UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-2573
Summary Calendar

TUTEUR ASSOCIATES, INC.,

Plaintiff-Appellant,

VERSUS

M/V OMISALJ, her engines, tackle, etc., in rem and against EUROPE-OVERSEAS STEAMSHIP LINES N.V. and JUGOLINIJA, in personam,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas (CA H 91 2046)

(May 18, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Tuteur Associates, Inc., challenges an adverse summary judgment. We **AFFIRM**.

I.

Jugolinija, a common carrier, time chartered the M/V OMISALJ to Fedcom. In turn, Fedcom allocated some of the vessel's cargo space to Europe-Overseas Steamship Lines. Fedcom issued bills of

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[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

lading to Europe-Overseas, but did not authorize Europe-Overseas to issue bills of lading to other entities.

Europe-Overseas sold some of its space on the ship to Tuteur, and issued bills of lading to it. Tuteur delivered coils of wire rods to the M/V OMISALJ in Hamburg, Germany, for shipment to Milwaukee. The cargo arrived in Milwaukee in damaged condition.

Tuteur filed a complaint under the Carriage of Goods by Seas Act (COGSA), 46 U.S.C. §§ 1300-15, against the M/V OMISALJ (*in rem*), Europe-Overseas, and Jugolinija to recover for the damaged goods. Jugolinija moved for summary judgment, which the district court granted.[2]

II.

Of course, we review freely a summary judgment. *E.g.*, ***Amburgey v. Corhart Refractories Corp.***, 936 F.2d 805, 809 (5th Cir. 1991). It is appropriate when, viewing the evidence in a light most favorable to the non-moving party, there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

Under COGSA, a cargo owner may recover only from the "carrier" of the goods. ***Pacific Employers Ins. Co. v. M/V GLORIA***, 767 F.2d 229, 234 (5th Cir. 1985). A "carrier" is defined as "the owner or the charterer who enters into a contract of carriage with a shipper." 46 U.S.C. § 1301(a). A "contract of carriage", in turn, applies "only to contracts of carriage covered by a bill of lading or other similar document of title". 46 U.S.C. § 1301(b).

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[2] The M/V OMISALJ also filed a motion for summary judgment, which was granted, and from which Tuteur does not appeal. Tuteur also voluntarily dismissed (without prejudice) Europe-Overseas.

In sum, to invoke COGSA, a cargo owner must establish that a defendant was party to a contract of carriage with it. ***Pacific Employers***, 767 F.2d at 234; *see also* ***Associated Metals & Minerals Corp. v. SS PORTORIA***, 484 F.2d 460, 462 (5th Cir. 1973). Where, as here, the cargo owner seeks to impose liability under COGSA on the vessel owner, the cargo owner bears the burden of showing that the vessel owner was a party to the contract of carriage; its failure to do so means that the cargo owner did not rely on the vessel owner to perform the contract. ***Associated Metals***, 484 F.2d at 462.

There are no genuine issues of material fact; Tuteur entered into a contract of carriage with Europe-Overseas, but Europe-Overseas was not authorized to issue bills of lading on behalf of Fedcom -- much less Jugolinija. Therefore, there was no privity of contract between Jugolinija and Tuteur, and Jugolinija is not a carrier within the meaning of COGSA. As this court stated in ***Associated Metals***:

> Relying on a failure of proof by the cargo owner that the vessel owner granted authority to the voyage charterer to sign the bill of lading on its behalf, [the vessel owner] asserts that there was no contract between it and [the cargo owner] .... We agree.

Id. at 462; *see also* ***J. Gerber & Co. v. M/V INAGUA TANIA***, 828 F. Supp. 458, 459-61 (S.D.Tex. 1992) (finding that vessel owner was not a "carrier" because there was no contractual relationship between it and the cargo owner); ***Otto Wolff Handelsgesellschaft v. Sheridan Transp. Co.***, 800 F. Supp. 1359, 1360-66 (E.D.Va. 1992) (same).

Tuteur "acknowledges the precedential authority of both ***Pacific Employers*** and ***Associated Metals*** ...." Nevertheless, it relies on cases from the Second Circuit to support the proposition that a vessel owner may be liable under COGSA to a cargo owner without privity of contract. *See* ***Siderius, Inc. v. M.V. "AMILLA"***, 880 F.2d 662 (2d Cir. 1989) (holding that when charterer's liability to cargo owner arises because vessel not seaworthy, vessel owner may be directly liable to cargo owner for breach of warranty of seaworthiness); ***Joo Seng Hong Kong Co. v. S.S. UNIBULKFIR***, 483 F. Supp. 43 (S.D.N.Y. 1979) (finding that term "carrier" is to be construed broadly to include all charterers and owners).[3] Needless to say, these cases are not controlling authority in this circuit, which requires privity of contract of carriage before liability under COGSA arises.

III.

For the foregoing reasons, the judgment is

AFFIRMED.

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[3] In addition, Tuteur relies on ***Trade Arbed, Inc. v. S/S ELLISPONTOS***, 482 F. Supp. 991 (S.D.Tex. 1980). ***Trade Arbed*** did not abrogate Fifth Circuit authority, nor, obviously, could it. The district court in that case merely recognized that, for purposes of considering a motion to dismiss, it was not inconceivable that both a charterer and a vessel owner could be carriers under COGSA. But, it expressly refused to "mak[e] a determination of which parties are COGSA carriers". ***Id.*** at 994-95.