper was the plaintiff, but in the case at bar, the plaintiff is not the shipper. Takumi's recovery is limited by the contract between Store #5418 and UPS.⁴ As noted above, Store #5418 is bound by the terms of the UPS Tariff; therefore, any recovery by Takumi is also limited by the Tariff because Takumi's rights stem from the relationship between Store #5418 and UPS.

Furthermore, the contract (The UPS Store Parcel Shipping Order Terms and Conditions) between Takumi and Store #5418 expressly states that liability will be limited to \$100 if no value is declared. The contract provides:

10. Declared Value Terms & Conditions. Declared value coverage will be available only if You have complied with all Declared Value Terms & Conditions. For an additional fee We will obtain declared value coverage for your shipment

⁴ This is analogous to the limited right to recovery in the situation where there is an intermediary carrier. In terms of limiting Carmack liability where there is an intermediary shipper, the United States Supreme court has held, "[w]hen an intermediary contracts with a carrier to transport goods, the cargo owner's recovery against the carrier *is limited by the liability limitation to which the intermediary and carrier agreed.*" *Norfolk S R Co v Kirby*, 543 US 14, 33; 125 S Ct 385; 160 L Ed 2d 283 (2004) (emphasis added).

through carrier designated on this PSO. We surcharge the cost of this product. You expressly acknowledge that the Value of each parcel does not exceed the amount you stated on the transaction receipt. If no amount is specified, You agree that the value of the parcel(s) shall not exceed \$100. If you refuse additional declared value coverage for items of greater value than \$100, You will be limited to a maximum declared value coverage of \$100. Each declared value provider designates monetary limit coverage. The declared value terms and conditions of the various carriers are located in the carrier service guide for coverage provided by the carriers and are also available at this location upon request. Consult the applicable Declared Value Terms & Conditions and terms of coverage for further information.

11. Limitations of Liability. Our Liability, the carriers liability for loss or damage to Your parcel is limited to Your actual damages or \$100 whichever is less, unless you declare and pay a higher authorized value. Declared value coverage is not available for items of sentimental value, precious metals, negotiable instruments, or prohibited items. . . Limitations of liability can be found in the carrier's service guide or tariff.

[Store #5418's Exhibit A.]

Despite Takumi's argument that they were unaware of the Tariff, Takumi was provided with – and signed – the PSO that explains the limitations on liability if no value is declared. The PSO also directs Takumi to the carrier's declared value terms and conditions in the tariff. Takumi had the opportunity to declare a value higher than \$100 – this was expressly laid out in the PSO. Further, pursuant to paragraph 10 and 11 of the PSO, Takumi agreed to be bound by the carrier's limitation of liability. Therefore, Takumi's recovery is limited by the tariff to \$100. However, Takumi's complaint does not allege an action under federal common law or the Carmack Amendment. Therefore, Takumi's claims, as stated, fail as a matter of law and must be dismissed. Further, if Takumi wishes to proceed with its third-party beneficiary claim it must amend its complaint.

V. CONCLUSION

For the reasons set forth above, defendants UPS and Store #5418's motion for summary disposition is GRANTED. However, pursuant to MCR 2.116(I)(5), the Court grants Takumi the

opportunity to amend its complaint as provided by MCR 2.118. Takumi must file its amended complaint within 21 days of the date of this Opinion and Order. In the event Takumi does not file an amended complaint within the proscribed period this matter will be closed. Pursuant to MCR 2.602(A)(3), this Opinion and Order neither resolves the last pending claim nor closes this case.

IT IS SO ORDERED.

/s/ John C. Foster
JOHN C. FOSTER, Circuit Judge

Dated: December 1, 2014

JCF/sr

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