



## Zim American Integrated Shipping Services Co., LLC v. Sportswear Group, LLC

2021 | Cited 0 times | S.D. New York | July 27, 2021

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK  
----- ZIM AMERICAN INTEGRATED  
SHIPPING SERVICES CO., LLC, Plaintiff, -v- SPORTSWEAR GROUP, LLC, Defendants.  
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20-cv-4838 (LJL) OPINION AND ORDER

LEWIS J. LIMAN, United States District Judge:

pursuant to Fed. R. Civ. P. 12(b)(1), to dismiss the complaint against it for lack of subject matter

jurisdiction. In the alternative, Defendant moves, pursuant to Fed. R. Civ. P. 12(b)(6), to dismiss the complaint against it for failure to state a claim upon which relief can be granted. Dkt. No. 12. For the following reasons, Defendant's motion for failure to state a claim for relief is granted without prejudice.

FACTUAL BACKGROUND agent for Zim Integrated Shipping Services Ltd. and S

common carrier by water, inter alia, in the interstate and foreign commerce of the United States as defined in The Shipping Act of 1984, 46 U.S.C. § 40101 et seq., and was a common carrier for the benefit of Defendant S Defendant 7/27/2021

apparel. Dkt. No. 13- from factories in Bangladesh. Id

arrange for and pay for overseas carriage. Id. ¶ 3. The shippers fulfilled their obligations by arranging for carriage of cargo aboard a vessel owned or operated by Seth and issued bills of lading to the shippers for carriage of the goods from the ocean port at Chittagong, Bangladesh to the Port of New York. Id.; Dkt. No. 13 at 2. 1

In connection with its opposition to this motion, - -2. It is not clear from the Complaint or any of the materials on this record who were the parties to these bills of lading or how they relate to one-another or are different. The Seth Bill of Lading is in tiny print and mostly illegible. Neither bill of lading appears to be executed by any party.



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The negotiable bills of lading bank. Dkt. No. 13 at 2. The bank would collect all relevant shipping documents and transmit

Id. Upon payment by Defendant, the shipping documents would be released to Defendant. Id. When the shipment arrived at the Port of New York, Defendant would provide the original bills of lading to Plaintiff

1 Neither the Complaint nor documents incorporated by reference spell out precisely the contractual relationships that were entered into by Seth, Zim, the shippers, and the Defendant. For purposes of stating the background of the case, the Court draws facts not only from the Complaint but from the briefs and affidavits submitted in connection with this motion. However, in analyzing the motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court considers only the allegations contained or incorporated by reference in the Complaint, which are accepted as true for purposes of the motion. See *Washington State Inv. Bd. v. Odebrecht S.A.*, 461 F. Supp. 3d 46, 60 (S.D.N.Y. 2020). For purposes of the motion brought pursuant to 12(b)(6) *Hylton v. J.P. Morgan Chase Bank, N.A.*, 338 F. Supp. 3d 263, 272-73 (S.D.N.Y. 2018) (internal quotation marks and citations omitted).

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Plaintiff claims that it transported cargo for the benefit of Defendant during 2018-2019 in [s]uch

and/or freight bills, invoices, credit agreements and freight guarantees, the terms of which are Id. Plaintiff alleges that it has fulfilled its obligations

the amount of \$71,100 Id. ¶¶ 8-9.

shipping containers used to transport the cargo, resulting in damages. See Dkt. No. 13 at 5; Dkt. No. 14 at 4. Plaintiff argues that based on the terms of the bills of lading, which are maritime ed in the bills of lading, 2

is liable for all freight and related charges, including demurrage or detention of containers. See Dkt. No. 14 at 4. demurrage service ¶ 18. Plaintiff alleges that Defendant has knowingly and willfully failed and refused to pay

Plaintiff the full amount due for transportation and services provided. Id. ¶¶ 7-8, 13.

2 the holder and any assignee or endorsee of this Bill of Lading, and/or any one acting on behalf of s -3 at 1.

Plaintiff brings claims for money due under tariff and service contracts, breach of written contract, unjust enrichment, quantum meruit, account stated, and seeks attorney fees. Defendant moves to



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dismiss the Complaint on two grounds. First, Defendant argues that there is no federal admiralty if subject matter jurisdiction were to exist, Plaintiff fails to state a claim for which relief can be granted.

For the following reasons, the Court finds that it possesses subject matter jurisdiction, but holds that the Complaint fails to state a claim upon which relief may be granted.

**LEGAL STANDARD** Defendant moves to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). A court properly dismisses a claim for lack of subject matter jurisdiction under Rule 12(b)(1) *it. Cortlandt St. Recovery Corp. v. Hellas Telecomms., S.A.R.L.*, 790 F.3d 411, 416-17 (2d Cir. 2015). *Makarova v. United States*, 201 F.3d 110, 113 (2d

Cir. 2000). *U.S. Airlines Pilots Ass'n ex rel. Cleary v. US Airways, Inc.*, 859 F. Supp. 2d 283, 296 (E.D.N.Y. 2012) (quoting *Guadagno v. Wallack Ader Levithan Assocs.*, 932 F. Supp. 94, 95 (S.D.N.Y. 1996)). Where the defendant challenges the legal sufficiency of a complaint's allegations, the court must treat all factual allegations as true and draw reasonable inferences in favor of the complaining party. *Robinson v. Gov't of Malay.*, 269 F.3d 133, 140 (2d Cir. 2001). However, where the jurisdictional challenge is fact- rward with evidence of their own to

. . . *Carter v. HealthPort Techs., LLC*, 822 F.3d 47, 57 (2d Cir. 2016) (quoting *Exch. Nat'l Bank of Chi. v. Touche Ross & Co.*, 544 F.2d 1126, 1131 (2d Cir. 1976)). sfy the Court, as fact- *Guadagno*, 932 F. Supp. at 95.

To survive a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), a claim to relief that *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*

*Twombly*, the plaintiff pleads factual content that allows the court to draw the reasonable inference that the

*Iqbal* complaint states a plausible claim for relief will . . . be a context-specific task that requires the *Id.* at 679. Put another

discovery will reveal evidence [supporting *Twombly*, 550 U.S. at 556; see also *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 46 (2011)].

### DISCUSSION A. Admiralty Jurisdiction

civil case of admiralty or maritime jurisdiction. 28 U.S.C. § 1333(1). This grant includes

, 822 F.3d 620, 632 (2d Cir. 2016) (internal quotation marks and citation omitted). *Sisson v. Ruby*, 497



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U.S. 358, 367 (1990) (quoting *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674 (1982)). Admiralty jurisdiction does not depend on where the contract is made, see *Constructive Hands, Inc. v. Baker*, 446 F. Supp. 2d 88, 90 (N.D.N.Y. 2006), or on the status of the parties, see *Outbound Maritime Corp. v. P.T. Indonesian Consortium of Constr. Industries*, 575 F. Supp. 1222, 1223 (S.D.N.Y. 1983). Rather, w  
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*Kiralama A.S. v. Aqua Marine and Trading Inc.*, 697 F.3d 59, 65 (2d Cir. 2012) (quoting *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 24 (2004)). Our court must ask *v. Primera Mar. (Hellas) Ltd.*, 886 F.3d 216, 223 (2d Cir. 2018) (quoting *Kirby*, 543 U.S. at 24);

see *Nippon Yusen Kaisha v. FIL Lines USA Inc.*, 977 F. Supp. 2d 343, 347-48 (S.D.N.Y. 2013) (contract is maritime in nature when its primary objective is to accomplish the transportation of goods by sea from a foreign port to a port in the United States.) (quoting *Kirby*, 543 U.S. at

*Ltd.*, 886 F.3d at 223 (quoting *Kirby*, 543 U.S. at 24). The subject matter must be our

*Fireman's Fund*, 822 F.3d at 632 (quoting *Folksamerica Reinsurance Co. v. Clean Water of N.Y., Inc.*, 413 F.3d 307, 312 (2d Cir. 2005)).

The parties do not dispute that an ocean bill of lading is a maritime contract in the sense

foreign port to a port in the United States. *Nippon Yusen Kaisha*, 977 F. Supp. 2d at 347-48 (S.D.N.Y. 2013) (quoting *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 24 (2004)); see Dkt. No. 13 at 4; Dkt. No. 14 at 5-6. The primary objective of the bills of lading at issue was to accomplish the transportation of goods by sea from a foreign port in Bangladesh to the Port of New York. As such, the bills of lading constitute maritime contracts, over which there is admiralty jurisdiction. See , 886 F.3d at 223. Defendant argues, instead, that Plaintiff has no claim

insignee. Dkt. No. 14-3 § 4; see Dkt.

from Bangla and that the contract was fulfilled -5. Defendant thus argues that any obligation to timely return

solely to non-maritime transport jurisdiction. *Id.* at 5.

However, the Zim Bill of Lading provided by Plaintiff assigns to the alleged by Plaintiff to include Defendant (see *infra*) the responsibility to return any containers released thereto and for demurrage costs. It provides:

10. CONTAINERS SUPPLIED BY THE CARRIER 1. Containers supplied by the Carrier are and shall remain the sole property of the Carrier, without the Merchant having any rights or interest



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therein. Containers will be put at the disposal of the Merchant subject to the appropriate interchange form

being entered into in respect of such Containers. Containers released into the care of the Merchant for stuffing, unstuffing, or any other purpose whatsoever shall remain at the sole risk and responsibility of the Merchant until redelivered to the Carrier. The Merchant shall indemnify the Carrier for all loss of and/or damage and/or delay to such Containers including and for loss of use of the Containers. . . . 3. Container demurrage, Container detention, storage, wharfage and/or pier/quay rent shall be based on Carrier's regular charges, and are payable by the Merchant. 4. The Merchant is responsible for returning at his risk, expense and responsibility the empty Containers in sound condition with interiors brushed and clean and odor free to the Port of Destination, or Final Destination, if contracted for, or to any other point or place designated by the Carrier, his servants or agents, within the prescribed time. Should a Container not be stripped by the Merchant, or not be returned within the prescribed time and/or in sound condition and/or with the interior brushed and clean, the Merchant shall be liable for all losses and/or damage, liabilities, demurrage, detention, charges, costs, expenses (including but not limited to legal fees), resulting there from [sic]. Dkt. No. 14-3 § 10.

but not [being] limited to demurrage, surcharges and charges as Id. § 17.

In this case, Plaintiff claims damages for detention and/or demurrage See Compl. ¶¶ 16, 18. Although it is not pled in the Complaint, it appears the alleged demurrage and detention costs resulting from the untimely return of containers. On the face of the Zim Bill of for such costs. Accordingly, the claim Plaintiff brings appears to arise out of the Zim Bill of Lading, which both parties agree is a maritime contract , 886 F.3d at 223 (quoting Kirby, 543 U.S. at 24).

12(b)(1) or 12(b)(6) that Rally Trucking, not Defendant, is the entity that allegedly failed to timely return the containers. To the extent Defendant is responsible for demurrage and detention costs under the provisions quoted above, liability can attach whether it or its agent, acting on its behalf, caused the costs to materialize in the first instance. See Evergreen Line A Joint Serv. Agreement FMC, No. 011982 v. US Dynamics Recycling LLC, 2018 WL 6313607, at \*2 n.2 [I] delegant of the ultimate responsibility to see that the obligation is performed. If the delegate

fa ) (quoting Merryman v. Citigroup, Inc., 2018 WL 1621495, at \*17 (S.D.N.Y. Mar. 22, 2018)); Contemporary Mission, Inc. v. Famous Music Corp., 557 F.2d 918, 924 (2d Cir. 1977).

Defendant could also be understood to argue, in the alternative, that although the Zim Bill of Lading contains demurrage and container detention provisions, those relate not to the carriage of goods by sea but to non-maritime obligations which are severable, and thus the Court has no admiralty jurisdiction over claims arising thereunder. See Dkt. No. 13 at 5. This argument also t is well-settled that demurrage clauses are maritime in nature because they remunerat[e] the shipowner for the



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detention of its vessel beyond the number of days allowed by the charter-party, and thus have a sufficient connection to maritime commerce. *Crossbow Cement SA v. Mohamed Ali Saleh Al-Hashedi & Bros.*, 2008 WL 5101180, at \*5 (S.D.N.Y. Dec. 4, 2008) (quoting *Transatlantic Shiffahrtsskontor GmbH v. Shanghai Foreign Trade Corp.*, 204 F.3d 384, 386 n.2 (2d Cir. 2000)); see also *Mediterranean Shipping Co. v. Rose*, 2008 WL 4694758, at \*3 (S.D.N.Y. Oct. 23, 2008) ( . . . been found over

actions for the recovery of demurrage or detention charges pursuant to a contract for the carriage . 3

B. Failure to State a Claim Although the Court possesses admiralty jurisdiction to hear claims brought in connection with breach of demurrage and detention clauses in the operative bills of lading, Plaintiff has not adequately pled any such claims in the Complaint.

Under New York law, existence of an agreement, (2) adequate performance of the contract by the plaintiff, (3) breach *Ellington Credit Fund, Ltd. v. Select Portfolio Servicing, Inc.*, 837 F. Supp. 2d 162, 188 89 (S.D.N.Y. 2011) (quoting *Harsco Corp. v. Segui*, 91 F.3d 337, 348 (2d Cir. 1996)). adequately allege contractual privity between the parties. See *CDJ Builders Corp. v. Hudson*

*Grp. Const. Corp.*, 889 N.Y.S.2d 64, 65 ( for breach of contract does (quoting *Hamlet at Willow Creek Dev. Co., LLC v. Ne. Land Dev. Corp.*, 878 N.Y.S.2d 97, 112 ( 3

It is also not clear whether this approach to maritime jurisdiction where, on analyzing a , - the Court would exercise juri the non- , 822 F.3d at 635 decision in *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. at 14. Prior to *Kirby*, the Second Cirhad held that admiralty jurisdiction was limited to contracts, claims, and services [that were] purely maritime, , 822 F.3d at 635 (internal quotation marks and citation omitted), with two exceptions: (1) for clauses where the claim arose from maritime obligations that are severable from the non-maritime obligations, and (2) where the non-maritime elements of a contract are merely incidental to the maritime ones, *id Kirby Fund*, 822 F.3d at 635 ed the impact of *Kirby* on the severability *Id*. In any event this is irrelevant to the instant case, as demurrage and detention clauses such as those at issue here have been held to be maritime in nature. See *supra*.

2009)). The Complaint contains only the conclusory allegations that Plaintiff for the benefit of Defendant during 2018- performed pursuant to written contract(s) of carriage and/or service contracts between Zim and Defendant, as evidenced by . allegations, without more, are insufficient to establish contractual privity. See *Alzal Corp. v. I.F.C. Int l Freight Corp.*, at \*7 (E.D.N.Y. Mar. 23, 2015) (conclusory allegations of contract

@Wireless Enterprises, Inc. v. AI Consulting, LLC, 2006 WL 3370696, at \*5 (W.D.N.Y. Oct. 30, 2006)

insufficient to plead privity of contract).



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Plaintiff attaches to the Complaint a spreadsheet of what appear to be a list of invoices to -1, but that is not a contract. It is merely a list of invoices, and there is no clear connection, either from the document itself or from the allegations in the complaint, between Defendant and , Plaintiff attaches

the Seth Bill of Lading and the Zim Bill of Lading. Dkt. Nos. 14-2, 14-3. The Seth Bill of Lading is largely illegible and does not appear to be executed by any party. Dkt. No. 14-2. The Zim Bill of Lading also does not appear to be executed by any party. Dkt. No. 14-3. See *Alzal Corp.*, be named as a defendant in a breach of contract action unless it has thereafter assumed or been assigned the *In re Cavalry Const., Inc.*, 428 B.R. 25, 30 (S.D.N.Y. 2010)); see also *Crabtree v. Tristar Auto. Grp., Inc.*, 776 F. Supp. 155, 166 (S.D.N.Y. 1991),

70 (2d Cir. 2011). It is neither evident from the conclusory allegations in the Complaint nor the bills of lading themselves when or by what transaction Defendant assumed any obligations under either of the bills of lading.

In its opposition brief to the instant motion, Merchant under the Seth Bill of Lading, since it was the holder, assignee or endorsee of the Seth Bill potentially liable under the demurrage

and detention clauses quoted supra pper, the consignee, the -3 § 1. However, the nsignee, the holder, [or] ll of Lading, id., or when or by what transaction it became such a party. Moreover, even where a defendant may fall within the definition of such a broad Merchant consents t *In re M/V Rickmers Genoa Litig.*, 622 F. Supp. 2d 56, 71 (S.D.N.Y.), adhered to on reconsideration, 643 F. Supp. 2d 553 (S.D.N.Y. 2009), and aff'd sub nom., *Chem One, Ltd. v. M/V RICKMERS GENOA*, 502 F. Appx 66 (2d Cir. 2012) (citing *Stein Hall & Co. v. S.S. Concordia Viking*, 494 F.2d 287, 291 (2d Cir. 1974)); see also *EIMSKIP v. Atl. Fish Mkt., Inc.*, 417 F.3d 72, 78 (1st Cir. although it probably embraces [the buyer-plaintiff] arguably is not binding on someone who

Plaintiff has not pled any factual allegations, necessary to support its claims, that Defendant was a party to or an assignee of either of the bills of lading, that it fell within the Merchant clause of

See *In re M/V Rickmers Genoa Litig.*, 622 F. Supp. 2d at 71. Absent such allegations, first and second claims for breach of contract must be dismissed, along with its sixth claim for which also relies on the contract alleged.

-contract and account stated, must also be dismissed.

together as a single quasi-contract cla *Nat l Util. Serv., Inc. v. Tiffany & Co.*, 2009 WL 755292, at \*9 (S.D.N.Y. Mar. 20, 2009) (citing *Mid-Hudson Catskill Rural Migrant Ministry, Inc. v. Fine Host Corp.*, 418 F.3d 168, 175 (2d Cir. 2005)); see also *Snyder v. Bronfman*, 893 N.Y.S.2d 800, 80 essentially identical claims, and both are claims under a contract implied . . . in law to pay -701(a)(10)). to of services in good faith, (2) the acceptance of the services by the person to whom they are





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rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the Mid-Hudson Catskill Rural Migrant Ministry, Inc., 418 F.3d at 175 (quoting Revson v. Cinque & Cinque, P.C., 221 F.3d 59, 69 (2d Cir. 2000)).

Plaintiff has not adequately pled any reasonable expectation of compensation. The Complaint alleges that Plaintiff expected compensation by the counterparties of the bills of lading. The Complaint is devoid of any allegations that Plaintiff expected compensation other than that to which it was entitled by the terms of the bills of lading and from the parties thereto. However, Plaintiff has not adequately pled that Defendant is among those counterparties or that there is any basis upon which Plaintiff had a reasonable expectation of compensation from

Defendant rather than a third party. See Grayson v. Ressler & Ressler, 271 F. Supp. 3d 501, 523 (S.D.N.Y. 2017) To succeed on a quantum meruit claim, [Plaintiff] must allege that she expected compensation from the Defendants, not from a third party. -contract claims are thus dismissed without prejudice.

account was presented; (2) it was accepted as correct; IMG Fragrance Brands, LLC v. Houbigant, Inc., 679 F. Supp. 2d 395, 411 (S.D.N.Y. 2009) (quoting The Haskell Co. v. Radiant Energy Corp., 2007 WL 2746903, at \*12 (E.D.N.Y. Sept. 19, 2007)). Air Atlanta Aero Eng'g Ltd. v. SP Aircraft Owner I, LLC, 637 F. Supp. 2d 185, 197 (S.D.N.Y. 2009) (quoting Unclaimed Property Recovery Serv., Inc. v. UBS PaineWebber Inc., 870 N.Y.S.2d 361, 362 (1st see Grinnell v. Ultimate Realty, LLC, 832 N.Y.S.2d 244, 245 (2d Dep cause of action alleging an account stated cannot be utilized simply as another means to attempt ; Abbott, Duncan & Wiener v. Ragusa, 625 N.Y.S.2d 178, 178 (1st Dep't, 1995) ( An account stated is an account, balanced and rendered, with an assent to the balance either express or implied There can be no account stated where no account was . For the reasons provided above, there is no well pled allegation of any indebtedness of Defendant to Plaintiff. Thus, the claim for account stated is dismissed without prejudice.

**CONCLUSION** For the foregoing reasons, the motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) is DENIED. Procedure 12(b)(6) is GRANTED without prejudice. Plaintiff may file an amended complaint

within 30 days of the date of this order, or else the case will be closed. The Clerk of Court is respectfully directed to close Dkt. No. 12.

SO ORDERED.

Dated: July 27, 2021 \_\_\_\_\_ New York, New York LEWIS J. LIMAN  
United States District Judge

