Plaintiff(s) **ALLIANCE SHIPPERS, INC.** CIVIL ACTION vs. Defendant(s) **KEVLAUR INDUSTRIES, INC.**, et als	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MIDDLESEX COUNTY DOCKET NO.: MID-L-507-04 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

THE PLAINTIFF'S APPLICATION FOR RECONSIDERATION IS DENIED

The defendants, Loitz Bros. Construction Co. (hereinafter referred to as Loitz) and Apex Business Center, LLC (hereinafter referred to as Apex) filed motions for summary judgment returnable on July 7, 2007. Both motions were granted.

STATEMENT OF FACTS

The defendant, Kevlaur, is a manufacturer of wood chips, mulch and other agricultural products for sale to retailers of landscaping supplies. Kevlaur hired Alliance to arrange for transportation services from its facilities in Kalama, Washington and Van Buren, Maine to various locations including Loitz and Apex warehouses in the midwest. These facilities were utilized in order to forward position its products, i.e. have the products stored closer to its ultimate purchasers so that the orders could be filled within 24-48 hours. The defendant, Kevlaur, had an agreement with both Loitz and Apex to rent space for storage of their products. The plaintiff, Alliance, never communicated with the defendants, Loitz or Apex concerning the terms or conditions of the contract entered into between it and defendant Kevlaur. At all times relevant hereto, the plaintiff, Alliance, considered the agreement entered into with Kevaur to be confidential.

As part of the first leg of the shipping process from the manufacturer to the warehouse, the defendant, Kevlaur, issued a warehouse ticket or transfer slip. The product was picked up by truck, taken to the nearest railhead, and shipped by rail to the Chicago, Illinois area. Thereafter trucking companies delivered it to the warehouses. These truckers used preprinted forms of their own to confirm the drop-off. Kevlaur had several conversations with Alliance with reference to the truckers not using the proper documentation.

When Kevlaur wanted to ship its product from the warehouses to the ultimate purchaser (second leg), Kevlaur would fax a bill of lading to the warehouse with instructions to load and deliver products by the type of product and quantity indicated on the bill of lading. Thereafter, it was shipped by a third party carrier to the consignee.

Neither Loitz nor Apex were consignees of any of the freight delivered to its facility. A consignee is not merely the destination of the freight, but the customer of the product being shipped. The movement of goods from the manufacturing facility to the warehouse was an intra-company inventory transfer. For inventory transfers between manufacturing facilities and its warehouse, a warehouse ticket or transfer ticket was used. These tickets served no purpose other than to track the inventory. Kevlaur did not issue a bill of lading for any of its inventory transfers from its manufacturing facilities to the warehouses as there was no buyer/seller consignor/consignee relationship present.

While the goods were stored at the warehouses, GMAC, Kevlaur's lender, continued to have a security interest in the inventory. While the goods were stored at Loitz, Kevlaur would continually check on the product and Kevlaur's affiliate, Bevcorp,

maintained offices at the facility from which it had access to the product and arranged for shipment.

The purchaser/consignee of these goods was Home Depot and/or Lowes. Kevlaur continued to have ownership control and possession of the products at its forward bases. Kevlaur was shipping to itself. Bills of lading were only issued when Kevlaur products were being shipped to its customers like Lowes and Home Depot. Loitz never arranged any freight transfers on behalf of itself, Kevlaur, Alliance, or Home Depot nor did it prepare any shipping documents. Kevlaur utilized Bevcorp, a subsidiary, to ship goods from the warehouse to the Home Depot stores.

OPINION

While the Statement of Undisputed Facts filed by Loitz is more detailed than that filed by Apex, the operative facts are the same. The plaintiff, Alliance Shippers, Inc. (hereinafter referred to as Alliance), a shipping contractor hired by the defendant, Kevlaur Industries, Inc. (hereinafter referred to as Kevlaur) seeks to make the warehouses, who were the disclosed agents of Kevlaur, responsible for the shipping charges incurred by Kevlaur. The defendants, Loitz and Apex, correctly indicated that there are only limited methods by which a party may be made responsible for shipping charges.

First, they may be made responsible by contract or fiduciary relationship. Loitz and Apex had no contract whatsoever with the shipper, Alliance. The record is clear that Alliance considered the arrangement it had with Kevlaur to be confidential. It was not made available to Loitz or Apex nor were they involved in negotiating the shipping rates and they made no express or implied promise to pay those rates. Liability for

transportation charges cannot be imposed upon an entity which is not a party to a shipping contract. See Middle Atlantic Conference v. U.S., 353 F.Supp. 1109, 1118 (D.C. 1972). There needs to be some legal foundation for such liability and the mere handling of the goods is not sufficient. This was an intra-company transfer. Hence, both Loitz and Apex were disclosed agents of Kevlaur and liability may not attach to them. See Union Pacific R. Co. v. Ametek, Inc. 104F3d 558, 563 (3rd Cir. (Pa)1997).

Alliance should have recognized that both Loitz and Apex were the agents of Kevlaur as warehouse tickets and transfer slips were utilized in the movement of the inventory to a leased storage facility.

The second method by which Alliance sought to make Loitz and Apex responsible for the shipping charges was by asserting that they were designated in a bill of lading as a consignee. A bill of lading is a document which serves as: (1) proof of delivery; (2) a contract of carriage; (3) a record of transfer of title. In re Chateaugay Corp. 78 B.R. 713,717 (Bkrtcy.S.D.N.Y. 1987). A consignee is defined by federal law as "a person named in the bill of lading as the person to whom the goods are to be delivered." 49 U.S.C.A. § 80101. The New Jersey Supreme Court adopted a similar definition: "the term 'consignee' means the person named in the bill of [lading] as the person to whom delivery of the goods is to be made." Pennsylvania R. Co. v. Townsend, 90 N.J.L. 75 (N.J. 1917) (applying P.L. 1913, p 261). It is axiomatic that a party cannot be a legal consignee if it is not a party to the contract of carriage contained in the bill of lading. Middle Atlantic, 353 F.Supp. at 1118. The courts have held that the naming of a third party or agent by mistake or by unilateral decision will not make the party so named to be liable for freight transportation expenses. See Evans Products Co. v I.C.C., 729

F.2nd 1107,1113 (7th Cir.1984); States Marine Intern., Inc. v. Seattle-First Nat. Bank, 524 F.2nd 245, 249 (9th Cir.1975); City of New Orleans v. Rapid Truck Leasing, Inc., 348 So. 2d 1299, 1301 (La. App. 1977). It is important to note that a party's unilateral decision to name another as a consignee may be treated differently if the person sought to name was "either the purchaser of the cargo or, at least, the person to whom final delivery was to be made and who thus had an interest in and control over the cargo". Southern Pac. Trans. C. vs. Matson Naavigation Co., 383 F. Supp. 154,157 (N.D. Cal.1974). In this case, there is no evidence that either Loitz or Apex were the ultimate purchasers or had an interest or control over the cargo. As previously set forth, the transfers from Kevlaur to Loitz and Apex were merely intra-company transfers designed to make use of "forward basing". The trucking companies utilized to aid in the transport of the goods from Kevlaur to Loitz and Apex did not have the authority to unilaterally designate consignees. Matson, 383 F Supp. At 157-58; See Evans Products Co. 729 F.2d at 1118; States Marine Intern., 524 F.2d at 249.

Notwithstanding the above, the plaintiff, Alliance, asserts there is authority to hold the defendants responsible for the shipping charges without the issuance of a bill of lading. In support of this contention, the plaintiff relies upon Freight Operations, Inc. v. Hunterdon County Democrat, Inc., 184 N.J.Super. 556 (App.Div. 1982). That case is factually distinguishable from the case at hand. In Freight, the Court held that the shipper was responsible for freight charges. In the instant case, the plaintiff is seeking not to hold Kevlaur, but Kevlaur's disclosed agents, responsible for freight charges.

Alliance argues that a warehouse ticket/transfer slip can serve as a bill of lading as they contain all the operative terms and conditions. While that is true, the factual

predicates did not exist in this case. Alliance's reliance upon the unpublished case of Hillenbrand Industries, Inc. v. Con-way Transp. Services, Inc. 2002 WL1461687 (S.D.Ind. 2002) is misplaced. In that case, both the shipper and the carrier expressly incorporated extensive terms of a bill of lading into their documents so that either document would serve as a contract of carriage, again not the facts here.

The defendants have advanced additional arguments to avoid liability in this case. Those arguments are not addressed by the Court as they are moot.

The Court found in favor of the defendants and against the plaintiff as there is simply no case in which a warehouse, not having proprietary interest in goods, has ever been held to be a consignee without a bill of lading. For the foregoing reasons, the court entered summary judgment in favor of the defendants, Loitz and Apex.

MOTION FOR RECONSIDERATION

On August 3, 2007, the plaintiff Alliance filed a motion for reconsideration and submitted a letter brief in support of that application. The plaintiff asserted that the Court did not make substantial findings of fact and conclusions of law in reaching its finding set forth above. It should be noted that the Court relied upon the papers filed by the defendants which accurately and in detail set forth the appropriate law. The plaintiff set forth additional grounds for reconsideration which misstated the relevant issue. The plaintiff asserted: "When a consignee is not a beneficial owner of the goods such as when it is a warehouseman, it must give written notice to a carrier that it is an agent only, without beneficial title to the property. Otherwise it has been held responsible for freight charges upon its acceptance of delivery." This issue is not germane to the case at bar. The issue in this case is whether a warehouseman not named as a consignee in a bill of

lading and not having a proprietary interest in the freight, can be held responsible for freight charges. The answer to that question is no. See discussion above.

Since the issue is not germane, the cases cited are not relevant, to wit:

(1) Boston and Main Railroad vs. Hannaford Bros. Co. and Casco Banks and Trust Company, Trustee, 144 Me. 306; 68 A.2d; 1949 Me. In this case, the defendant was the consignee and hence had to comply with the terms and conditions of the Interstate Commerce Act. Such condition did not exist in this case;

(2) Union Pacific Railroad Co. v. Eyres Transfer & Warehouse Co., 12 Wn.2d 282; 121 P.2d 340; 1942 Wash. In this case, the shipment was co-signed by use of a bill of lading to the defendant. Again, not the case here; and

(3) Central Warehouse Co. v. Chicago, R.I. & P.Ry. Co., 20 F.2d 828; 1927 U.S. App. In this case, a bill of lading was endorsed to the defendant. Again not the case here as no bill of lading was ever issued to the defendants in this case.

There was no legally cognizant reason to alter the Court's previous findings and the motion for reconsideration was denied.

HON. BRYAN D. GARRUTO, J.S.C.