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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

ZIM AMERICAN INTEGRATED
SHIPPING SERVICES, CO., LLC,

Cross-complainant and Respondent,

v.

GES LOGISTICS, INC.,

Cross-defendant and Appellant.

B292259

(Los Angeles County
Super. Ct. No. BC570399)

APPEAL from a judgment of the Superior Court of
Los Angeles County. Michael J. Raphael, Judge. Affirmed.

Rogers, MacLeith & Stolp and Douglas R. MacLeith for
Cross-defendant and Appellant.

Lewis Brisbois Bisgaard & Smith and Lynn L. Krieger for
Cross-complainant and Respondent.

ZIM American Integrated Shipping Services, Co., LLC (ZIM) and GES Logistics, Inc. (GES) had a service contract whereby ZIM agreed to provide GES shipping services at specified rates. GES allowed another company, Export Shipping, to use its service contract number to book shipments with ZIM. When Export Shipping and its customer had a dispute over billing, GES directed ZIM to place a hold on the customer's cargo. The customer responded by filing a lawsuit against ZIM. ZIM cross-sued GES, alleging it was liable for its legal fees pursuant to the terms of the service contract.

After a bench trial, the court entered judgment in ZIM's favor against GES. The court found Export Shipping was acting as GES's agent when it booked the shipments. It also found the service contract required GES pay ZIM's legal fees incurred in the other lawsuit. GES challenges these findings on appeal. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

ZIM and GES's Service Contracts

GES is a licensed Non-vessel Operating Common Carrier (NVOCC). NVOCCs charge fees to customers to arrange for the shipment of their cargo. They then contract with licensed Vessel Operating Common Carriers (VOCCs), like ZIM, to actually transport the cargo. The Federal Maritime Commission (FMC) regulates NVOCCs and VOCCs, both of which must be licensed. Export Shipping also provides shipping services to customers, but it is not licensed or registered with the FMC.

Federal regulations require all VOCCs, including ZIM, publish "public tariffs" showing the cost to move particular types of cargo from one point to another. Any person can ship goods through ZIM under its public tariffs. ZIM also enters into private

service contracts with NVOCCs, which must be filed with the FMC. Service contracts always include a minimum volume commitment, and the rates are typically lower than those contained in the public tariffs.

ZIM and GES entered into multiple confidential service contracts over the course of several years. Each contract required GES meet minimum volume commitments; if it failed to do so, it had to pay ZIM liquidated damages.

The contracts mandated GES be the named shipper of any shipment booked under them.¹ The shipments, however, could be booked by GES's booking agents. Shippers commonly use booking agents for such purposes. GES was also precluded from assigning its rights under the contract without ZIM's written consent.

All shipments booked under the service contracts were subject to the terms and conditions of ZIM's form bill of lading (Terms and Conditions). Paragraph 7 of Clause 12 of the Terms and Conditions contains an indemnity clause. It provides, in relevant part:

"The [shipper] agrees to be liable and to indemnify [ZIM] for any direct, indirect or consequential loss or damage, injury, liability, claim, fines or expenses (including, inter alia, legal fees) caused or incurred to [ZIM] . . . [from] any other cause related or in connection with the Goods for which [ZIM] is not responsible, or as a consequence of [ZIM]

¹ GES's named affiliate, Aris, could also be the shipping party on a shipment booked under some of the contracts. In addition, GES could be named the exporter or consignee on the bill of lading.

acting in accordance with the [shipper's] instructions and information”

At various times, GES provided Export Shipping the booking numbers for its service contracts, which Export Shipping used to book more than 70 shipments with ZIM.

Ehiemenonye Shipments

In 2013, Bridget Ehiemenonye hired Export Shipping to ship several vehicles to Nigeria. Export Shipping then used GES's service contract number to book shipment of the vehicles through ZIM. Because the shipments were booked under GES's service contract, ZIM listed GES as the shipper on the bills of lading. According to ZIM's vice president, ZIM considered Export Shipping to be GES's agent for purposes of the transactions; it would not have allowed Export Shipping to be the named shipper on a shipment booked under GES's service contract.

While the cargo was in transit, Ehiemenonye and Export Shipping had a dispute over billing. Export Shipping sent ZIM an e-mail requesting it place holds on the shipments, which would prevent Ehiemenonye from retrieving her vehicles until the billing dispute was resolved. GES's owner, Lynn Lacy, was copied on the e-mail. ZIM refused to place the holds because the shipments were booked under GES's contract and Export Shipping was not listed as the shipper on the bills of lading.

ZIM contacted Lacy and informed her any hold orders would have to come from GES since it was the named shipper. Lacy responded with an e-mail stating the following: “Please be advised that the consignee still owes for the shipping charges, and you may not disclosure [sic] our confidential cost to the consignee. Further, if the two containers in question should be released in contravention to our hold order, we shall hold ZIM

liable and responsible for the charges still owing our company from the consignee, regardless of his allegations to the contrary.”² After receiving the e-mail, ZIM placed de facto holds on the shipments.

Ehiemenonye subsequently filed a complaint against ZIM, GES, and Export Shipping³ alleging she suffered harm as the result of the defendants wrongfully placing holds on her cargo. ZIM filed a cross-complaint against GES for indemnity, contribution, declaratory relief, and breach of contract. In relief, it sought reimbursement for the attorney fees and costs incurred in the course of defending itself against Ehiemenonye’s lawsuit and investigating the circumstances that led to it.

ZIM moved for summary judgment on Ehiemenonye’s complaint, which the trial court granted. GES and Export Shipping subsequently prevailed at trial.⁴ The court then conducted a separate bench trial on ZIM’s cross-complaint, at which ZIM presented evidence establishing the facts summarized above.

On the cross-complaint, the trial court concluded GES was liable for ZIM’s attorney fees and costs incurred while defending itself against Ehiemenonye’s complaint. In its statement of decision, the court explained that Export Shipping was GES’s

² According to Lacy, Export Shipping drafted the language used in the e-mail.

³ Ehiemenonye named as defendants the owners of Export Shipping, Estaban and Elizabeth Escobar. For the sake of simplicity, we refer to them as Export Shipping.

⁴ We affirmed the judgment in a nonpublished opinion, *Ehiemenonye v. Escobar* (Oct. 23, 2019, B285915) [nonpub. opn.].

agent, or otherwise acting on its behalf, with respect to the Ehiemenonye shipments. In support, it pointed to evidence that GES provided Export Shipping its service contract number, Export Shipping booked the relevant shipments using that number, and GES directly made the request to place holds on the shipments.

The court further found ZIM was following GES's instructions when it placed holds on Ehiemenonye's cargo. Therefore, the legal fees ZIM incurred in defending against Ehiemenonye's lawsuit—which was premised on those holds—were “direct, indirect or consequential” damages either “related to or in connection with the Goods” or “as a consequence of [ZIM] acting in accordance with [GES's] instructions and information.” Accordingly, the court concluded paragraph 7 of Clause 12 of the Terms and Conditions required GES pay ZIM's attorney fees and costs incurred in defending against the lawsuit.

Based on these findings, the court entered judgment in favor of ZIM and against GES for \$87,024.91.⁵ GES timely appealed.

DISCUSSION

I. Substantial Evidence Demonstrates Export Shipping Was GES's Agent

GES contends the trial court erred in finding Export Shipping was acting as its agent with respect to the Ehiemenonye shipments. We disagree.

⁵ The court refused ZIM's request for fees it incurred after its motion for summary judgment was granted in the Ehiemenonye case.

In an agency relationship, the agent represents the principal in dealings with third persons. (Civ. Code, § 2295.) The principal is bound by its agent's acts that are within the scope of the agent's authority. (Civ. Code, § 2330.)

An agency may be actual or ostensible. (Civ. Code, § 2298.) An agency is actual if "the agent is really employed by the principal." (Civ. Code, § 2299.) Such agency arises by express agreement or by implication from the conduct of the principal and agent. (*van't Rood v. County of Santa Clara* (2003) 113 Cal.App.4th 549, 571; *Flores v. Evergreen at San Diego, LLC* (2007) 148 Cal.App.4th 581, 587.) An agency is ostensible "when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him." (Civ. Code, § 2300.) An ostensible agency may be implied from the circumstances. (*Kaplan v. Coldwell Banker Residential Affiliates, Inc.* (1997) 59 Cal.App.4th 741, 748.) Whether an agency exists is a question of fact, which we review for substantial evidence. (*Secchi v. United Independent Taxi Drivers, Inc.* (2017) 8 Cal.App.5th 846, 854.)

Here, there is substantial evidence showing GES and Export Shipping had an actual agency relationship. Lacy's testimony established that GES gave Export Shipping its service contract number with the expectation that it would use the number to book shipments with ZIM. Per the terms of the service contract—with some exceptions not relevant here—GES was required to be the named shipper for all shipments booked under its contract. Accordingly, in allowing Export Shipping to use its service contract number, GES implicitly gave it the authority to book shipments with ZIM in which GES would be the named shipper. In other words, GES gave Export Shipping

the authority to book shipments on its behalf. Export Shipping then exercised that authority when it booked the Ehiemenonye shipments using GES's service contract number.

Evidence of GES's subsequent conduct provides further support for a finding that Export Shipping was acting as its agent. After refusing Export Shipping's demand to put holds on Ehiemenonye's shipments, ZIM reached out to GES seeking guidance. Instead of explaining that Export Shipping acted independently when it booked the shipments, GES directed ZIM to place the holds and threatened it with liability if it failed to do so. Such actions are entirely inconsistent with GES's current claim that it was a stranger to the transactions. Instead, they provide strong evidence that Export Shipping booked the shipments on GES's behalf.

Even if there were no actual agency, substantial evidence demonstrates there was an ostensible agency. As discussed above, GES allowed Export Shipping to book the relevant shipments under its service contract, which expressly required GES be the named shipper of those shipments. GES then provided ZIM directions regarding the shipments and threatened it with liability if it failed to comply with those directions. Such actions reasonably led ZIM to believe Export Shipping was acting as GES's agent, and were sufficient to create an ostensible agency. (See *Chalmers v. Ebbert* (1954) 128 Cal.App.2d 374, 379.)

We are not persuaded by GES's efforts to identify evidence in the record that tends to indicate there was no agency relationship. GES cites, among other things, evidence that it was not aware of the shipments until after the fact, Export Shipping paid for the shipments, and the documents related to the

shipments displayed Export Shipping's logo. As discussed above, there is substantial evidence supporting the trial court's agency finding. Nothing GES cites conclusively refutes that evidence, and we decline GES's implicit invitation to reweigh the evidence. (See *Citizens Business Bank v. Gevorgian* (2013) 218 Cal.App.4th 602, 613.)

II. GES is Liable for ZIM's Legal Fees Pursuant to the Terms and Conditions

GES contends the trial court erred in interpreting the Terms and Conditions as requiring it reimburse ZIM for its attorney fees and costs incurred in connection with the Ehiemenonye lawsuit. We disagree.⁶

“‘The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties.’ [Citations.] ‘Such intent is to be inferred, if possible, solely from the written provisions of the contract.’ [Citations.] ‘If contractual language is clear and explicit, it governs.’ [Citation.]” (*State of California v. Continental Ins. Co.* (2012) 55 Cal.4th 186, 194–195.) When there is no conflict in extrinsic evidence, courts review the interpretation of a contract de novo. (*City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 395.)

The trial court correctly found GES liable for ZIM's legal fees pursuant to paragraph 7 of Clause 12 of the Terms and Conditions. The paragraph states, in whole:

“12. CONTAINERS STUFFED BY MERCHANT AND UNCONTAINERIZED GOODS

⁶ GES does not contest that it would be subject to the Terms and Conditions if Export Shipping acted as its agent when it booked the Ehiemenonye shipments.

“[¶] . . . [¶]

“7. [GES] agrees to be liable and to indemnify [ZIM] for any direct, indirect or consequential loss or damage, injury, liability, claim, fines or expenses (including, inter alia, legal fees) caused or incurred to [ZIM] . . . from either of

- (i) improper or inadequate stowage in and stuffing of the Containers or Goods by [GES] its agents or servants, or
- (ii) any defect, deficiency, unseaworthiness or uncargoworthiness of any equipment or Container supplied by [GES], or
- (iii) any infestation, contamination, condemnation, deficiency or nature of the Goods and/or Containers supplied or stuffed by [GES], or
- (iv) any breach of [GES] of its warranties or obligations under this Clause or Clause 13, or
- (v) any other cause related or in connection with the Goods for which [ZIM] is not responsible, or as a consequence of [ZIM] acting in accordance with [GES’s] instructions and information, or the inaccuracy or insufficiency thereof, or
- (vi) any other cause for which [GES] and its own agents or servants are responsible for under this Bill of Lading.”

ZIM presented evidence showing it incurred attorney fees and costs in defending itself against Ehiemenonye’s lawsuit. That lawsuit was premised on allegations that ZIM improperly placed holds on Ehiemenonye’s shipments, which resulted in the loss of her cargo. Further, it is undisputed that ZIM placed the holds on the cargo only after GES directed it to do so. Thus, ZIM’s legal fees were unquestionably incurred as a consequence of it acting in accordance with GES’s instructions. Under the

plain language of subdivision (v) of paragraph 7—which requires GES indemnify ZIM for its legal fees incurred “as a consequence of [ZIM] acting in accordance with [GES’s] instructions and information”—GES was required to reimburse ZIM for such fees.

GES insists its liability under the indemnity clause is much narrower and extends only to legal fees related to the specific items discussed in the preceding six paragraphs in Clause 12. Those paragraphs consist primarily of warranties regarding the nature of the goods and containers that are being transported. In paragraph 1, for example, GES warrants the goods are fit for transport and are not contraband. In paragraphs 2, 3, and 6, GES warrants the containers meet safety standards, are suitable for its purposes, and are properly sealed. The remaining paragraphs contain similar warranties.

The problem with GES’s interpretation is that the indemnity clause expressly extends beyond the items listed in Clause 12. For example, subdivision (iv) requires GES indemnify ZIM for expenses resulting from a breach of the warranties and obligations under Clause 13, which primarily concern the payment of fees, customs, fines, and taxes. Subdivision (vi), moreover, broadly provides indemnity for “any other cause for which [GES] and its own agents or servants are responsible for under this Bill of Lading.” It is clear from the inclusion of these provisions that the parties intended to extend indemnity beyond the specific items discussed in Clause 12. GES fails to acknowledge these provisions, let alone explain how they can be reconciled with its proposed interpretation.

We reject GES’s contention that it is not liable for ZIM’s legal fees because they arose out of a billing dispute, which is not covered by the indemnity clause. Contrary to GES’s assertions, a

billing dispute was not at the heart of Ehiemenonye's lawsuit against ZIM. Rather, it arose out of the holds ZIM placed on Ehiemenonye's cargo at GES's direction. As discussed above, the indemnity clause expressly requires GES pay ZIM's legal fees incurred as a consequence of it following GES's instructions. The circumstances here fit squarely within that provision.

DISPOSITION

The judgment is affirmed. Respondent is awarded its costs on appeal.

BIGELOW, P. J.

We concur:

GRIMES, J.

STRATTON, J.