2015 IL App (3d) 140552-U

Order filed August 18, 2015

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2015

SNI SOLUTIONS, INC., an Illinois Corporation,	)	Appeal from the Circuit Court of the 14th Judicial Circuit, Henry County, Illinois,
Plaintiff-Appellant,	)	
v.	)	Appeal No. 3-14-0552 Circuit No. 11-L-20
MINING INTERNATIONAL, LLC an Illinois Limited Liability Company,	)	Honorable Richard A. Zimmer Judge, Presiding.
Defendant-Appellee.	)	

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Holdridge and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court erred when it found that plaintiff did not establish the elements of bailment where evidence demonstrated an agreement, delivery and loss of plaintiff's property. The trial court properly denied defendant's request for demurrage.

¶ 2 Plaintiff SNI Solution, Inc. brought this bailment action against defendant Mining International, seeking damages from Mining's alleged breach of the bailment and for demurrage

charges. The trial court, following a trial, found in favor of Mining. SNI appealed. We reverse and remand on the bailment action and affirm on the denial of demurrage.

¶ 3 FACTS

¶ 4 Plaintiff SNI Solutions, Inc. purchased deicing salt from Caterpillar, which arranged for shipment of the salt to New Orleans onboard a ship called the *Zebra Wind*. SNI used Mid-Ship Logistics, a shipping company, to transfer the salt from the *Zebra Wind* to barges for transport to various Midwest ports. SNI planned to store some of the salt at the Port of Will County, which was operated by defendant Mining International. SNI and Mining had an agreement, signed on November 2, 2009, that Mining would (1) unload and stockpile SNI's salt; (2) load authorized amounts of salt onto trucks for pickup by SNI customers, as authorized by SNI; (3) provide documentation of the amounts removed; and (4) not load tonnage beyond the authorized amounts. Mid-Ship provided an estimated time of arrival (ETA) notice to Mining on October 30, 2012, informing Mining of when the barges were due to arrive. Mining sent a second ETA on November 12, informing Mining of a November 12 arrival.

¶ 5 The barges arrived at the Will County port on November 12, 2009. They could not be unloaded, however, because Mining had not finished installing the equipment necessary to unload the salt. SNI rerouted some of the barges to other ports. The remaining barges were unloaded beginning on November 15 and it took five days to complete the unloading. Mid-Ship's records indicate 15,462.299 standard tons of salt were on the barges that were unloaded at the Joliet port. Mid-Ship billed SNI $21,600 in demurrage charges for fees incurred in the unloading delays. Mid-Ship's invoice showed there were 51 days of demurrage at $300 per barge, per day, for a total of $15,300 attributed to the delays at the Will County port. SNI received a total of $11,450 in credits from Mid-Ship against the demurrage charges.

¶ 6 Mining stored the salt, and as authorized by SNI, loaded it for SNI customers. In 2011, Mining informed SNI it would no longer provide storage and loading services. After SNI removed the remaining salt, both SNI and Mining discovered a shortfall of 1,486 tons between what was delivered to Mining and the amount of salt Mining loaded for SNI customers. In September 2011, SNI filed a complaint against Mining, and in its second amended complaint, alleged that Mining was negligent in its bailment (count I) and that SNI incurred demurrage charges as a result of Mining's negligence (count II). SNI sought $111,450 for damages under count I and $15,300 in damages under count II. Mining filed an answer and counter-claim, alleging that SNI had an unpaid balance of $13,029. SNI did not dispute that it did not pay the outstanding charges from Mining.

¶ 7 A bench trial took place and the following evidence was submitted. Steven Jackson, who had been a commodity trader for Caterpillar World Trade, purchased the salt and arranged its sale to SNI. He also hired Mid-Ship to place the loads on the barges and transport it to the various ports for SNI. He ordered draft weight surveys on SNI's behalf for the barges. A draft weight survey, a/k/a draft weight or engineered-weight, determines the weight of the cargo on a barge using engineering principles. An engineer-survey weight is accepted in the industry as weight delivered.

¶ 8 When the barges were unloaded in Will County, Mining did not reweigh the salt. It relied on the ETA notices that showed the amount of salt on each barge. The ETAs included the engineer-measure draft weights calculated by Mid-Ship. The ETAs were admitted as plaintiff's exhibit #2 and established that 15,462.299 standard tons of salt were on the barges assigned for unloading and storage at the Will County port. Mining used the ETA notices to charge SNI for

unloading and storage of 15,462.299 standard tons of salt. SNI paid the invoice of $38,655.75 based on the 15,462.299 standard ton amount.

¶ 9 Thereafter, per their contract, Mining would fill salt orders for SNI customers as authorized by SNI. Mining weighed the salt it loaded for them and there were no reported discrepancies with SNI's customers between the loaded amount and the billed amount. Mining created salt tickets and invoices evidencing the salt transactions. In early 2011, Mining requested SNI remove the salt from its property because it needed the space. SNI contracted with Ozinga, which removed the salt from Mining for storage at an Ozinga facility. The evidence demonstrated that authorized sales and the salt removed by Ozinga totaled 13,976.299 standard tons, leaving a shortfall of 1,486 tons.

¶ 10 Mike Bellovics, SNI's president, contacted Mining about the shortfall. Wendy Weitzel, the controller who handled the accounting for Mining, including billing, prepared a document called "reconciliation" dated June 16, 2011. The "reconciliation" showed 15,462.299 tons of salt were offloaded; 97 tons of salt were cash sales; 100 tons were left on site; and 464 tons were attributed to 3% shrinkage rate. Mining could not account for 742 tons of salt. The cash sales were not specifically authorized by SNI and it never received the proceeds from them. In the bulk materials industry, the industry custom is that shrinkage is not allowed unless it is expressly provided for in the contract. The agreement between SNI and Mining did not allot for shrinkage.

¶ 11 Mining presented evidence regarding its storage and care of the salt and the security at its property. The property was completely fenced and all access points were gated. The property was bordered by a road, the Des Plaines River, a waste disposal facility, and another business that was protected by Homeland Security. All equipment keys were locked up when the port was not open. Mining also presented evidence that SNI owed it $13,029 on its final bill for

loading SNI customers. Mining introduced Exhibits 24 and 31, which were documents Mid-Ship used in its transaction with Caterpillar. The documents showed the tonnage on each barge in both metric and standard tons. The metric tons on some columns on Exhibits 24 and 31 did not match the metric tons on the ETAs.

¶ 12 The trial court found that the salt was valued at $75 per ton and that SNI did not prove the amount of salt delivered to Mining by a preponderance of the evidence. It noted the metric tonnage on exhibits 24 and 31 were larger than the standard ton quantities, leading the court to surmise that two conversions were done and one was in error. The trial court further surmised that a calculation error occurred previously in the delivery chain, which was carried forward. The trial court also found that Mining rebutted any presumption of negligence, determining that Mining properly cared for the salt. The trial court further found that SNI's demurrage claim failed because demurrage was not provided for in the contract. Lastly, it also found there was no unreasonable delay in Mining's unloading of the barges.

¶ 13 The trial court entered judgment in favor of Mining on both counts of SNI's claim and on its counter-claim against SNI for its unpaid account balance in the amount of $13,029. SNI moved to reconsider on both counts. On reconsideration, the trial court found that Mining owed SNI for the unauthorized cash sales of 97 tons of salt. The trial court awarded SNI $7,275 and set off that amount against Mining's counter-claim of $13,029, resulting in a final award in favor of Mining in the amount of $5,754. SNI appealed.

¶ 14 ANALYSIS

¶ 15 SNI presents two issues for our review: whether the trial court erred when it found that Mining was not negligent in its bailment of SNI's salt and when it denied SNI demurrage charges.

¶ 16 We begin with the bailment issue. SNI argues Mining breached the bailment, asserting that it proved beyond a preponderance of the evidence that 15,462.299 standard tons of salt were delivered to Mining and 13,976.200 standard tons were authorized for removal, leaving 1,486 tons unaccounted for. It challenges the trial court's failure to afford proper weight to the business records showing delivery; its conclusion that Mining rebutted the presumption of negligence; and its determination that SNI did not establish negligence.

¶ 17 The elements necessary to sustain an action for a bailment include (1) an agreement, either express or implied, to create a bailment; (2) delivery of the property in good condition; (3) acceptance of the property by the bailee; and (4) failure by the bailee to return the property or the bailee's return of the property in a damaged condition. *Tucker v. Soy Capital Bank & Trust Co.*, 2012 IL App (1st) 103303, ¶ 56 (quoting *American Ambassador Casualty Co. v. Jackson*, 295 Ill. App. 3d 485, 490 (1998)).

¶ 18 When a plaintiff has established a *prima facie* case, a rebuttable presumption that the defendant acted negligently arises. *Wausau Insurance Co. v. All Chicagoland Moving & Storage Co.*, 333 Ill. App. 3d 1116, 1121 (2002). Once a *prima facie* case is established, the defendant may rebut the presumption of negligence with evidence of its safekeeping of plaintiff's property. *Bielunski v. Tousignant*, 17 Ill. App. 2d 359, 363 (1958). A bailee must exercise reasonable care under the circumstances and whether he did so is generally a question of fact for the trier of fact. *All Chicagoland Moving & Storage Co.*, 333 Ill. App. 3d at 1121.

¶ 19 If the defendant rebuts the presumption of negligence, the plaintiff must offer evidence sufficient to sustain its negligence action as if the presumption did not exist. *Wright v. Autohaus Fortense, Inc.*, 129 Ill. App. 3d 422, 426 (1984). The plaintiff must establish that the defendant failed to exercise the necessary degree of care; the question is "whether the bailee's conduct was

reasonable under the circumstances." *Wright*, 129 Ill. App. 3d at 426. A trial court's findings following a bench trial will not be reversed unless they are against the manifest weight of the evidence. *Smith, Allen, Mendenhall, Emons & Selby v. Thomson Corp.*, 371 Ill. App. 3d 556, 558 (2006).

¶ 20 Illinois Supreme Court Rule 236 codifies the business exception to the hearsay rule and provides that any writing or record, if made in the regular course of business at the time of the transaction being recorded, or within a reasonable time after the occurrence, is admissible as evidence of the transaction. Ill. S. Ct. R. 236 (eff. Oct. 1, 1983). Business records are admissible as a hearsay exception because they are considered accurate; otherwise their purpose of aiding in the transaction of business would be negated. *Kimble v. Earle M. Jorgenson Co.*, 358 Ill. App. 3d 400, 414 (2005) (quoting M. Graham, Cleary & Graham's Handbook of Illinois Evidence § 803.10, at 817 (7th Ed. 1999)). Because accuracy is presumed, the proponent need only satisfy the foundational requirements that (1) the record was made in the regular course of business, (2) at or around the time the transaction took place. *Kimble*, 358 Ill. App. 3d at 414.

¶ 21 To establish a *prima facie* case of bailment sufficient to raise a presumption of Mining's negligence, SNI was required to prove: a bailment agreement, delivery of the salt, and loss of the salt. The first element, a bailment agreement, was established. It is undisputed that there was an agreement between SNI and Mining whereby Mining agreed to unload the barges and stockpile the salt; load the salt onto trucks as authorized by SNI; provide weight tickets showing tonnage removed; and prevent unauthorized loading of tonnage.

¶ 22 The trial court found SNI did not establish the second element, the amount of salt delivered to the Port of Will County. In reaching its finding, the trial court pointed to the discrepancies in the amount of salt delivered to Mining in Mining's exhibits 24 and 31. Those

exhibits included the barge breakdown from the cargo on *Zebra Wind* and the exhibits were included as attachments to emails sent by Mid-Ship to Caterpillar World Trade. The trial court relied on miscalculations in the conversions between metric and standard tons on the Mid-Ship breakdown regarding the amount of salt on the barges. While the metric ton amounts are in conflict with each other on the exhibits, the standard ton amounts are consistent. The parties relied on the standard ton weight in all their transactions. The standard ton amounts were used by Mining to bill SNI for unloading and storing the salt. SNI relied on the standard ton amount in paying Mining's invoice. We find the discrepancies in metric tonnage irrelevant to the determination of delivery and reject the trial court's reliance on it.

¶ 23 SNI maintains the trial court was bound by Mining's invoice to SNI, charging it to unload 15,462.299 tons of salt. According to SNI, the invoice established its *prima facie* case that 15,462.299 standard tons of salt were delivered to Mining. We agree. SNI demonstrated that the draft weight survey was the standard measure in the industry. Mining relied on the standard ton amount per the draft weight survey when it billed SNI for 15,466.299 standard tons. Mining also used the 15,462.299 figure when it created its reconciliation to account for some of the missing salt.

¶ 24 The trial court determined that the Mining invoice, admissible as a business record, was based on inaccurate information beginning earlier in the delivery chain. As discussed above, the miscalculations regarding the metric tons was immaterial as the parties used the standard ton weight in their transactions. The trial court was bound to accept the salt amount on the Mining invoice as a business record. The invoice established that Mining accepted that 15642.299 standard tons of salt were delivered and it was uncontradicted by any evidence demonstrating discrepancies in the standard ton amounts. SNI paid the invoice in full based on the 15,642.299

standard ton amount. Mining's Weitzel testified that she prepared the invoice in the regular course of her duties and that it was accurate and correct. Because the invoice was uncontroverted, the invoice was credible evidence the trial court was not free to disregard. It erred in doing so.

¶ 25 Accordingly, we determine that the trial court's finding that SNI did not present a *prima facie* case because it could not establish the amount of salt delivered to Mining was against the manifest weight of the evidence. SNI established delivery of 15,642.299 standard tons of salt. It is undisputed Mining could only account for 13,976.299 standard tons, leaving a shortage of 1,486 tons. We find that SNI has demonstrated a *prima facie* case.

¶ 26 The trial court considered that if SNI had established a *prima facie* case, Mining rebutted the presumption of negligence with evidence of its safekeeping of the salt. We do not agree. As the bailee, Mining bears the burden of explaining what happened to the salt and its failure to do so raises the presumption of negligence. Mining offered no explanation for the missing salt, aside from the accounting on its "reconciliation." There are a myriad of reasons for what could have happened to the salt. Mining failed to offer any viable explanation for the missing tons.

¶ 27 In finding Mining rebutted the presumption of negligence, the trial court relied on the evidence of security measures used at Mining's storage facility, the presence of Homeland Security agents on the neighboring property, and Mining's usual practices of ensuring that only weighed and authorized shipments left the facility. This information might be persuasive were the salt at issue alleged to be stolen. However, there is no specific allegation of theft here. Moreover, the evidence presented by Mining also included that the Homeland Security personnel from next door could access the property at any time, suggesting that other unauthorized persons

could enter the premises the property as well. We do not consider that Mining demonstrated safekeeping of the salt sufficient to rebut the presumption of negligence.

¶ 28 According to Mining's "reconciliation", 464 tons were attributed to a 3% shrinkage rate. We reject the shrinkage amount. Testimony established that shrinkage is loss that occurs through handling or storage of bulk materials, and that to be recoverable, it must be a term of the contract. The agreement here did not include a 3% shrinkage allowance or any allowance for shrinkage. The trial court erred in accepting Mining's assertion that 464 tons of the missing salt was attributable to shrinkage. Similarly, Mining failed to offer evidence in support of its claim that 100 tons were left on site. It did not bill SNI for storing the salt after Ozinga removed the remaining supply. In contrast, the Ozinga witness testified they removed all of SNI's salt from Mining's facility.

¶ 29 On reconsideration, the trial court properly credited SNI for the 97 tons that Mining agreed it sold for cash and failed to remit the proceeds to SNI. Because we consider Mining did not rebut the presumption of negligence in its bailment of the salt and thus proved Mining's negligence, SNI is entitled to credit for the other 1,388 tons for which Mining could not account. Mining and SNI do not argue with the trial court's valuation of $75 per ton, and we accept that figure as the price per standard ton for the salt. Accordingly, we find that Mining owes SNI $104,100 for the missing 1,388 standard tons of salt.

¶ 30 Next, SNI argues it was entitled to damages for demurrage charges it incurred because of Mining's delay in unloading the barges. SNI acknowledges that there was no provision allowing demurrage in the agreement between SNI and Mining but submits that Mining had an implied duty under general contract principles to unload the barges in a reasonable and timely manner and the demurrage charges are recoverable as consequential damages.

¶ 31 The primary goal of contract interpretation is to give effect to the parties' intent. *Richard W. McCarthy Trust dated September 2, 2004 v. Illinois Casualty Co.*, 408 Ill. App. 3d 526, 535 (2011). To determine intent, a court considers the contract as a whole. *McCarthy*, 408 Ill. App. 3d at 535. Contract language is construed strongly against the creator of the contract. *Wysocki v. The Upjohn Co.*, 157 Ill. App. 3d 868, 872 (1987). All contracts include an implied duty of good faith and fair dealing, requiring the parties to act in a manner consistent with their reasonable expectations. *The Reserve at Woodstock, LLC v. City of Woodstock*, 2011 IL App (2d) 100676, ¶ 42. The party seeking damages under a contract has the burden to establish them. *Dyduch v. Crystal Green Corp.*, 221 Ill. App. 3d 474, 477 (1991). What constitutes a reasonable time for performance is a question of fact. *Anderson v. Kohler*, 397 Ill. App. 3d 773, 792 (2009). This court reviews a trial court's interpretation of a contract *de novo*. *Grate v. Grzetich*, 373 Ill. App. 3d 228, 231 (2007).

¶ 32 The trial court denied SNI's request for demurrage damages, finding the contract did not provide for demurrage, the contract should be construed against SNI as its drafter, and Mining did unreasonably delay in unloading the barges. We accept its reasoning and its conclusion. The contract between SNI and Mining provided Mining would load and stockpile the salt; load authorized amounts of salt for SNI's customers; and document the sales. The agreement did not mention demurrage or which party was responsible for paying demurrage expenses. Moreover, SNI did not establish what specific demurrage charges were due to Mining's delay.

¶ 33 The demurrage charges listed on the invoice from Mid-Ship did not identify which specific charges corresponded with the purported delay in unloading at the port in Joliet. SNI did not present any witnesses from Mid-Ship to explain the demurrage charges or the credits it received against them. It was SNI's burden to establish its damages and it did not demonstrate

what demurrage expenses were the result of a delay in unloading in Joliet. We also agree with the trial court's finding that Mining unloaded the barges within a reasonable amount of time. After the initial delay due to lack of equipment, Mining unloaded the barges at the rate customary rate of two per day. Other than the lack of installed equipment on November 12 when the barges arrived, SNI did not present any evidence that Mining acted unreasonably in unloading the barges or that it unnecessarily delayed the unloading process. We find the trial court did not err in denying SNI's request for demurrage.

¶ 34 Based on our above discussions, we find that SNI established that Mining breached the bailment and that SNI is owed $104,100 for the missing salt. Although we affirm the trial court's finding on Mining's counterclaim, after deducting SNI's outstanding bill of $13,029, judgment should be entered in favor of SNI in the amount of $91,071.

¶ 35 For the foregoing reasons, the judgment of the circuit court of Henry County is affirmed in part, reversed in part, and the cause remanded.

¶ 36 Affirmed in part, reversed in part, and remanded.