Filed 9/25/13 Philippe's Watches v. United Parcel Service CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

PHILIPPE'S WATCHES, INC., Plaintiff and Respondent, v. UNITED PARCEL SERVICE, INC., Defendant and Appellant.	B244333 (Los Angeles County Super. Ct. No. SC109438)

APPEAL from a judgment of the Superior Court of Los Angeles County. Norman P. Tarle, Judge. Affirmed.

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Kermisch & Paletz and Jorge Velasco for Defendant and Appellant.

Resch Polster & Berger, Michael C. Baum, and Michael E. Byerts for Plaintiff and Respondent.

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United Parcel Service, Inc. (UPS) appeals from a judgment awarding $50,000 plus interest to Philippe's Watches, Inc. (Philippe's) based on claims that UPS lost a watch shipped by Philippe's. We affirm.

BACKGROUND

The parties stipulated to the truth of the following statement of facts: "[Philippe's] operates a retail watch store. [UPS] is a common carrier. In November 2009, Philippe's sent, via UPS, a package to a watch repair center on behalf of a customer. Philippe's claims that this package contained a watch worth more than $50,000. UPS delivered the package to the repair center the next day, but the package did not contain a watch when the package was opened. [¶] Philippe's paid UPS a fee in addition to the regular shipping charges to have a declared value of $50,000 for the package. Philippe's claims that this fee protects against damage for the contents of the package up to $50,000 in the event that the package was lost or stolen in the course of transportation. Philippe's then filed this lawsuit against UPS to recover the value of the watch. [¶] UPS denies Philippe's claims. First, UPS claims that the watch was never in the package. Second, UPS claims that even if the watch was lost in the course of transportation, Philippe's failed to take all of the required steps prior to filing suit to recover any damages."

When Philippe's shipped the package, UPS provided Philippe's with a shipment receipt. Under the heading "Responsibility for Loss or Damage," the shipment receipt states the following: "Unless a greater value is recorded in the declared value field as appropriate for the UPS shipping system used, the shipper agrees that the released value of each package covered by this receipt is no greater than $100, which is a reasonable value under the circumstances surrounding the transportation. If additional protection is desired, a shipper may increase UPS's limit of liability by declaring a higher value and paying an additional charge. UPS does not accept for transportation and shipper[]s requesting service through the internet are prohibited from shipping packages with a value of more than $50,000. The maximum liability per package assumed by UPS shall not exceed $50,000, regardless of value in excess of the maximum. . . . All shipments are

subject to the terms and conditions contained in the UPS Tariff and the UPS Terms and Conditions of Service, which can be found at www.ups.com."

The UPS tariff and terms and conditions of service is a 44-page, single-spaced document. It provides that "[e]ach UPS domestic package or international shipment is automatically protected by UPS against loss or damage up to a value of $100. . . . [¶] If additional protection is desired, the shipper may declare a value in excess of $100, subject to the maximum allowable limits, by showing a value in excess of $100 in the declared value field of the UPS source document or the UPS shipping system used. An additional charge as set forth in the UPS Rates in effect at the time of shipping will be assessed."

The UPS tariff and terms and conditions also provides, however, that "UPS does not accept for transportation, and shippers are prohibited from shipping," all "[a]rticles of unusual value," which are defined as including "[a]ny package with an actual value of more than $50,000." It further provides that "UPS shall not be liable or responsible for . . . loss or damage to articles of unusual value (as defined in the UPS Tariff/Terms and Conditions of Service)" and "UPS shall not be liable or responsible for the loss of or damage to any package containing articles that shippers are prohibited from shipping, that UPS does not or is not authorized to accept for transportation, that UPS states that it will not accept, or that UPS has a right to refuse."

Philippe's original complaint alleged state law claims for strict liability, negligence, and breach of contract, and Philippe's later amended the complaint to allege a federal claim under the Federal Aviation Administration Authorization Act of 1994 (FAAAA).[1] (Pub.L. No. 103-105 (Aug. 23, 1994) 108 Stat. 1569.) Philippe's waived jury trial, and the claims were tried to the court.

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[1] In its statement of decision, the trial court stated that the parties agreed that to prevail on a claim under the FAAAA, the shipper must prove (1) that the shipper delivered to the carrier an item in good condition, (2) that the item was lost or arrived at its destination in damaged condition, and (3) the amount of damages. On appeal, no party challenges the trial court's specification of the elements of the FAAAA claim.

The court found in favor of Philippe's on all causes of action and awarded damages of $50,000 (the declared value of the watch) plus interest from the date of the loss. The court entered judgment in favor of Philippe's in the amount of $62,819.41, and UPS timely appealed.

In its statement of decision, the trial court expressly found that the owner of Philippe's, who testified at trial, was a credible witness. The court further found that certain evidence introduced by UPS was of "little weight" for several reasons, including credibility problems.

The statement of decision also addressed UPS's argument that Philippe's could not recover because it violated the contractual requirement that it "file a written claim within a limited period of time providing specifically required information." The court relied on *Thayer v. Pacific Electric Railway Co.* (1961) 55 Cal.2d 430, 435 (*Thayer*), as authority for the standard for evaluating compliance with such a written claim requirement. Under *Thayer*, the written claim requirement "'is to be construed in a practical way.' [Citations.]" (*Ibid.*) The purpose of the requirement "is to give the carrier written notice of the claimed damage to a particular shipment, and written notice that the shipper intends to make a claim for damage to that shipment, so that the carrier may make a timely investigation and protect itself from fraudulent claims." (*Ibid.*) In addition, when the carrier's employees record information given to them orally by the shipper, their writings may satisfy the written claim requirement. (*Id.* at p. 438.) The trial court concluded that, under *Thayer*, Philippe's conduct was sufficient to satisfy the written claim requirement—Philippe's gave UPS timely notice of its claim, and it was sufficiently written (the court noted, for example, that the exhibits showed that within two weeks after the delivery of the package, UPS had obtained all of the necessary information and had assigned a claim number to Philippe's claim).

In addition, the statement of decision's analysis of the breach of contract claim addressed UPS's argument that recovery was prohibited because the watch was worth more than $50,000. The court found that "[t]he value of the watch exceeds $50,000" and that Philippe's therefore breached the contract by shipping it. But the court concluded

that it was not a material breach (partly because Philippe's limited its claim to the $50,000 declared value of the watch), so UPS's obligations under the contract were not excused.

STANDARD OF REVIEW

We review the trial court's conclusions of law de novo, and we review its findings of fact under the substantial evidence standard. (*Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888.)

DISCUSSION

On appeal, UPS argues on two grounds that Philippe's is prohibited from recovering on its claim under the FAAAA. UPS argues that the UPS tariff and terms and conditions of service do not allow for any recovery because (1) Philippe's did not timely file a written claim, and (2) Philippe's shipped an item worth more than $50,000. We are not persuaded.

As regards the written claim requirement, the trial court relied on the standard applied in *Thayer*, *supra*, in determining that Philippe's substantially complied with the requirement. Under *Thayer*, writings created by the carrier's own employees on the basis of information conveyed orally by the shipper can be sufficient to satisfy the written claim requirement. (*Thayer*, *supra*, 55 Cal.2d at p. 438.) The trial court found that UPS employees created such writings in this case, and the court concluded that those writings were sufficient under *Thayer* to satisfy the written claim requirement.

UPS does not argue that the relevant factual findings were not supported by substantial evidence. Instead, UPS argues first that *Thayer* "confirmed that whether a party complies with a shipping contract is a question of federal law, which contradicts Philippe's . . . assertions that this matter is governed by California law." The point does not aid UPS, however, because the trial court decided the written claim issue under the same federal standard that was applied in *Thayer*, and the trial court found against UPS on Philippe's federal cause of action, which was sufficient on its own to support the judgment.

Second, UPS asserts that under *Thayer* "the doctrines of waiver or estoppel cannot be applied against a carrier to obviate the requirement of written notice." But the trial court's reasoning, summarized above, was not based on waiver or estoppel. UPS's argument consequently does not show that the trial court erred.

Third, UPS argues that *Thayer* is distinguishable because in that case the "shipper provided a dated notation on a freight bill noting that the package was damaged." That is not correct—the carrier's station agent (not the shipper) wrote on the freight bill his own name, the date, and that the shipment was damaged. (*Thayer, supra,* 55 Cal.2d at p. 433.) That was the basis for the Supreme Court's conclusion that the station agent "became plaintiff's agent for the purpose of noting on the freight bill that the plaintiff intended to claim damages because of the condition of the [shipment]." (*Id.* at p. 438.) UPS further contends that "[n]o cases exist where a shipper's oral representations have met the requirements of filing a written claim." The contention is true but irrelevant—in *Thayer* it was not the shipper's oral representations but rather *the carrier's written notations based on the shipper's oral representations* that satisfied the written claim requirement, just as the trial court found in the instant case. In a similar vein, UPS contends that "[n]o cases exist in which a phone call, coupled with the written notations of a common carrier's representative not created by a shipper, satisfies the requirement of a written claim pursuant to federal law." Again, the contention is true but irrelevant—in *Thayer* the shipper's oral representations were made in person, not by phone, but UPS does not explain why that distinction should make any difference.

For all of the foregoing reasons, we conclude that UPS has not carried its burden of demonstrating that the trial court's treatment of the written claim requirement was legally erroneous or unsupported by the evidence.

As regards the shipping of an item worth more than $50,000, UPS cites *Treiber Straub, Inc. v. United Parcel Service, Inc.* (7th Cir. 2007) 474 F.3d 379 (*Treiber*) and *Sam L. Majors Jewelers v. ABX, Inc.* (5th Cir. 1997) 117 F.3d 922 (*Sam L. Majors*) for the proposition that UPS's contractual elimination of all liability for lost or damaged packages worth more than $50,000 is enforceable. In *Treiber* and *Sam L. Majors*,

however, similar contractual provisions were enforced *only after the courts first determined that the carriers provided sufficient notice of the limitation of liability*. (See *Treiber, supra*, 474 F.3d at pp. 384-385 [determining that the carrier provided "adequate notice" of the limitation of liability, which was therefore enforceable]; *Sam L. Majors, supra*, 117 F.3d at pp. 930-931 [before enforcing such a limitation of liability, "we must determine whether the liability limiting provisions were sufficiently plain and conspicuous to give reasonable notice of their meaning"].) In its opening brief on appeal, UPS does not argue that it gave Philippe's adequate notice of the elimination of liability for packages worth more than $50,000.[2] Moreover, the shipment receipt suggested that if the shipper paid for insurance up to $50,000, then the shipper was covered for the declared value of the package up to $50,000 even if the package was actually worth more than $50,000. ("The maximum liability per package assumed by UPS shall not exceed $50,000, regardless of value in excess of the maximum.") For all of these reasons, we conclude that UPS has failed to show that the trial court erred by failing to enforce the contractual elimination of liability for packages worth more than $50,000.

We consequently reject both of UPS's challenges to the trial court's decision on Philippe's claim under the FAAAA. Our resolution of those issues makes it unnecessary for us to address the remaining arguments raised by the parties.[3]

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[2] UPS's reply brief argues that Philippe's had both actual and constructive knowledge of the elimination of liability, but points raised for the first time in a reply brief need not be considered, absent a showing of good cause for failure to raise them earlier. (*Campos v. Anderson* (1997) 57 Cal.App.4th 784, 794, fn. 3.) UPS has not attempted to show good cause for failing to address the issue of notice in its opening brief.

[3] The bulk of UPS's opening brief is devoted to arguing that Philippe's state law claims are preempted, so the only nonpreempted claim in Philippe's complaint is the FAAAA claim. Those arguments are moot in light of our rejection of UPS's arguments concerning the FAAAA claim—even if we agreed with UPS about preemption, we would still have to affirm the judgment.

DISPOSITION

The judgment is affirmed. Respondent shall recover its costs of appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

JOHNSON, J.