

Duferco Steel, Inc. v. M/V KALISTI

United States Court of Appeals for the Seventh Circuit

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Before RIPPLE, MANION and DIANE P. WOOD, Circuit Judges.

RIPPLE, Circuit Judge.

This is an in rem action against the M/V Kalisti and an in personam action against the ship's owner, Tomazos Shipping, Limited ("Tomazos"). The suit was brought by Duferco Steel Incorporated ("Duferco"), under the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C.App. § § 1300 et seq., to recover for damage done to goods in transit from Italy to the United States. The district court granted the motion of Tomazos to dismiss Duferco's complaint. For the reasons set forth in this opinion, we affirm the judgment of the district court.

I. BACKGROUND

A. Facts

In October 1994, Duferco delivered a cargo of goods to Tomazos and the M/V Kalisti in Italy for carriage to Canada and the United States. The vessel delivered the goods between November 8 and 17, 1994. On November 6, 1995, Duferco filed this action. Duferco's suit therefore was filed "within one year after delivery of the goods" in accordance with § 3(6) of COGSA. 46 U.S.C.App. § 1303(6). Duferco sought a recovery of \$175,000 because the goods were not delivered in good condition.

This appeal focuses on the bills of lading that set forth the parties' shipping agreement. The back side, or "overleaf," of each bill of lading provides that all the terms of the Brodin-Sidermar charter party, dated September 19, 1994, are incorporated into the bills of lading. Paragraph 35 of that charter party, the provision that is the key to this appeal, states:

All dispute[s] arising out from the performance or interpretation of this contract shall be referred to arbitration in London in the customary manner and according to English law. The right of both parties to refer any dispute to arbitration ceases 12 (twelve) months after the date of completion of discharge and in case of non performance 12 (twelve) months after the cancelling date as per clause Nr. 11. Where this provision is not complied with, claims shall be deemed to be waived and absolutely barred.

R.10, Ex.B at 6 para. 35. Tomazos moved to dismiss Duferco's complaint on the ground that Duferco did not exercise its right to arbitrate the dispute in London within one year of the completion of the shipment.

B. Decision of the District Court

The district court decided that the bills of lading, by incorporating the charter party's arbitration clause, required Duferco to arbitrate its claim in London within a year of the shipment; otherwise, the claim was barred. The court held that, because Duferco had failed to arbitrate, the claim was barred as a matter of law and that dismissal was appropriate.

II. DISCUSSION

A.

The parties disagree on whether the arbitration clause in the charter party was incorporated into the bills of lading. The district court took the view that United States law governed this question and that, under that law, the arbitration clause was incorporated in the bills of lading and therefore was an operative part of the parties' agreement.

The arbitration clause in the charter party provides that "[a]ll dispute[s] arising out from the performance or interpretation of this contract shall be referred to arbitration in London in the customary manner and according to English law." R.10, Ex.B at 6 para. 35 (emphasis added). Both parties agree (and we shall assume they are correct for purposes of this decision) that, under English law, general words of incorporation in bills of lading do not incorporate the arbitration clause of a charter party. English law requires, we are told, that, in order for a bill-of-lading claim to be arbitrable, one of the following must be true: (1) The bills of lading contain an arbitration clause; (2) the bills of lading expressly refer to the arbitration clause in the charter party; or (3) the arbitration clause in the charter party expressly refers to bill-of-lading claims. The incorporation clause in the bills of lading in this case is general in its wording and does not mention specifically arbitration.

On the basis of this understanding of English law, Duferco's argument goes as follows: The bills of lading incorporate the charter party's terms; one term of the charter party is that English law shall govern arbitration; that term of the charter party means that the English rule of incorporation is incorporated into the bills of lading; the English rule of incorporation would not permit the charter party's arbitration clause to be incorporated into the bills of lading; and therefore the district court should have allowed Duferco's suit to go forward.

We cannot accept this argument. Its circularity reveals that it misses an important analytical step. Before making an initial decision on the appropriate choice of law to govern the incorporation of the charter party's arbitration clause into the bills of lading, Duferco's argument immediately incorporates the arbitration clause into the bills of lading and then maintains that, on the basis of the arbitration clause that was just incorporated, the arbitration clause cannot be incorporated into the bills of lading. In short, in Duferco's view, it is permissible to incorporate the arbitration clause into the bills of lading in the first instance, but only to find out that the arbitration clause cannot be incorporated. Accepted choice of law methodology permits a far less convoluted view of the parties' agreement. This methodology requires that we first determine the governing law with respect to the issue of incorporation. This initial and independent step, not part of Duferco's tendered analysis, is, as the district court recognized, crucial.

Upon examination of the bills of lading and the circumstances of the case, we conclude that there is no reason to suppose that the incorporation issue ought to be governed by English law. Nothing in the bills of lading suggests that English law should govern the incorporation issue. Indeed, the bills of lading provide that the "Hague Rules ... as enacted in the country of shipment shall apply to this contract" and that, if "no such enactment is in force in the country of shipment, the corresponding legislation of the country of destination shall apply." R.10, Ex.A at 2 para. 2. The parties agree, and we shall assume, that neither Italy nor Canada has implemented the Hague Rules. Therefore, under this contractual provision, United States law, specifically COGSA, applies to the bills of lading. United States law, in contrast to the English rule as the parties describe it, is that a bill of lading can incorporate the provisions of a charter party by specific reference to it. There is no requirement, as there apparently is in English law, that the incorporation language make explicit reference to the arbitration clause. Duferco does not contend that the reference to the charter party in the bills of lading is not sufficiently specific to permit incorporation of the charter party into the bills of lading under United States law.

Accordingly, the district court correctly held that United States law determined whether the arbitration clause of the charter party was incorporated into the bills of lading.

B.

Because the district court believed, correctly, that the charter party's arbitration clause was part of the parties' agreement, the court determined that the case ought to be dismissed because Duferco had failed to arbitrate its claim in a timely manner. The arbitration clause in the charter party required that all disputes "arising out from the performance" of the parties' agreement be referred to arbitration within twelve months of "the date of completion of discharge." R.10, Ex.B at 6 para. 35. According to the materials submitted, the date of completion of discharge was November 17, 1994; Duferco therefore had until November 16, 1995 to arbitrate its claim. It did not comply with this requirement. The charter party provides, in unmistakable language, that the consequence of Duferco's failure to arbitrate within twelve months is that its "claims shall be deemed to be waived and absolutely barred." *Id.* On the basis of this language, the district court dismissed Duferco's claim as time barred.

Duferco claims that Tomazos had no right to this dismissal but that it could only move under the Federal Arbitration Act ("FAA") for a stay pending arbitration. See 9 U.S.C. § 3. We cannot accept this assertion. Having been sued by Duferco in federal court, Tomazos was entitled to rely on Duferco's waiver of its right to arbitrate. See *Morrie Mages & Shirlee Mages Found. v. Thrifty Corp.*, 916 F.2d 402, 405 (7th Cir.1990). A plaintiff waives (or at least presumptively waives) its entitlement to insist on arbitration by filing suit in court. *Cabinetree of Wis., Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 390-91 (7th Cir.1995); *Galion Iron Works & Mfg. Co. v. J.D. Adams Mfg. Co.*, 128 F.2d 411, 413 (7th Cir.1942). Although a defendant may waive its rights under an arbitration clause by electing to follow the plaintiff's lead and to proceed before the nonarbitral tribunal, see *Cabinetree*, 50 F.3d at 390-91; *Galion Iron Works*, 128 F.2d at 413, Tomazos, faced with this litigation in the final days of the arbitration clause's life, can hardly be said to have acquiesced in the course chosen by Duferco and therefore to have waived its rights under the arbitration clause. Consequently, Tomazos was within its rights to enforce the time bar provision of the arbitration clause by filing a motion to dismiss rather than a motion for a stay of the action. See *St. Mary's Med. Ctr. v. Disco Aluminum Prods. Co.*, 969 F.2d 585, 588 (7th Cir.1992) ("The essential question is whether, based on the circumstances, the alleged defaulting party has acted inconsistently with the right to arbitrate."). By the time Tomazos filed its motion to dismiss, the time for arbitration had expired by the terms of the contract.

Given the waiver of arbitration by Duferco, the district court was under no independent obligation to invoke the remedy rejected by the party; the court was not required, as Duferco insists, to stay, on its own motion, the action under § 3 of the FAA. Section 3 states that the district court "shall" stay the trial of the action when the parties' agreement provides for arbitration, but it states further that the court shall do so only "on application of one of the parties." 9 U.S.C. § 3. Here, neither party moved for a stay; neither Duferco's complaint nor Tomazos' motion to dismiss, no matter how liberally construed, can be viewed as containing a stay request. Similarly, because neither party petitioned the district court for an order compelling arbitration, Duferco's contention that § 4 required the district court to compel arbitration has no force. See 9 U.S.C. § 4; *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 217-19, 105 S.Ct. 1238, 1240-41, 84 L.Ed.2d 158 (1985) (holding that FAA requires the court to "compel arbitration of otherwise arbitrable claims, when a motion to compel arbitration is made.") (emphasis added).

The district court properly determined that Duferco, not having sought to arbitrate its dispute during the allotted time according to the agreement, had waived its right to recovery by the terms of that agreement. The district court correctly dismissed the suit.

CONCLUSION

For the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED.

United States District Court, N.D. Illinois, Eastern Division.
June 07, 1996.

MEMORANDUM ORDER

BOBRICK, United States Magistrate Judge.

Before the court is the motion of in personam defendant Tomazos Shipping Company, Ltd. ("TSC") to dismiss the complaint in admiralty of plaintiff Duferco Steel Inc.

I. BACKGROUND

Plaintiff in this case is a New Jersey corporation which, according to its complaint, shipped either "cold rolled steel coils" (Complaint at 2) or "hot dipped Galvanized steel sheets in coils" (Complaint at 4) on board the M/V Kalisti on October 4, 1994. TSC is a Greek corporation that owned and operated the M/V Kalisti at that time. Plaintiff delivered its cargo to TSC and the M/V Kalisti at the port of Genoa, Italy, for shipment to Hamilton, Ontario; Detroit, Michigan; and Chicago, Illinois. Delivery and shipping were to be in accordance with signed bills of lading. According to plaintiff, defendants failed to deliver the said cargo in the same good order and condition in which plaintiff delivered it. Plaintiff alleges that the damage to the cargo was due to the fault or negligence of the defendants. Plaintiff submits that it has performed all conditions precedent under the bills of lading, and claims damages in the amount of \$175,000.

A. Bills of Lading

The bills of lading in this case, which appear to be standard, referred to the charter party on the front and back. (Memorandum in Support of Motion to Dismiss, Ex. A). The front of each bill contained a "freight payable as per charter party" box which was filled in to reflect the charter party dated "September 19th, 1994."

The front of each bill also referred to the back or overleaf of the bill for conditions of carriage. The "Conditions of Carriage" section of the overleaf stated that "[a]ll terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf,

are herewith incorporated ..." According to the charter party, the ship owner was Brodin Shipping of Sweden and the charterer was Sidermar di Navigazione of Genoa, Italy. The clause at issue herein states as follows:

ALL DISPUTE [sic] ARISING FROM THE PERFORMANCE OR INTERPRETATION OF THIS CONTRACT SHALL BE REFERRED TO ARBITRATION IN LONDON IN THE CUSTOMARY MANNER AND ACCORDING TO ENGLISH LAW. THE RIGHT OF BOTH PARTIES TO REFER ANY DISPUTE TO ARBITRATION CEASES 12 (TWELVE) MONTHS AFTER THE DATE OF COMPLETION OF DISCHARGE ... WHERE THIS PROVISIONS NOT COMPLIED WITH, CLAIMS SHALL BE DEEMED TO BE WAIVED AND ABSOLUTELY BARRED.

B. Parties' Positions

The defendants move to dismiss plaintiff's cause of action, arguing that it is barred according to the bills of lading the parties executed. According to defendants, the bills of lading incorporated the M/V Kalisti's charter party, which required plaintiff to arbitrate its claim within a year of the shipment in London, England, or have that claim barred. As plaintiff failed to do this, defendants submit that its complaint must be dismissed.

Plaintiff advances three arguments as to why the arbitration clause does not command dismissal here. First, plaintiff contends that it cannot be bound by the arbitration clause because it was not incorporated into the bill of lading. Next, plaintiff submits that, even if arbitration is applicable, a stay of the proceedings is the proper course under the Federal Arbitration Act ("FAA"). 9 U.S.C. § 3. Finally, plaintiff argues that dismissal of its action would violate the Carriage of Goods by Sea Act ("COGSA"). 46 U.S.C.App. § 1303.

II. ANALYSIS

Initially, we must address plaintiff's arguments regarding applicable law. At one time or another in its submissions, plaintiff champions the application of English law, of COGSA, and of the FAA. Plaintiff is unable to cite a case that would suggest that English law applies to this dispute, relying solely on the reference to English law in the charter party's arbitration clause--a document and clause which plaintiff claims are inapplicable here. Plaintiff's self-contradictions aside, the law to which a charter party's arbitration clause refers does not guide the interpretation of the shipping contract. Instead, we must apply COGSA and the FAA to the parties' dispute. *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. ----, ----, 115 S.Ct. 2322, 2325-26, 2329-30 (1995) (reconciliation of COGSA and FAA where arbitration clause specified application of Japanese law). Accordingly, we must reject plaintiff's unsupported suggestion that we apply English law to the instant dispute.

The decision in *M/V Sky Reefer* also disposes of plaintiff's argument that COGSA invalidates the application of the charter party's arbitration clause. There, the Supreme Court held that foreign arbitration clauses in bills of lading were not invalid under COGSA. *Id.* at ----, 115 S.Ct. at 2330. The *M/V Sky Reefer* Court addressed the COGSA provision that:

[a]ny clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties or obligations provided in this section, or lessening such liability otherwise than provided in this chapter, shall be null and void and of no effect.

46 U.S.C.App. § 1303(8). The Court found that nothing in COGSA prevented "parties from agreeing to enforce [their] obligations in a particular forum." *M/V Sky Reefer*, 515 U.S. at ----, 115 S.Ct. at 2337. "By its terms, it establishes certain duties and obligations, separate and apart from the mechanisms for their enforcement." *Id.* The Court essentially found that the expense or inconvenience of foreign arbitration did not constitute a "lessening of liability." *Id.* at ----, 115 S.Ct. 2328-29. We can see no reason why the rationale upholding the application of a Japanese arbitration clause would not apply to an English arbitration clause.

Nevertheless, plaintiff argues that because the arbitration clause calls for the dismissal of its action for failure to bring it to arbitration within a year, the clause does run afoul of COGSA because it would relieve the defendants of all liability. The two cases plaintiff cites in support of this proposition involve a clause exempting a carrier from liability due to negligence, and a clause requiring a shipper to affirmatively prove a carrier's lack of due diligence. (Corrected Memorandum in Opposition at 9-10). These clauses, however, evince a clear "lessening of liability," whereas a time limit for bringing a claim is more part and parcel to a mechanism for enforcement. Furthermore, the one-year limitation in the arbitration clause is no more restrictive than the limitation period under COGSA, which is also one year. 46 U.S.C.App. § 1303(6). Finally, noncompliance with the arbitration provision and resultant waiver of its claim was entirely within the plaintiff's control. Nowhere does plaintiff argue that it was unaware of the charter party or arbitration clause, which appears to have been commonplace in the maritime shipping industry.

Plaintiff's other tack is to argue that the arbitration clause was not sufficiently incorporated into the bills of lading. The bills of lading, their incorporation clauses, and the charter party's arbitration clause, as already noted, all appear to be standard provisions. There have been many cases--if not from this circuit--that have discussed similar clauses. In general, a bill of lading can incorporate a charter party by way of specific reference to it. *Cargill, Inc. v. Golden Chariot MV*, 31 F.3d 316, 318 (5th Cir.1994); *New York Marine & Gen. v. S/S "Ming Prosperity"*, 920 F.Supp. 416, 427 (S.D.N.Y.1996). Here, the bill of lading identifies the charter party it references by its date, which falls within the range of specificity courts have allowed for incorporation by reference. *Cargill Cargo International v. M/V Huta Zygmunt*, No. 95-2639 (E.D.La. May 6, 1996) 1996 WL 229445*2-3 (and collected cases).

Plaintiff also argues that the charter party here is inapplicable because it was not a signatory to it. It is a surprising argument, given the line of caselaw to the contrary. See, e.g. *New York Marine*, 920 F.Supp. at 427 (collected cases); *M/V Huta Zygmunt*, 1996 WL 229445*3 (collected cases). The issue in such a case is whether the clause in the charter party is sufficiently broad to reach beyond the signatory parties. Courts have found language such as "any dispute arising out of this contract," or "all disputes arising out of this

charter," to be sufficiently broad to bind nonsignatories if there is no specific limitation to owners and charterers in the clause. *Progressive Cas. v. C.A. Reaseguradora Nacional*, 991 F.2d 42, 47-48 (2nd Cir.1993) (discussing carter party cases); *M/V Huta Zygmunt*, supra; *Continental U.K. Ltd. v. Anangel Confidence Compania Naviera, S.A.*, 658 F.Supp. 809, 812 (S.D.N.Y.1987); cf. *Otto Wolff Handelsgesellschaft v. Sheridan Transp.*, 800 F.Supp. 1353, 1357 (E.D.Va.1992) (finding nonsignatory not bound by arbitration clause that specifically limited application to owners and charterers). The clause in the instant case is as broad and does not include such a limitation.

The arbitration clause, then meets all of the requirements for applicability to a nonsignatory such as the plaintiff. Plaintiff submits that, if the clause is found applicable, this action must be stayed under 9 U.S.C. § 3, which provides:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which the suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing that the applicant for the stay is not in default in proceeding with such arbitration.

(emphasis added). In arguing for a stay of these proceedings, plaintiff ignores the final clause of this provision--indeed, it is edited from plaintiff's quotation of the statute. (Corrected Memorandum in Opposition at 5). That clause requires that the applicant for a stay not be in default in proceeding with arbitration. See *C. Itoh v. Jordan International Co.*, 552 F.2d 1228, 1231 (7th Cir.1977). Courts have found a default under this clause where the defaulting party "actively participated in litigation," *In Re Mercury Const. Corp.*, 656 F.2d 933, 939 (4th Cir.1981), or "has acted inconsistently with the arbitration right." *U.S. For Use and Benefit of DMI v. Darwin Const.*, 750 F.Supp. 536, 538 (D.Me.1990). More specifically, courts have held that a plaintiff that brings suit on a contract without availing himself of the contract's arbitration clause has waived his rights under that clause and could not subsequently ask the court for a stay under Section 3. *Doctor's Associates, Inc. v. Distajo*, 66 F.3d 438, 454-55 (2nd Cir.1995) (citing *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 989 (2nd Cir.1942)). Here, plaintiff has allowed the period for arbitration to lapse, choosing instead to proceed with a civil suit. Plaintiff has certainly acted inconsistently with its arbitration right, not only by ignoring it until it expired, but by initiating civil litigation. Accordingly, we must consider plaintiff in default under 9 U.S.C. § 3, and find it not entitled to a stay of these proceedings.

IV. CONCLUSION

For the foregoing reasons, it is hereby ordered that defendant's motion to dismiss the plaintiff's complaint be GRANTED.