

clean bill of lading that states the cargo was loaded “Clean on Board,” i.e., undamaged.

In response, Star Cosmo denies that the cargo was undamaged when loaded, that the cargo was damaged while Star Cosmo was responsible for the cargo, and that Star Cosmo was negligent and liable to Lamina Y Placa for damages to the cargo. Star Cosmo’s defense is based upon a claused bill of lading that lists the cargo as damaged prior to shipping.

At issue is which of the two bills of lading is genuine and controlling.

This matter is before the Court on Star Cosmo’s Motion for Summary Judgment (the “Motion”). The parties waived oral arguments on the Motion.

Based upon the briefs and exhibits submitted by the parties, the Court finds (i) that Star Comos presented evidence showing the Claused Bill of Lading is genuine and is the controlling bill of lading and (ii) that Lamina Y Paca failed to provide any evidence to prove otherwise. Accordingly, the Court concludes that there is no genuine issue of material fact the Cargo was damaged before it was loaded on board the Vessel, that Star Cosmo and Daewoo are not responsible for such damage, and that Star Cosmo is entitled to summary judgment as a matter of law, i.e., the law negligence.

I. PROCEDURAL AND FACTUAL BACKGROUND

On April 2, 2014, Lamina Y Placa filed its Complaint. In the Complaint, Lamina Y Placa alleges that it is the owner of 365 prime dipped galvanized steel coils (the “Cargo”). *See* Compl., ¶6. The Cargo was loaded onto the Vessel on October 20, 2012, in the port of Changshu, China, bound for Altamira, Mexico. *Id.* Ex. P-2. Star Cosmo is the owner of the Vessel. *Ans.*, ¶5. During the time at issue, the Vessel was chartered to Daewoo. *Mot.* at 4. The shipper of the Cargo was Wuxi Zhongcai New Metal Co. Ltd. *Compl.*, Ex. P-2.

Lamina Y Placa alleges that the Cargo was loaded on board the Vessel in an undamaged state. *Id.* ¶12. The Cargo arrived in Mexico and was delivered on April 2, 2013. *Id.* ¶13.

Lamina Y Placa alleges that at the time the Cargo was delivered, it was damaged. *Id.* Lamina Y Placa alleges that Defendants are jointly and severally liable for this damage. *Id.* ¶18. In support of its allegations, Lamina Y Placa submitted an Entity Report for Star Cosmo and two different Bills of Lading. *Id.* Exs P-1 and P-2. The first Bill of Lading notes the state of the Cargo as “Clean on Board.” *Id.* Ex. P-2, at 2. The first Bill of Lading is referred to herein as the “Clean Bill of Lading.” The second Bill of Lading contains the following remarks:

- 1) All of cargo was stored at terminal warehouse before shipment.
- 2) All cargo was slightly scratched on package surface.
- 3) 53 coils cargo packages crumpled.
- 4) 36 coils strapping bands were broken / slack with 1-2 pieces.
- 5) 19 coils out packages partly open and / or broken.
- 6) 5 coils deformed before shipping, and additional 8 coils deformed during the loading of the upper tiers.

Id. Ex. P-2 at 2. The second Bill of Lading is referred to herein as the “Claused Bill of Lading.”

The Complaint did not address or explain the difference in the two Bills of Lading. Lamina Y Placa did not offer evidence that the Clean Bill of Lading was issued by Star Cosmo or its agents. Nor did Lamina Y Placa offer evidence that the Claused Bill of Lading was not genuine and covered the subject transaction.

On September 19, 2014, Star Cosmo filed its Answer to the Complaint. On February 17,

2015, Star Cosmo filed the Motion. In the Motion, Star Cosmo alleged that the Clean Bill of Lading was *prima facie* fraudulent as it was never issued by Star Cosmo or any of its agents. Mot., at 3. Star Cosmo also alleged that the Claused Bill of Lading was the actual Bill of Lading, and that it defeated the claims in the Complaint. *Id.* at 4. In support of these allegations, Star Cosmo submitted the following documents:

1. an Authorization to Sign Bills of Lading dated October 19, 2012, to Bonavigon International Shipping Service Co., Ltd.;
2. Cargo Condition Report dated October 20, 2012, from Uteam Marine Surveyors & Consultants Co., Ltd.;
3. a Mate's Receipt dated October 20, 2012, from Bonavigon International Shipping Service Co., Ltd.;
4. the Claused Bill of Lading dated October 20, 2012;
5. the Clean Bill of Lading dated October 20, 2012;
6. a letter dated January 31, 2013, from Lamina Y Placa's Purchasing Manager;
7. a letter dated February 22, 2013, from Lamina Y Placa's Purchasing Manager;
8. a Petition for Garnishment for Security of an Ocean-Going Vessel filed in the Court of First Instance of Ghent, Belgium dated January 25, 2013, along with an English translation of same¹; and

¹On January 25, 2013, while the Vessel was in Ghent, Lamina Y Placa arrested the Vessel. *See* Mot., Exs. 8, 9. In the arrest application, Lamina Y Placa claimed that it had no knowledge that a claused Bill of Lading had been issued and that the only valid Bill of Lading was the clean one. *See* Mot., Ex. 9. Lamina Y Placa thus claimed that Daewoo and Star Cosmo were refusing to deliver the Cargo with the presentation of the clean Bill of Lading. *Id.* The arrest was made for a claim of US\$3,282,141.00, consisting of a principal amount of US\$2,524,724.00 plus a provision for costs and interests amounting to US\$757,417.00. *Id.*

9. a Judgment by the Distrainment Judge, Court of First Instance of Ghent, Belgium dated January 30, 2013, along with an English translation of same.²

See Mot., Exs 1 - 11. Star Cosmo asserted that the documents submitted established that the damage to the Cargo occurred before it was loaded onto the Vessel. *See id.*

On February 18, 2015, Star Cosmo filed an Errata to its Motion. The Errata contained the Declaration of Georgia Mastagaki. Mastagaki declared, upon personal knowledge, that Exhibits 1-4, 6, and 7 are true and correct copies of records relating to the shipment of the Cargo kept in the course of regularly conducted business activity by Star Cosmo and made at or near the time of the acts or events evidenced by such documents, in the regular course of Star Cosmo.

On March 10, 2015, Lamina Y Placa filed its Opposition to the Motion. In the Opposition, Lamina Y Placa claimed that the Motion failed to establish that there was an absence of dispute as to material facts or that Star Cosmo was entitled to summary judgment as a matter of law. *Opp.*, at 1. Lamina Y Placa pointed to the discrepancies between the allegations in the Complaint and those in the Motion to show that there were disputes as to material facts. *See Opp.*, *passim*. However, Lamina Y Placa conceded the Claused Bill of Lading bears its signature. Lamina Y Placa endorsed the Claused Bill of Lading to get its Cargo released. *Opp.*, at 5 and Ex. 1 to the *Opp.*

On March 12, 2015, the Court filed a Notice of Missing Page in Defendant's

²Star Cosmo immediately filed opposition proceedings against the arrest based on the defense that the clean Bill of Lading was fraudulent. A hearing on the arrest application was held on January 29, 2013. The next day, January 30, 2013, the Distrainment Judge of the Court of First Instance of Ghent issued his judgment. *See Mot.*, Exs. 10, 11. In that judgment, the judge determined that the Clean Bill of Lading was *prima facie* fraudulent. *Ex. 11 at 6.* The judge then lifted the arrest of the Vessel. *Id.*

Memorandum in Support of Motion for Summary Judgment. In response to this Notice, Star Cosmo filed an Errata, along with the missing page, on March 13, 2015.

On March 18, 2015, Lamina Y Placa submitted its Reply Memorandum in Support of the Motion.

The parties held a status conference on May 7, 2015. Based on this status conference, the Court, in its Order Setting Oral Argument dated the same day, allowed the parties to file additional submissions relating to the Motion. Pursuant to this Order, on July 29, 2015, Star Cosmo filed Supplemental Exhibits in Support of the Motion. The supplemental exhibits included a Judgment from the Seventh Chamber, Court of Appeal, Ghent, Belgium dated April 13, 2015, along with an English translation of same. *See* Supp. Ex. in Support of Mot. Exs 12 and 13.³ Lamina Y Placa did not file any supplemental exhibits.

On October 2, 2015, the parties held another status conference, wherein the parties agreed to waive oral arguments and to submit proposed orders relating to the Motion. Based on this status conference, the Court issued an Order for Draft Order and for Responses on the same day.

II. LEGAL STANDARD FOR MOTION FOR SUMMARY JUDGMENT

For granting summary judgment motions, Marshall Islands Rules of Civil Procedure 56(a) adopts a two-part test. The Court shall grant summary judgment if “the moving party shows [1] that there is no genuine issue as to any material fact and [2] that the moving party is entitled to a

³On January 30, 2013, the same day that the Distraint Judge lifted the arrest of the Vessel described in footnote 1, Lamina Y Placa submitted a second application for arrest. Star Cosmo filed an opposition proceeding to this arrest application as well. *See* Supp. Ex. in Support of Mot., Ex. 13 at 4. Both arrest applications were challenged to the Court of Appeal of Ghent on the issue of whether Lamina Y Placa could arrest the Vessel as security for its claims. *See id.* On April 15, 2015, the Court of Appeal of Ghent upheld the Distraint Judge's decision lifting the arrest of the Vessel. *See id.* at 13.

judgment as a matter of law.” MIRCP 56(a).

A. No Genuine Issue as to Any Material Fact

The moving party satisfies its initial burden under Rule 56 by showing “that there is an absence of evidence to support the non-moving party’s case.” *Celotex v. Catrett*, 477 U.S. 317, 325 (1986). Once the moving party makes its showing, the non-moving party must go beyond the pleadings and identify facts which show a genuine issue for trial. *Id.* at 324; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (citing *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968)) (“[A] party opposing a properly supported motion for summary judgment ‘may not rest upon the mere allegations or denials of his pleading, but . . . must set forth facts showing that there is a genuine issue for trial.’”).

In order to raise a “genuine” issue of fact, the “evidence [must be] such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson*, 477 U.S. at 248. With respect to the materiality of facts, “[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” *Id.* “A material fact is one which may affect the outcome of the litigation.” *Commodity Futures Trading Com’n v. Savage*, 611 F.2d 270, 282 (9th Cir. 1979).

In the case of ambiguities, ambiguities must be resolved and all reasonable inferences must be drawn in favor of the nonmoving party. *Heyman v. Commerce & Indus. Ins. Co.*, 524 F.2d 1317, 1320 (2d Cir. 1975). If reasonable minds could differ as to import of nonmoving party’s evidence, and if there is any evidence in the record from any source from which reasonable inference in nonmoving party’s favor may be drawn, moving party simply cannot obtain summary judgment. *R.B. Ventures, Ltd. v. Shane*, 112 F.3d 54 (2d Cir. 1997). However,

there must be more than a “scintilla” of evidence favoring the nonmoving party to create an issue of material fact. *Sumners v. Teichert & Son, Inc.*, 127 F.3d 1150, 1152 (9th Cir. 1997). Once the moving party makes its showing, the nonmoving party may not defeat a motion for summary judgment in the absence of any significant probative evidence tending to support its legal theory. *Commodity Futures Trading Com’n*, 611 F.2d at 282.

If the moving party can show there is no genuine issue as to a material fact, then the moving party must show that it is entitled to judgment as a matter of law. In this case, the applicable law is the law of negligence. *Opp.*, at 1.

B. Negligence

To prevail on a claim for negligence, a plaintiff must prove: duty, breach, causation, and damages. *Republic of the Marshall Islands v. American Tobacco Co.*, 2 MILR 181, 190 (2002) (citing *Schmanski v. Church of St. Casimir of Wells*, 243 Minn. 289, 292 (1954)). If the plaintiff fails to produce evidence linking the defendant’s conduct to the plaintiff’s claims of damages, summary judgment ends consideration of the plaintiff’s claims. *Id.* at 191.

III. DISCUSSION

This case turns on one issue: whether the Cargo was loaded on the Vessel in an undamaged state prior to coming under the Defendants’ control and responsibility, as asserted in the Opposition. *Opp.*, at 2. This issue, in turn, is determined by which Bill of Lading is genuine and controlling: the Clean Bill of Lading or the Claused Bill of Lading. Star Cosmo has presented evidence showing that the Claused Bill of Lading is genuine and the controlling bill of lading. Lamina Y Placa failed to provide any evidence to show otherwise.

Through the deceleration of Mastagaki, Star Cosmo has presented evidence on the record

of the following facts:

Prior to the loading of the Cargo, the Master of the Vessel authorized Daewoo's agent, Bonavigon International Shipping Service Co., Ltd. ("Bonavigon"), to sign Bills of Lading on his behalf. *See* Mot., Ex. 1. The Authorization specifically states that Bonavigon "shall clause said Bills of Ladings is [sic] strict conformity with Mate's/Tally's clerk's receipts." *Id.*

A pre-loading survey of the Cargo was conducted on October 19 and 20, 2012, by Uteam Marine Surveyors & Consultants Co., Ltd. ("Uteam"). *See* Mot., Ex. 2. During this survey, Uteam noted the defects in the Cargo. *Id.* Specifically, Uteam noted the following:

- 1) All of cargo was stored at terminal warehouse before shipment.
- 2) All cargo was slightly scratched on package surface.
- 3) 53coils cargo packages crumpled.
- 4) 36coils strapping bands were broken/slack with 1~2pieces.
- 5) 19coils out packages partly open and/or broken.
- 6) 5coils deformed before shipping, and additional 8coils deformed during the loading of the upper tiers.

Id. Uteam then recommended that the Captain and the Chief Officer note these deficiencies in the Mate's Receipt and the Bill of Lading. *Id.*

Consistent with Uteam's recommendation, Bonavigon noted these pre-loading deficiencies on the Mate's Receipt. *See* Mot., Ex. 3. Bonavigon, on behalf of the Master, then issued the Claused Bill of Lading, with number DWLGSTCALT21001, which specifically noted these deficiencies. *See* Mot., Ex. 4; cf Compl., Ex. P-2, at 2. The Claused Bill of Lading was issued "to order" of Lamina Y Placa. Mot., Ex. 4.

The Cargo was then shipped to Altamira, Mexico. Upon arrival and discharge of the Cargo in Altamira, Lamina Y Placa's representatives presented themselves to Daewoo's agent, Newman International, S.A. de C.V. ("Newman"), on January 8, 2013, and asked for delivery of the Cargo. Lamina Y Placa's representatives presented the Clean Bill of Lading, which did not note the damage to the Cargo. *See* Mot., Ex. 5; cf Ex. P-2 of Compl., at 1. This Clean Bill of Lading was not issued by Bonavigon, and instead was issued by a Chinese company named Shanghai Xinhui Shipping Agency. Mot., Ex. 5. Rejecting the Clean Bill of Lading, Newman refused delivery of the Cargo to Lamina Y Placa. Pending resolution of this issue, the Cargo was instead put in storage. Compl., ¶14.

On January 31, 2013, Lamina Y Placa's agent, Villacero, requested release of the Cargo based on the fact that they had endorsed the Claused Bill of Lading. *See* Mot., Ex. 6. On February 22, 2013, Villacero sent another letter to Newman, in which it again requested release of the Cargo based on the Claused Bill of Lading. *See* Mot., Ex. 7. Villacero also agreed to indemnify Daewoo against all potential claims related to release of the Cargo. *Id.* Based upon these representations, the Cargo was subsequently released to Lamina Y Placa.

In its Opposition, Lamina Y Placa does not provide any evidence to dispute any of these facts. Rather, Lamina Y Placa simply asserts that there are factual issues at the core of this dispute. First, Lamina Y Placa claims that there is a dispute regarding whether the Cargo was damaged prior to being shipped. In support of this claim, Lamina Y Placa points to its own Complaint and its Arrest Application from the proceedings in the Ghent Court. Mot., Ex. 9. However, these are mere allegations. In fact, they are unverified as Lamina Y Placa did not provide any affidavits or declarations to support these allegations. These unverified allegations

are not evidentiary in nature. They do not satisfy the requirement for factual support under MIRCPC 56(c)(1)(A).⁴

Lamina Y Placa then claims that the fact that there are two different bills of lading of the same date and identification number is itself evidence of a dispute. Lamina Y Placa states: “Lamina Y Placa contends that it was issued the Clean Bill of Lading and never saw the Claused Bill of Lading until after it attempted to obtain its coils from Defendant.” In support of this, Lamina Y Placa again points to the Arrest Application that was before the Ghent Court. The fact that Lamina Y Placa has to point to the Arrest Application rather than its own Complaint confirms that these facts were never actually alleged in the Complaint. In addition, notwithstanding Lamina Y Placa’s claim, the statements from the Arrest Application are not evidentiary in nature. They also do not satisfy the requirement for factual support under MIRCPC 56(c)(1)(A).

The only actual piece of evidence presented by Lamina Y Placa in its Opposition is a letter from Lamina Y Placa’s purchasing director. Lamina Y Placa asserts that the letter shows that Lamina Y Placa only signed the Claused Bill of Lading in order to obtain return of the Cargo. Opp., at 5. However, the letter does not establish the validity of the Clean Bill of Lading,

⁴MIRCPC 56(c)(1)(A) provides as follow:

(1) Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials;

which Lamina Y Placa relies upon to support the Complaint. Even more significant, the letter does not negate the validity of the Claused Bill of Lading. The letter only states that the purchasing director had not previously seen the Claused Bill of Lading. Opp., Ex. 1. This statement in and of itself does not show that the Claused Bill of Lading is invalid.

With respect to the facts established by Star Cosmo in the Motion, the letter submitted by Lamina Y Placa actually confirms that Lamina Y Placa did sign the Claused Bill of Lading. Though it seeks to explain why Lamina Y Placa signed the Claused Bill of Lading, this issue does not bear on the validity of the Claused Bill of Lading. Further, the letter does not disprove that a pre-loading survey found the Cargo to be damaged prior to coming under the Defendants' control and responsibility. Nor does it demonstrate that Shanghai Xinhui Shipping Agency, which signed the Clean Bill of Lading, had any actual authority to sign on behalf of the Master. Lamina Y Placa has simply failed to provide any probative evidence to support its claims against Star Cosmo in this case. There is simply no evidence favoring Lamina Y Placa to create an issue of material fact, and summary judgment in favor of Star Cosmo is proper.

IV. CONCLUSION

Star Cosmo has shown that there is an absence of evidence to support Lamina Y Placa's case. Star Cosmo has through Mastagaki's declaration come forward with evidence that shows the Cargo was damaged prior to coming under Defendants' control and responsibility. Star Cosmo has shown that the Claused Bill of Lading is the genuine and controlling bill of lading. Star Cosmo has met its Rule 56(a) obligation.

Lamina Y Placa, on the other hand, has offered no evidence upon which a reasonable trier of fact could find otherwise. Lamina Y Paca cannot rely on its unverified pleadings and

allegations. They do not satisfy the requirement for factual support under MIRCPC 56(c)(1)(A). *See USA Small Bus. Adm. v. Trans Atoll Ser. Corp.*, 1 MILR (Rev.) 57, 58 (1986) (Summary judgment is determined on the basis of the record, including affidavits. Unsworn statements of counsel will not be considered.).

In response to Star Cosmos's evidence, Lamina Y Placa has failed to produce evidence that there is a genuine issue as to a material fact. Lamina Y Placa has failed to produce evidence that the damage was due to Defendants' negligence. Lamina Y Placa has failed to produce evidence of duty, breach, causation, and damages: i.e., the elements of negligence. Accordingly, Star Cosmo is entitled to a summary judgment as a matter of law.

V. ORDER

Based upon the above, the Court hereby orders that this case is dismissed, with each party to bare its own costs and expense.

Entered: December 1, 2015.

A handwritten signature in black ink, appearing to read 'C. B. INGRAM', written over a horizontal line.

Carl B. Ingram
Chief Justice, High Court