

## Sanchez v. Maverick Express Carriers, LLC

United States District Court for the Western District of Texas, Del Rio Division

July 13, 2021, Decided; July 13, 2021, Filed

Civil Action No. 2:20-CV-44-AM-CW

### Reporter

2021 U.S. Dist. LEXIS 155280 \*; 2021 WL 3598283

PEDRO SANCHEZ, Plaintiff, v. MAVERICK EXPRESS CARRIERS, LLC; JORGE SIERRA; COX TRANSPORTATION SERVICES, INC.; AND COMMUNICATIONS TEST DESIGN, INC., Defendants.

**Counsel:** [\*1] For Pedro Sanchez, Plaintiff: Nicole Elizalde Henning, LEAD ATTORNEY, The Henning Firm, San Antonio, TX; Wayne Colodny, LEAD ATTORNEY, Shelton and Valadez, San Antonio, TX.

For Communications Test Design, Inc., Defendant: Lynn Layne Rada, LEAD ATTORNEY, Espey & Associates, San Antonio, TX; Richard William Espey, LEAD ATTORNEY, Espey & Associates, PC, San Antonio, TX.

**Judges:** COLLIS WHITE, UNITED STATES MAGISTRATE JUDGE. Honorable Alia Moses, United States District Judge.

**Opinion by:** COLLIS WHITE

### Opinion

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#### REPORT AND RECOMMENDATION

To the Honorable Alia Moses, United States District Judge:

Presently pending before the Court is Defendant Communications Test Design, Inc.'s motion for

summary judgment. ECF No. 10. All pretrial matters were referred to the undersigned pursuant to 28 U.S.C. § 636. After considering the motion, the undersigned recommends that the motion for summary judgment be granted. The undersigned also recommends that the claims against Defendants Maverick Express Carriers, LLC and Jorge Sierra be dismissed.

### I. BACKGROUND

In 2016, Plaintiff Pedro Sanchez, an experienced commercial tractor trailer driver, began working for Defendant Jorge Sierra to operate commercial tractor trailers for Defendant Maverick Express Carriers, [\*2] LLC ("Maverick"). According to Plaintiff's complaint, on September 12 or 13, 2017, Sierra and Maverick directed Plaintiff to pick up a load of cargo at the annex yard of Cox Transportation Services, Inc. ("Cox") in Port Allen, Louisiana. Cox loaded the trailer, and Plaintiff drove the load to Defendant Communications Test Design, Inc.'s ("CTDI") shipping yard in Joliet, Illinois.<sup>1</sup> On September 15, 2017, Plaintiff arrived at the CTDI yard and opened the right door to the trailer. He was struck and crushed by several crates that had shifted in transit during the trip. Unbeknownst to him, the load had been negligently loaded and/or poorly secured, causing the load to

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<sup>1</sup> For the bill of lading, *see* ECF No. 1-5 at 50.

become unstable and shift while in transit. Plaintiff suffered significant injuries.

Plaintiff, who is domiciled in Texas, filed suit on July 9, 2019, in the 293rd Judicial District in Maverick County, Texas, against Maverick, Sierra, Cox, and CTDI, bringing negligence claims. Plaintiff alleges that: (1) Maverick and Sierra failed to properly train him on how to open trailer doors in a safe fashion and failed to implement a safety policy to protect drivers from unstable loads; (2) Cox negligently loaded the cargo, failed [\*3] to warn Plaintiff of its failure to properly load the cargo, and negligently trained, hired, and supervised its employees; and (3) CTDI failed to have a safe system in place to unload trailers, negligently hired and trained its employees, and negligently monitored unloading.

Plaintiff attempted to serve Defendants via certified mail. Maverick and Sierra were unsuccessfully served. *See* ECF No. 1-2 at 1. Cox, a Virginia corporation, was served on September 16, 2019, but did not file an answer or make an appearance in state court. *Id.* CTDI, a Pennsylvania company, appeared in state court and then removed the case to federal court on July 8, 2020, claiming that the Court has jurisdiction based on diversity, even though Plaintiff, Maverick, and Sierra are Texas citizens for diversity purposes. According to CTDI, Maverick and Sierra were fraudulently joined as defendants, as evidenced by Plaintiff's failure to diligently pursue service of process.

Once the case was removed, Plaintiff did not file a motion to remand. CTDI thereafter conferred with Mr. Colodny, an attorney for Plaintiff, and together they submitted an agreed proposed scheduling order to the Court. The undersigned entered a scheduling [\*4] order, setting numerous deadlines in accordance with Appendix B of the Local Rules of the Western District of Texas. CTDI, however, filed various notices with the

Court, indicating that Plaintiff had not complied with various provisions of the Court's scheduling order. For example, Plaintiff did not submit an offer of settlement (ECF No. 8), did not confer with CTDI about filing an alternative dispute resolution report (ECF No. 9), did not designate any testifying experts (ECF No. 14), and did not serve material required by Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure (ECF No. 14).

Then, on January 13, 2021, CTDI filed the present motion for summary judgment, claiming that there is no evidence that CTDI owed any duty to Plaintiff or that CTDI breached a duty. Continuing with an emerging pattern, counsel for Plaintiff did not respond to the motion. And as the Court is well aware, additional problems then arose in this case, where Ms. Henning, also counsel of record for Plaintiff, filed a motion to substitute counsel, which was agreed to and signed by Mr. Vela, an attorney who later swore he did not agree to or sign the document. *See* ECF No. 11. Contempt proceedings are still ongoing.

On June 11, 2021, the undersigned issued Plaintiff [\*5] a show cause order, noting that despite passage of almost a year since CTDI removed the case to federal court, Plaintiff (1) still had not served Maverick and Sierra, and (2) still had not moved for an entry of default and default judgment against Cox. ECF No. 24. The undersigned ordered Plaintiff to show cause why the claims against Maverick, Sierra, and Cox should not be dismissed for failure to prosecute and/or for failure to comply with the Federal Rules of Civil Procedure. Mr. Colodny responded, agreeing to the dismissal of Maverick and Sierra but asking for additional time to seek a default judgment against Cox, claiming that he has been seriously ill. ECF No. 27.

## II. CTDI'S MOTION FOR SUMMARY JUDGMENT

The undersigned will first address the merits of CTDI's

motion for summary judgment. Plaintiff brings negligence claims against CTDI, alleging that CTDI owed a duty (1) to have a procedure in place to safely unload trailers to avoid the risk of injury to people, (2) to properly train employees, and (3) to monitor workers to ensure safe unloading. According to Plaintiff, CTDI breached that duty, and CTDI's breach proximately caused Plaintiff's injuries and damages. CTDI now argues [\*6] that summary judgment is appropriate because there is no evidence that CTDI owed Plaintiff a legal duty or that CTDI breached any duty.

### A. Summary Judgment Standard

Under Rule 56 of the Federal Rules of Civil Procedure, a party is entitled to summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A genuine issue of material fact exists if the record, taken as a whole, could lead a rational trier of fact to find for the non-moving party." *Tubos de Acero de Mexico, S.A. v. Am. Int'l Inv. Corp.*, 292 F.3d 471, 478 (5th Cir. 2002). Furthermore, "where the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial, no genuine issue of material fact can exist." *Apache Corp. v. W & T Offshore, Inc.*, 626 F.3d 789, 793 (5th Cir. 2010) (quoting *Nichols v. Enterasys Networks, Inc.*, 495 F.3d 185, 188 (5th Cir. 2007)).

A party who asserts 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; or

(B) showing that the materials cited do not establish [\*7] the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c). The Court must "view the facts and draw reasonable inferences 'in the light most favorable to the party opposing the [summary judgment] motion.'" *Scott v. Harris*, 550 U.S. 372, 378, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007) (quoting *United States v. Diebold, Inc.* 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1962)). However, once a proper summary judgment motion has been made, the non-moving party may not rest upon conclusory allegations, improbable inferences, general denials, or unsupported specifics, and instead must present affirmative evidence setting forth specific facts to show the existence of a genuine issue for trial. *Int'l Shortstop, Inc. v. Rally's Inc.*, 939 F.2d 1257, 1266 (5th Cir. 1991); *Clark v. Am.'s Favorite Chicken Co.*, 110 F.3d 295, 297 (5th Cir. 1997).<sup>2</sup>

### B. Analysis

In order to establish a negligence claim under Texas law, a plaintiff must provide evidence of: (1) the existence of a legal duty owed to the plaintiff by the defendant; (2) a breach of that duty; and (3) damages

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<sup>2</sup>A motion for summary judgment cannot be granted as unopposed where no response has been filed, "even if the failure to oppose violated a local rule." *Hibernia Nat'l Bank v. Administracion Cent. Sociedad Anonima*, 776 F.2d 1277, 1279 (5th Cir. 1985). However, the Court "has no obligation to 'sift through the record in search of evidence' to support the nonmovant's opposition to the motion for summary judgment." *Morgan v. Fed. Express Corp.*, 114 F. Supp. 3d 434 (S.D. Tex. 2015) (quoting *Forsyth v. Barr*, 19 F.3d 1527, 1533 (5th Cir. 1994)).

proximately caused by the breach of that duty. *Boudreaux v. Swift Transp. Co.*, 402 F.3d 536, 540-41 (5th Cir. 2005).<sup>3</sup> The existence of a legal duty is a threshold issue, because "[i]f there is no duty, there cannot be negligence liability." *Thapar v. Zezulka*, 994 S.W.2d 635, 637 (Tex. 1999).

Whether a legal duty exists under a set of facts "is a question of law for the court to decide from the facts surrounding the occurrence in question." *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990). "In determining [\*8] whether the defendant was under a duty, the court [considers] several interrelated factors, including the risk, foreseeability, and likelihood of injury weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant." *Id.* "Of all these factors, foreseeability of the risk is the foremost and dominant consideration." *Id.* (quotations omitted).

A good starting point in determining whether CTDI owed Plaintiff a legal duty is to look at common law rules that apply to *loading* of goods, as Plaintiff's allegations indicate that the cargo which fell on him was improperly loaded. In *United States v. Savage Truck Line, Inc.*, 209 F.2d 442 (4th Cir. 1953), the Fourth Circuit articulated a widely adopted approach concerning the allocation of duty for loading shipped goods:

The primary duty as to the safe loading of property is . . . upon the carrier. When the shipper assumes the responsibility of loading, the general rule is that he becomes liable for the defects which are latent and concealed and cannot be discerned by ordinary observation by the agents of the carrier; but if the improper loading is apparent, the carrier will be liable notwithstanding [\*9] the negligence of the shipper.

209 F.2d at 445. This general rule has been applied by numerous courts, including the Texas Court of Appeals. *See, e.g., Unimex Logistics, LLC v. Tim Neff Towing, Inc.*, No. 9-16-275-CV, 2018 WL 2339623, at \*6 (Tex. App. May 24, 2018); *Tex. Specialty Trailers, Inc. v. Jackson & Simmen Drilling Co.*, No. 2-07-228-CV, 2009 WL 2462530, at \*7 (Tex. App. Aug. 13, 2009); *see also Dixon v. Leopoldo Garza Logistics, Inc.*, Civ. No. 5:17-CV-127, 2020 WL 4689217, at \*3 (S.D. Tex. June 26, 2020). Federal and state statutory regulations similarly impose a general duty to secure cargo upon the carrier, "reflecting the everyday practice and understanding in the trucking industry that carriers have the final responsibility for the loads they haul." *Aragon v. Wal-Mart Stores E., LP*, 735 F.3d 807, 809-12 (8th Cir. 2013) (citing 49 C.F.R. § 392.9); *see also* Tex. Transp. Code § 5.001(a)(1) ("Unless otherwise provided by this code or other law, . . . the duties and liabilities of a carrier in this state and the remedies against the carrier are the same as prescribed by the common law . . .").

Some courts have held that these general principles do not "relieve a party who breaches a common law duty of care from liability for its own negligence and comparative share of resulting damages in all circumstances." *United Rentals N. Am., Inc. v. Evans*, 608 S.W.3d 449, 461 (Tex. App. 2020). In other words, the *Savage* rule and attendant regulations do not negate a defendant's duty owed to others, and as a result, "a party who takes affirmative acts that create a danger . . .

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<sup>3</sup> Although the cargo was loaded in Louisiana and Plaintiff was injured in Illinois, CTDI applies Texas law in its analysis. Because no party seeks to apply another state's law, the undersigned will likewise apply Texas law. *See Primerica Life Ins. Co. v. Gross*, No. 1:15-CV-759-DAE, 2018 WL 181101, at \*7 (W.D. Tex. Mar. 27, 2018) ("The party seeking to apply another state's law has the burden of proving its substance to a reasonable certainty.") (citing *In re Aventel, S.A.*, 343 F.3d 311, 321-22 (5th Cir. 2003)).

can be held responsible for the results of those actions, along with other responsible actors." *Id.* at 463; *Bujnoch v. Nat'l Oilwell Varco, L.P.*, 542 S.W.3d 2, 8 (Tex. App. 2017).

With this framework in mind, the undersigned concludes that [\*10] Plaintiff has presented no summary judgment evidence that CTDI breached any duty owed to Plaintiff that proximately caused his injuries. Looking at Plaintiff's allegations and the evidence in the record in the light most favorable to Plaintiff: (1) Cox, the shipper, negligently loaded the cargo; and (2) Sierra and Maverick, Plaintiff's employers, failed to properly train Plaintiff or have a safety policy in place, *see* ECF No. 10-2 at 2. Plaintiff acknowledged during his deposition that: (1) it was his duty to secure the cargo, *see* ECF Nos. 10-4 at 2, 10-6 at 1, 10-7 at 1; (2) he inspected the load prior to departure, *see* ECF No. 10-3 at 1; and (3) he improperly opened the trailer door upon arrival, despite his extensive training and years of experience, *see* ECF Nos. 10-8 at 1, 10-9 at 1, 10-10 at 1. CTDI, in turn, was nothing more than a consignee who had no knowledge of the condition of the cargo.<sup>4</sup>

Thus, neither *Savage* nor statutory regulations impose any sort of duty upon CTDI. Indeed, in *Thomas v. Itochu Project Management, Inc.*, No. 1-00-578-CV, 2002 WL 2023509 (Tex. App. Aug. 30, 2002), the Texas Court of Appeals addressed a similar factual pattern and determined that a consignee owed no duty to the driver who was injured while pulling an improperly loaded cargo container. The [\*11] court found no relevant authority to impose a duty upon a consignee under the circumstances, noting that a consignee is not in a position to know how goods were loaded prior to shipping. And because the plaintiff failed to present

evidence to suggest that the consignee had any special knowledge about the shipment that would trigger a duty to warn those involved in its transport, the court affirmed summary judgment.

Similarly, Plaintiff presents no evidence that CTDI loaded the cargo or knew of the condition of the cargo. Plaintiff of course frames his claims in terms of negligent *unloading*. Plaintiff, however, presents no evidence that CTDI and its employees had any duty to unload the cargo or to supervise the unloading. And even assuming such a duty, there was simply no foreseeability of risk. The evidence shows that the cargo arrived in an unsafe condition that was created by negligent loading of which CTDI played no part and had no knowledge. Before the trailer was ever actually unloaded, Plaintiff opened the door to the trailer and the cargo immediately fell upon him. As Plaintiff admits, he had over thirty years of experience of handling cargo, and he himself had a duty to inspect [\*12] the cargo to ensure it was safely loaded. He also admits he was trained on how to open the trailer doors to avoid accidents such as these but failed to follow proper procedure. Under such circumstances, and with no supportive legal authority to the contrary, it would be improvident to impose a duty of care upon CTDI. Accordingly, the undersigned recommends that CTDI's motion for summary judgment be granted.<sup>5</sup>

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<sup>4</sup> A consignee is defined under Texas law as "a person named in a bill of lading to which or to whose order the bill promises delivery." Tex. Bus. & Com. Code § 7.102.

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<sup>5</sup> It is unclear whether Plaintiff is alleging that he, as CTDI's employee, should have been properly trained or supervised. Regardless, there is no evidence that CTDI was Plaintiff's employer. And without an employer-employee relationship, there can be no negligent supervision, hiring, or training. *Douglas v. Hardy*, 600 S.W.3d 358, 367 (Tex. App. 2019) ("No general duty to control others currently exists in Texas, but a special relationship such as the employer-employee relationship may sometimes give rise to a duty to aid or protect others.").

### III. THE REMAINING DEFENDANTS

The next issue is whether the claims against Maverick, Sierra, and Cox should be dismissed. Plaintiff does not contest dismissal of Maverick and Sierra. Therefore, the undersigned recommends that the claims against them be dismissed without prejudice pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure.

As for Cox, counsel for Plaintiff indicates that he will promptly seek an entry of default. A Rule 41(b) dismissal for failure to prosecute is with prejudice—an extreme sanction reserved for "egregious and sometimes outrageous delays." *Rogers v. Kroger Co.*, 669 F.2d 317, 321 (5th Cir. 1982). To warrant dismissal, there must be a showing of "a clear record of delay or contumacious conduct by the plaintiff, and where lesser sanctions would not serve the best interests of justice." *Id.* at 320 (cleaned up). Courts also "inquire into the extent to which the plaintiff, as [\*13] distinguished from counsel, was personally responsible for the delay . . . ." *Id.*

Unquestionably, there were significant delays in this case. However, these delays were caused by Plaintiff's counsel, not Plaintiff himself. As previously detailed, Ms. Henning and Mr. Colodny have not only ignored Court deadlines but are also facing contempt proceedings. Mr. Colodny also indicates that he suffered severe health problems and was hospitalized. Plaintiff should not be penalized for his counsel's actions and/or inactions, at least at this point. However, should Plaintiff not promptly file a motion for default and a motion for default judgment, the undersigned will recommend dismissal.

### IV. CONCLUSION

For the foregoing reasons, the undersigned **RECOMMENDS** that:

(1) CTDI's motion for summary judgment be **GRANTED** and judgment entered in favor of CTDI;

(2) The claims against Defendants Maverick Express Carriers, LLC and Jorge Sierra be **DISMISSED WITHOUT PREJUDICE**, pursuant to Rule 41(a)(2); and

(3) Plaintiff be allowed additional time to seek a default judgment against Defendant Cox Transportation Services, Inc.

### V. NOTICE

The United States District Clerk shall serve a copy of this report and recommendation on all parties [\*14] either by (1) electronic transmittal to all parties represented by an attorney registered as a filing user with the Clerk of Court pursuant to the Court's Procedural Rules for Electronic Filing in Civil and Criminal Cases; or (2) certified mail, return receipt requested, to any party not represented by an attorney registered as a filing user. Pursuant to 28 U.S.C. § 636(b)(1), any party who wishes to object to this report and recommendation may do so within fourteen days after being served with a copy. Failure to file written objections to the findings and recommendations contained in this report shall bar an aggrieved party from receiving a de novo review by the District Court of the findings and recommendations contained herein, see 28 U.S.C. § 636(b)(1)(c), and shall bar an aggrieved party from appealing "the unobjected-to proposed factual findings and legal conclusions accepted by the District Court" except on grounds of plain error. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1429 (5th Cir. 1996).

SIGNED this 13th day of July, 2021.

/s/ Collis White

COLLIS WHITE

UNITED STATES MAGISTRATE JUDGE

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