REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

PORT OF SPAIN

CV 2011 - 02772

BETWEEN

DR. LAINI M. GILLIAM-JOSEPH

Claimant

AND

MAHINDRA NAGASSAR

First Defendant

AND

TRINFORWARDING INTERNATIONAL INC.

Second Defendant

BEFORE THE HONOURABLE JUSTICE RICKY RAHIM

Appearances:

Mr. B. Charles instructed by Ms. S. Charles for the Claimant.

Mr. D. Ali instructed by Ms. Birsingh for the Defendants.

Reasons

1. On the 12th June 2012 the court made the following order in this claim:

    (a) As between the Claimant and the First Defendant:

        i. The Claim against the First Defendant is dismissed.

        ii. The Claimant is to pay to the First Defendant prescribed costs in the sum of **$4,200.00**.

    (b) As between the Claimant and the Second Defendant:

        i. General damages is awarded to the Claimant in the sum of **$125,000.00** for breach of the agreement by the Second Defendant to insure the Claimant's items.

        ii. Prescribed costs in the sum of **$27,750.00** to be paid by the Second Defendant to the Claimant.

2. The following are the reasons for the decision.

3. It was agreed among the parties that by an oral contract made in or around September 2007, the Second Defendant agreed to provide shipping services to the Claimant for the transportation of certain items belonging to the Claimant. The items were to be, and in fact were, transported from the Claimant's home in Trinidad to the United States of America (USA).

4. The items ranged from pieces of paintings, art and craft pieces, glassware, glass cabinets, sofas, beds, bedroom furniture, televisions and other personal effects and were shipped in two containers, a forty foot container and a twenty foot container. On arrival in the USA, at the Coastal Marine, Customs Inspection Facility, Blount Island,

Jacksonville, Florida, USA on the 19th October 2007, the twenty foot container was found to be in a state of disarray and the items therein were either damaged or destroyed. The Claimant observed the damage to the items when it arrived at her home on the 31st October 2007.

5. Claimant's claim for breach of contract and/or negligence was based on the Claimant's assertion of the existence of two terms in the oral contract to ship the items:

    i. That the Second Defendant insure the items to be shipped; and
    ii. That the Second Defendant wrap, package and pack the Claimant's items.

6. Consequently the court found that the issues to be determined were:

    i. Whether there was an agreement between the Claimant and the Defendants that the Defendants would insure the Claimant's items.

    ii. If there was an agreement, whether the Defendants failed to insure the Claimant's items.

    iii. Whether there was an agreement between the Claimant and Defendants that the Defendants would wrap, package and pack the Claimant's items.

    iv. Whether the Defendants breached the said agreement and/or were negligent in so doing and as a result the items sustained damage.

Agreement to Insure

7. The Claimant, in this respect, testified that she had a discussion with the First Defendant and Ms. Modeste-McComie, an employee of the Second Defendant, about insuring her items and that it was agreed that the Second Defendant would insure the items. She gave evidence that she gave the First Defendant a list of the items to be shipped, which the First Defendant requested, and a total value for the items and was of the understanding that the Second Defendant would insure her items. She therefore

testified that the sum of $37,877.75 which she paid to the Second Defendant to ship the items was inclusive of the cost for insurance. She testified that at no time did she think that her items were not insured.

8. The Claimant's witness Ms. Modeste-McComie also testified that she sent a quotation for the shipping job to the Claimant and that the quotation included insurance coverage for her items. However in cross examination, Ms. Modeste-McComie testified that she could not say for sure whether the figure quoted and paid included insurance, however from her recall it did.

9. The First Defendant testified that although he did have a discussion with the Claimant about insurance, the items were never insured because the Claimant had not provided a list of the items with their respective values. This he explained was needed in order to insure the items.

10. This issue therefore turned on the evidence.

11. It was borne out in evidence from the Claimant's witness, Ms. Modeste-McComie, that Ms. Modeste-McComie had an action pending against the Second Defendant, in which she claimed that she was separated unlawfully from the company. Ms. Modeste-McComie also testified in cross examination that she also claimed that the First Defendant was responsible for her separation from the company. This evidence, of course, was elicited to cast doubt on the credibility of this witness' evidence.

12. Notwithstanding this evidence, the court was of the opinion that Ms. Modeste-McComie was a neutral party in these proceedings. The court noted that Ms. Modeste-McComie, despite her pending proceedings, did not have an interest to serve by ensuring that the Second Defendant was indebted to another by way of a judgment. To the contrary, it would, in the court's view, be more beneficial to the witness to ensure that she did nothing which would make her a competitor for debts owed by the Second Defendant should she succeed in her claim and be entitled to damages. Modeste-

McComie did not appear to be dishonest in this court's opinion, nor did she appear to have a personal interest to serve by giving evidence for the Claimant. When probed in cross examination whether the Claimant had in fact given the list requested by the First Defendant in order to insure her items, she answered that she could not say for certain. She also did not definitively say if the insurance coverage was included in the sum paid by the Claimant. Instead Ms. Modeste-McComie stated that from what she recalled, the sum included insurance. It would have been much easier for the witness who wishes to tell untruths to simply say for certain that the sum included insurance. The issue for consideration with this witness was, for the court, one of reliability, not credibility.

13. The evidence of the Claimant was opposed to that of the First Defendant with respect to the agreement to insure the Claimant's items. The First Defendant said he required a list of **each item with its individual value** in order to insure the shipment. He testified that he received such a list, although he received a total figure for the value of all the items. The Claimant said the list was requested but that she gave the list with a **total value for all the items**, which the First Defendant accepted. In cross examination the First Defendant testified that the total value was used for customs declaration and that sometimes this figure or a higher figure can in fact be used for insurance purposes. This means that the First Defendant did in fact receive a total value of the items to be shipped.

14. The evidence of the Claimant's witness, Ms. Modeste-McComie, was, in the court's view, the tie breaker. Her evidence was supportive of the evidence of the Claimant in that she stated from her recall that the sum she quoted to the Claimant, which was paid, was inclusive of insurance. All three persons were present when this conversation on insurance occurred but Ms. Modeste-McComie's evidence tilts the pendulum in favour of the Claimant's case. It was the evidence of the Claimant that she was initially hesitant to insure the items but Ms. Modeste-McComie was adamant that they be insured because of the value. The Claimant also gave evidence that the First Defendant then said that they would take care of the insurance. The witness therefore remembers

the Claimant being adamant. This stood out in her mind. The court has considered this along with the general tenor of the conversation which took place on that day. The recall of the witness appears to have aided by the impression created by the Claimant in being adamant. It is therefore clear to the court having not only considered the evidence but having observed the demeanor of the witness that the evidence of this witness as regards the insurance was reliable.

15. The court found therefore, on a balance of probabilities, that there was an agreement for the Second Defendant to insure the items of the Claimant. This agreement was not dependent on the Claimant providing individual values for each item as the court accepted that the First Defendant acquiesced to the Claimant giving a total value for all the items. The agreement was for the Claimant to provide the First Defendant with a list of the items to be shipped and a value for the items.

16. It was a question of fact whether there was insurance coverage on the items. The court found on the evidence that the items were not in fact insured. Consequently, there being no insurance coverage on the Claimant's shipment, this court found that there was a breach of the agreement to insure by the Second Defendant.

17. A breach of contract gives an injured party a right of action for damages: see ***Halsbury's Laws of England, 4th Edn. Vol 9, para 559***. Damages for breach of contract are compensatory for the loss, damage or injury which the Claimant has suffered. It must put the Claimant in the position she would have been had the contract been performed: see ***Chitty on Contracts Vol. 1, para 1551***.

18. In the instant matter, the Claimant made a claim for General Damages and Special Damages for the damage and/or destruction of her items in the sum of USD $65,426.00. The Claimant also claimed Special Damages in the sum of USD $5,750.00 for money expended on legal fees and travelling to and from Trinidad in an effort to resolve the issue without court action.

19. It is settled that Special Damages must be pleaded, particularized and strictly proved: see ***Grant v Motilal Moonan Ltd. (1988) 43 WIR 372; Rampersad v Willies Ice Cream Ltd. Civ-App 20 of 2002***. A Claimant who bases her claim on precise calculation must give the defendant access to the facts on which they are based. This is because the purpose of special damages is to prevent surprise at the trial by giving the Defendant prior notice of any item in the claim for which a definite amount can be given in evidence: see ***Chitty on Contracts Vol. 1, para 1552.***

20. General Damages, on the other hand, is such damage as the law presumes to result from the infringement of a legal right. That is, the natural and probable consequence of the breach. The plaintiff is required only to assert that such damage has been suffered but need not be strictly quantified: see ***Chitty on Contracts Vol. 1, para 1552***.

21. However, to establish a claim for damages for breach of contract, the Claimant must show that the loss sustained was not too remote: see ***Hadley v Baxendale (1854) 9 Exch 341.***

22. Damage to cargo transported via sea is not a remote possibility. The First Defendant himself admitted in cross examination that he would always advise clients to take out insurance as it protects the company and the client against claims.

23. Although the Claimant particularized the Special Damages, she did not provide bills, receipts or valuations so as to strictly prove the sum claimed with respect to the damaged and/or destroyed items. The Claimant attempted to give values to the items based on a number of methods namely what she had paid for them (but no receipts were provided), their increased value over the years and their possible resale value. She therefore did not strictly prove her special damages. In relation to the sum expended on legal fees and travelling to and from Trinidad and Tobago the Claimant also did not provide any receipts or bills. This court therefore could not make an award for the sum claimed for Special Damages in the circumstances.

24. However, the court acknowledged that the Claimant did suffer a loss as a result of the breach of contract by the Second Defendant. In this regard, an award of general damages was made. Such an award is made, not to punish the party in breach, or to confer a windfall on the innocent party, but to simply compensate the innocent party for the loss. The sum awarded must be guided by the principles of reasonableness.

25. In awarding this sum the court considered the nature of the items destroyed and/or damaged. The Claimant and the Claimant's witness, Ms. Modeste-McComie, have both testified that the items were very valuable and unique items. The First Defendant in cross examination has also given evidence that the items were in fact unique collector's items.

26. The sum which this court must award, therefore, must attempt to place the Claimant in the position she would have been in had the contract been properly performed. That is, to place her in the position she would have been had the Second Defendant insured the items as agreed between the parties.

27. The Claimant has listed 26 items which were either damaged or destroyed. However, the Claimant has acknowledged payment for one item which was broken while being packed in Trinidad. This was listed as item no. 20 in the Particulars of Special Damages in the Claimant's Statement of Case. It was a crystal bowl base to a floral centerpiece. The other damaged/destroyed items ranged in size and value and included pieces of furniture, original paintings, African and Religious sculptures, and a television set. These items were high in value, both sentimental and monetary and the court thought it somewhat unfortunate that, having regard to the nature of the items, the Claimant could not provide documentary proof of the value of the items lost.

28. Bearing in mind the principles of reasonableness and the nature of the loss, the court considered the sum of $125,000.00 for the loss of 25 items to be a reasonable sum for damages for breach of contract.

Agreement to wrap, package and pack Claimant's items

29. The Claimant's case in this regard was that the Second Defendant was responsible for the wrapping, packaging and packing of the Claimant items. The Claimant claimed that the First Defendant informed her that one Mr. Ken Mohammed would be responsible for wrapping and packaging the Claimant's items. Consequently, when she paid the Second Defendant the sum paid was inclusive of this extra service.

30. The Claimant testified that she informed both the First Defendant and Ms. Modeste-McComie that the items would have to be packaged with thick bubble wrap for all glass items and that the wooden sculptures would require both shrink wrap to avoid chipping and scratches as well as thick bubble wrap for protection. The Claimant gave evidence that she gave the First Defendant and Ms. Modeste-McComie a sample of the bubble wrap paper she wanted used on her items. Ms. Modeste-McComie gave evidence that she went to the home of the Claimant with the First Defendant where they both observed that the items to be shipped were valuable and would require special packaging. Ms. Modeste-McComie further testified that the Claimant informed them that the items were wrapped in thick bubble wrap when they were shipped from the US to Trinidad and presented a sample of the bubble wrap.

31. The Defendant on the other hand testified that Mr. Ken Mohammed was recommended to the Claimant as a person who provided wrapping and packaging services. The Defendants however pleaded that they did not wrap or package any item of the Claimant. The First Defendant explained in cross examination that although the Claimant paid the Second Defendant for this service, the money was then paid to Mr. Mohammed by the First Defendant.

32. The Claimant's witness, Ms. Modeste-McComie, testified that the First Defendant informed her that he would talk to Mr. Mohammed about the packaging/packing

service. Ms Modeste-McComie gave evidence that she always knew Ken Mohammed as an employee of the Second Defendant.

33. Again this issue turned on whose evidence is preferred by the court. In this regard the court found that the agreement for the packaging/packing service was between the Claimant and the Second Defendant. There was no subsidiary contract between the Claimant and Mr. Mohammed. This is evident by the direct payment to the Second Defendant for this service by the Claimant. Additionally, the First Defendant testified during cross examination that the Claimant did in fact pay for packaging/packing services.

34. Although this court found that there was an agreement to provide this service and to do so in the way expressed by the Claimant, that is, with special shrink wrapping and bubble wrap paper, the court could not find on the evidence that there was a breach of this agreement.

35. When the shipment arrived in the USA the Claimant was not present to witness the state of packaging of the items in the container. It was noted that there was an email of the 24th April 2008, from Bud Underwood, VP Risk Management, of Coastal Maritime Stevedoring, LLC annexed to the Claimant's witness statement stating that the container arrived at the Port in a state of disarray; however there is no evidence that the wrapping or packaging was not as agreed. The items could have been damaged notwithstanding the proper packaging. This in itself is speculative and as there is no direct evidence that the items were not packed as agreed, this court could not make a finding that there was a breach of the agreement to wrap, package and pack.

36. There being a duty to wrap, package and pack, but no proof of a breach of this duty, this court found that the Claimant's claim in negligence and/or breach of contract on this issue must fail.

The Claim against the First Defendant

37. The court dismissed the claim against the First Defendant and in so doing the court considered the submissions of Counsel on the point.

38. Counsel for the Claimant submitted that the Defendants had not pleaded that the Claimant did not contract with the First Defendant that and it is too late now for the First Defendant to extricate himself. Counsel relied on ***Naresh Ramlogan v Orangefield Estates Ltd. and Others H.C.A. No. 2572 of 2000*** in submitting that each party must plead the material facts on which he means to rely at trial, otherwise he is not entitled to give evidence of them at the trial.

39. Counsel for the Defendants contended that there was no evidence to lead to the conclusion that the First Defendant contracted with the Claimant in his personal capacity. He argued that all evidence pointed to the First Defendant acting as an employee of the Second Defendant. The submission of Counsel for the Defendants was therefore that the Claimant did not prove on a balance of probabilities that the First Defendant was personally liable for the damage caused to her items and consequently the claim against him ought to be dismissed.

40. This court agreed with the submissions of Counsel for the Defendants. There was no contract between the Claimant and the First Defendant for the provision of shipping services. The oral contract for the provision of services was, at all times, with the Second Defendant. The First Defendant was at the material time the Director of National Operations of the Second Defendant and his dealings with the Claimant had been in this capacity.

41. In finding that the claim against the First Defendant ought to be dismissed, the court also considered the Claimant's testimony that at all times when dealing with the First Defendant it was as an employee of the Second Defendant.

42. On the issue of costs to be awarded to the First Defendant, the court assessed the claim as a claim for $50,000 in accordance with **Rule 67.5(2)(b)(iii)** of the **CPR 1998**. In arriving at the sum to be awarded the court was guided by **Rule 67.5(4)(a)** and **Rule 66.6(5)(a)**. This court considers that it may have been reasonable for the Claimant to pursue the allegations against the First Defendant due to the fact that she, at all time, communicated with the First Defendant and made arrangements with the company through the First Defendant. Further, the court notes that although the claim against the First Defendant was dismissed, his attendance at court and participation at every stage of the proceedings would have been, in any event, necessary as he was the Director of National Operations and representative of the Second Defendant.

43. In the circumstances and in accordance with the discretion conferred on the court by **Rule 67.5(4)(a)**, this court was of the opinion that the Claimant ought to pay to the First Defendant only 30% of the prescribed costs.

Dated this 21st day of September, 2012.

Ricky Rahim

Judge