RECENT DEVELOPMENTS IN SALVAGE LAW

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Jason R. Harris* &
Ellen Shults
Welch and Harris, LLP
North Carolina

Arnaud Girard v. M/Y QUALITY TIME, No. 14-10931, 2015 WL 65491 (11th Cir. Jan. 6, 2015). *Eleventh Circuit applies Blackwall factors and affirms low-order salvage award to professional salvor.*

The Eleventh Circuit Court of Appeals affirmed the District Court for the Southern District of Florida's award of $16,896.05 (12% of the vessel's post-casualty value) to Arnaud Girard, a professional salvor, in connection with the salvage of the M/Y QUALITY TIME following its grounding off the coast of Key West in 2012. Mr. Girard, appearing *pro se*, Appealed.

Rejecting Mr. Girard's argument that the District Court's conclusions of law were inconsistent with its factual findings, the Eleventh Circuit, applying the *Blackwall* factors, found that a low-order salvage award was appropriate because Mr. Girard's efforts were limited to routine salvage services typical of a professional salvor such as pumping or dewatering the vessel, patching the hull, and towing the vessel to the boatyard. The Court of Appeals noted that the seas were "moderate" and the weather was relatively calm at the time of the operation. The Court further noted that in making the award, the District Court had considered the risks Girard took during the nighttime dive to repair the vessel's hull and Girard's promptness and effectiveness in completing the salvage. In light of the District Court's application of the *Blackwall* factors to the factual findings, the Court of Appeals found no inconsistencies between the District Court's findings and conclusions.

Turning to Mr. Girard's contention that the District Court erroneously applied the fourth *Blackwall* factor when it found that he was not entitled to a liberal award because he did not face risks out of the ordinary for a professional salvor, the Court of Appeals noted that the appropriate standard to apply when evaluating whether to liberally reward the salvor is whether the salvor took risks out of the ordinary "for men of that calling," the typical professional salvor – as opposed to the risks that an ordinary person would take, adopting a standard earlier espoused by the Second Circuit Court of Appeals in *B.V. Bureau Wijsmuller v. United States*, 702 F.2d 333 (2d Cir. 1983). Therefore, the Court of Appeals held that the District Court did not err in its application of the fourth *Blackwall* factor and had appropriately made a low-order salvage award.

The Court of Appeals similarly dismissed Mr. Girard's argument that the lower court should have awarded him 33% of the Quality Time's post-casualty value as a means to incentivize salvors. In support of his contentions, Mr. Girard cited cases in which he claimed the salvage award was not less than 33% of the ship's value. The Court of Appeals disputed Girard's characterization of the cited cases, but found "in any event" that "fixed percentages of value and comparisons to percentage from previous

* Please direct comments/questions to the Salvage Committee Chairman at jrharris@welchharris.com. Mr. Harris is a partner with Welch and Harris, LLP, 636 Court Street, Jacksonville, NC 28540, telephone (910) 347-0161. Ms. Shults is an associate with Welch and Harris, LLP. The views and opinions expressed herein are not necessarily those of the Maritime Law Association of the United States or the Salvage Committee.

awards should play no role in the salvage award" and concluded by affirming the District Court's salvage award.

Lloyd's Syndicate 1861 v. Crosby Tugs, L.L.C., No. CIV.A. 13-5551, 2014 WL 3587375 (E.D. La. July 21, 2014), aff'd, No. 14-30888, 2015 WL 1412717 (5th Cir. Mar. 30, 2015). *Tow versus salvage analysis; Court denies vessel owner's negligent salvage claim.*

This dispute arose from the sinking of the M/V RICKY B, an offshore supply vessel, in the Gulf of Mexico while being towed by the defendant/salvor, Crosby Tugs, LLC ("Crosby"). The owner of the M/V RICKY B and its insurer sued Crosby alleging that the sinking of the RICKY B was the result of negligent towing by Crosby. Crosby counterclaimed alleging that it provided salvage towing services and seeking compensation for the same. Plaintiffs argued that Crosby was negligent by: (1) failing to pump the engine room before commencing the tow and (2) towing the RICKY B at an excessive rate of speed. Crosby responded that Plaintiffs' claims were barred by the Pennsylvania Rule and that the RICKY B was in "dire straits" long before Crosby reached it and was "doomed to sink notwithstanding Crosby's best efforts."

Following a bench trial, the Court rendered judgment in favor of Crosby. First, the Court determined that the services provided by Crosby were in the form of salvage vice towage. In conducting the analysis, the Court noted that the "[t]he major element distinguishing salvage [from towage] is an unanticipated marine peril that gives rise to or occurs during towage," and that, in light of the crew of the RICKY B sending a "we are sinking" message to shore and having abandoned ship, the ship was clearly in a position of peril, and that therefore the services provided by Crosby were in the nature of a salvage. Noting the existence of a contract salvage agreement, the Court found that Crosby was entitled to no additional compensation (other than the contracted amount) for its salvage efforts.

Next, the Court turned to the owner's negligent towing claims and found that the Pennsylvania Rule applied due to three statutory violations committed by the RICKY B (namely, (1) an inadequate number of crew members, (2) a violation of the Stability Letter issued by the Coast Guard, and (3) substance abuse by one of the crew members). The Court found that because the owner failed to show that the statutory violations "could not have caused the sinking of the vessel," the owner was prohibited from disclaiming all liability for the sinking of the vessel and that liability for the sinking of the vessel must instead be apportioned according to fault of the respective parties.

As to the apportioned fault of Crosby, the Court noted the rule that a salvor will be held liable for affirmative damages if the salvor is guilty of "gross negligence or willful misconduct," or if the salvor's negligence causes a "distinguishable" or "independent" injury to the salved vessel, meaning an injury other than the one that salvage efforts were undertaken to prevent. The Court found that Crosby's actions failed to reach the level of "gross negligence" and that the resultant sinking of the vessel was indistinguishable from the one that Crosby was originally called on to prevent and subsequently rendered judgment in favor of defendant Crosby.

Tug Blarney, LLC v. Ridge Contracting, Inc., No. 3:12-CV-00097-SLG, 2014 WL 1515620 (D. Alaska Apr. 16, 2014). *Pure salvage claim permitted under parties' charter agreement; existence of marine peril for purposes of pure salvage claim.*

In a complicated and lengthy decision, the United States District Court for the District of Alaska held that a charter agreement between a cargo owner and a sunken tug owner did not preclude the sunken tug owner from asserting a pure salvage claim against the cargo owner. In its analysis, the District Court noted that the parties' charter agreement stated that the tug owner would be eligible for salvage even if one of its ships performed salvage for the venture.

Turning to the merits of the salvage claim, the District Court held that the vessel was in marine peril, for purposes of the pure salvage claim where the barge carrying cargo was without power, unmanned, and stranded in the Bering Sea 100 miles from shore, and unable to respond to the changing conditions. The District Court also held that the salvage was "successful" for purposes of the pure salvage claim, even though the cargo owner asserted that the salvors took the cargo to an unsuitable destination and the cargo was not accessible for several weeks, noting that the cargo owner conceded that the cargo was delivered in essentially the same condition as it was in when loaded onto the barge.

St. Clair Marine Salvage, Inc. v. S/Y WITCH OF ENDOR MC, No. 6137 TZ, No. 14-11942, 2014 WL 4386725 (E.D. Mich. Sept. 5, 2014). *Salvor waived right to compel arbitration where it moved to amend its complaint to add a new substantive claim after arrest of sailboat.*

Plaintiff/salvor filed the complaint in this action in May 2014 following an incident involving the hard grounding of defendant/owner's 1986 39 foot sailboat in the St. Clair River. Salvor alleged that following the defendant's distress call requesting assistance, the salvor dispatched a salvage vessel that arrived to find the sailboat hard aground and offered to salvage her; defendant then signed a salvage agreement containing an arbitration provision. The salvor freed the sailboat and the sailboat was able to maneuver on her own into deeper water. Salvor alleged that the defendant was responsible for approximately $10,000 for salvage and that the salvor was entitled to enforcement of its maritime lien by way of arrest of the Vessel along with her engines, tackle, apparel, equipment, and other necessaries, as well as condemnation and sale to satisfy the lien.

The Court authorized arrest of the sailboat, and the salvor next moved to amend its complaint and compel arbitration. In opposition, the defendant argued that the salvor had waived its right to demand arbitration by filing the federal court action and filing an amended complaint going to the merits of its claim. The salvor responded that it had not waived its contractual right to arbitrate by proceeding in federal court to obtain an *in rem warrant* of arrest to protect its maritime lien.

The Court acknowledged that the salvor was entitled to proceed in federal court to secure arrest of the sailboat without waiving its contractual right to arbitrate the merits; however, by amending its complaint to add a new substantive claim directed to the merits of the matter and causing the defendant "to expend significant resources in this Court," the salvor engaged in the judicial process "well beyond what was necessary to secure the Vessel."

Notably, the Court found compelling that the plaintiff/salvor presented "no evidence that Plaintiff ever referenced the contractual arbitration provision, or suggested or demanded arbitration in the 13 months it spent negotiating the claim prior to filing the federal court action." Therefore, according to the Court, the salvor's actions were "utterly inconsistent with reliance on the contractual right to arbitrate."

Farnsworth v. Towboat Nantucket Sound, Inc., No. CIV. 13-11192-FDS, 2014 WL 3749158 (D. Mass. July 28, 2014). *Court approves arbitration panel's rejection of owner's claim of duress.*

This case arose out of a marine salvage contract containing a mandatory arbitration clause signed by the plaintiff/vessel owner after the defendant/salvor pulled the plaintiff's vessel off of a rocky shoal. Plaintiff filed the action requesting a preliminary injunction to prevent the salvor from enforcing the arbitration clause of the marine salvage contract. The District Court denied the plaintiff's motion and stayed the case pending the outcome of arbitration. In arbitration, the salvor was awarded $50,000 (7% of the vessel's undisputed value of $689,972.00)[1] and requested the District Court to confirm the arbitration award.

The District Court held that whether the vessel owner could void the arbitration clause was a question of arbitability for the court to decide. The Court further held that the owner's defensive claim that the purported contract was signed under duress was arbitrable as it fell within the scope of the salvage contract's arbitration clause.

Turning to the merits of the duress claim, the District Court held that the arbitration panel acted within its authority when it decided that the vessel owner did not sign the contract under duress. The Court stated that although it was sympathetic to the vessel owner's allegations regarding the presence of defendant's employees on the vessel, the circumstances surrounding their presence, and the vessel owner's contention that the salvor's refusal to leave until the plaintiff signed the salvage contract constituted an improper threat, the vessel owner did not allege that the salvor "actually physically compelled him to sign the salvage contract—for example, by putting a gun to his head or manually forcing him to sign the contract" as is necessary to void a contract under a claim of duress. Accordingly, the District Court affirmed the arbitration panel's award to the salvor. The vessel owner subsequently filed an appeal of the District Court's order to the United States Court of Appeals for the First Circuit; the parties have filed opening briefs and the appeal is pending.

St. Clair Marine Salvage, Inc. v. M/Y BLUE MARLIN, No. 13-14714, 2014 WL 2480587 (E.D. Mich. June 3, 2014). *Vessel owner's tort claims dismissed; Court distinguishes between intentional and unintentional torts when applying maritime economic loss rule.*

This dispute between plaintiff/salvor St. Clair and defendant/third-party plaintiff Lebowski arose following the grounding of Lebowski's vessel in Lake St. Clair, Michigan. After his own unsuccessful attempt to unground the vessel, Lebowski contacted third-party defendant BoatUS, with whom he had a membership agreement to provide certain towing and ungrounding services; BoatUS contacted St. Clair to respond to Lebowski's call.

St. Clair claimed that it found the vessel hard aground, that Lebowski's agreement with BoatUS covered only soft groundings, and that therefore, St. Clair and Lebowski entered into a separate salvage agreement for St. Clair's services to unground the Vessel. According to Lebowski, the vessel "ran aground on a sand bar" -- a "soft grounding" -- and Lebowski's BoatUS contract should therefore have covered the cost of St. Clair's services. Lebowski counterclaimed that St. Clair misrepresented the

[1] The arbitration award was reported in the "2014 Recent Developments in Salvage Law," available at www.welchharris.com/attorney-profiles/.

nature of the grounding to Lebowski and indicated to Lebowski that he would have to agree to a separate salvage contract in order to have the boat removed from the sandbar.

Lebowski also filed a third-party complaint against BoatUS for breach of contract and a number of tort claims, including a Michigan statutory claim for deceptive trade practices, citing BoatUS's purported misrepresentations of material facts regarding coverage for ungroundings and towings and based upon the contention that BoatUS knew or should have known that St. Clair (allegedly the agent of BoatUS) made misrepresentations as to the nature of the grounding. BoatUS moved to dismiss all of the Lebowski's tort-based claims on the grounds that the dispute between BoatUS and Lebowski was "a breach of contract case in which tort claims have no place." BoatUS further contended that maritime law governed the case in its entirety and that the maritime economic loss doctrine barred Lebowski's tort claims for economic damages.

The Court granted dismissal in favor of BoatUS on Lebowski's tort claims. In its analysis, the Court distinguished between intentional and unintentional torts, finding that the unintentional torts (e.g., negligence) were clearly barred by the maritime economic loss rule pursuant to the Second Circuit's holding in *American Petroleum & Transportation, Inc. v. City of New York*, 737 F.3d 185 (2d Cir. 2013).

As to the intentional tort claims, the Court cited the Third Circuit's decision in *Werwinksi v. Ford Motor Co.*, 286 F.3d 661, 676 (3d Cir.2002), wherein the Third Circuit described "an emerging trend ... 'recognizing a limited exception to the economic loss doctrine for fraud claims, but only where the claims at issue arise independently of the underlying contract.' The Court found, however, that because Lebowski's fraud and breach of contract claims were "virtually indistinguishable" the appropriate relief for the "purported misrepresentations—whether couched as intentional or innocent misrepresentations—rests in contract law, not that of tort," and dismissed the tort claims against BoatUS.

Even if the maritime economic loss rule did not bar the plaintiff's tort claims, the Court was "confounded" by the allegations lodged against BoatUS, noting that "[t]he Towing Service Agreement [between BoatUS and plaintiff/salvor] contains rather clear language delineating the scope of its coverage and there is no indication in the [owner's claims against BoatUS that plaintiff/salvor] is properly characterized as BoatUS's agent such that holding BoatUS accountable for St. Clair's alleged misconduct is proper." The Court went on to add that nothing in the owner's pleadings supported its claims that BoatUS falsely represented the nature of the grounding, thus rejecting the claim that BoatUS violated the Michigan Consumer Protection Act.

S. Recycling, LLC v. McAllister Towing of Virginia, Inc., No. CIV.A. 12-2197, 2014 WL 2440571 (E.D. La. May 29, 2014). *No salvage lien against vessel other than that salved.*

This matter arose out of a contract for towing services between McAllister and Southern Recycling for McAllister to tow Southern Recycling's drydock, the SCOTIA DOCK II from Nova Scotia to Texas. Following receipt of the SCOTIA DOCK II in Texas, Southern Recycling refused to pay McAllister on the grounds of negligence, breach of warranty, and breach of contract by McAllister.

Before the Court, was McAllister's motion for partial summary judgment seeking dismissal of (1) Southern Recycling's claim for a salvage lien against the MICHAEL MCALLISTER, the vessel used by McAllister to perform the tow services, (2) Southern Recycling's claim for breach of contract against McAllister for failing to name it as an additional insured, as required under the towing contract, and (3)

Southern Recycling's claim for lost revenue and/or profits for McAllister's subsequent arrest of the SCOTIA DOCK II following Southern Recycling's refusal to pay the $820,039.06 allegedly due under the towing contract.

As to the claim for a salvage lien against the MICHAEL MCALLISTER, McAllister argued that a salvage lien cannot be asserted against a vessel other than the one saved and further argued that under maritime law "[t]here is no legal basis for claiming salvage based upon agreeing to pay others ... to search for a lost asset when those parties fail to save the asset from a marine peril."

Southern Recycling did not contest McAllister's summary judgment motion on the salvage lien or the claim for breach of contract for failing to name it as an additional insured. Noting the same, the Court granted McAllister's motion for summary judgment on both counts, finding the record "devoid of any evidence that the MICHAEL J. McALLISTER was salvaged by Southern Recycling or that McAllister did not list Southern Recycling as an additional [insured]." The Court ordered further briefing on Southern Recycling's claim for lost revenue and profits and denied McAllister's motion for summary judgment on the claim against Southern Recycling for refusing to pay the amount allegedly due under the contract, finding that material facts remained in dispute.

Recovery Ltd. P'ship v. Wrecked & Abandoned Vessel S.S. Cent. Am., No. 2:87CV363, 2014 WL 3925495, (E.D. Va. Aug. 8, 2014) aff'd sub nom. Davidson v. Columbus-Am. Discovery Grp., 594 F. App'x 148 (4th Cir. 2015). *Information provided by attorney to salvor during course of legal representation of salvor cannot be the basis for a claim by the attorney to the salvaged vessel.*

This matter involved a salvage claim made by the salvor's former attorney to salvage rights to the wreck of the S.S. CENTRAL AMERICA. The attorney argued that he was entitled to a salvage award because during the course of his representation of the salvor, he provided information to the salvor that was "utilized in, and useful to, the salvage of the S.S. CENTRAL AMERICA." The attorney claimed that under Ohio law, he had an "attorney's retaining lien" on the information provided because he had not been paid attorney's fees by the salvor and that the information provided to the salvor constituted "service voluntarily rendered when not required as an existing duty or from special contract," making him entitled to a salvage award.

The Court rejected the attorney's salvage claim and granted dismissal in favor of the salvor. The Court stated that even if the attorney had an attorney's retainer lien under Ohio law, he "could not have used the information to salvage the vessel himself." Therefore, according to the Court, the information provided by the attorney to the salvor could not be used as the basis for a claim to the salvaged vessel. The Court noted that "at best" the attorney may have an "*in personam* claim for attorney's fees or document storage fees" against the salvor, but "not an *in rem* action against the Defendant vessel."

R/V BEACON, LLC v. Underwater Archeology & Exploration Corp., No. 14-CIV-22131, 2014 WL 4930645, (S.D. Fla. Oct. 1, 2014). *No piercing of the corporate veil where alleged fraudulent conduct was "unrelated" to breach of agreement to charter vessel for use in treasure hunting enterprise.*

This dispute arose out of a contractual relationship between plaintiff R/V Beacon, LLC, owner of the R/V BEACON ("Vessel"), and defendant Underwater Archeology & Exploration Corp. ("Underwater),

whereby Underwater agreed to charter the vessel for use in a treasure hunting enterprise for a period of three years commencing in March 2011. Pursuant to the parties' agreement, Underwater would pay Beacon 20% of the value of all "nongovernmental treasure recovered." Although the agreement required Underwater to "actively utilize the vessel on as many days as possible," at the time of the Court's decision, the Vessel had not left port since December 2011, purportedly due to mechanical problems.

Beacon sent money to Underwater on several occasions for repair of the vessel as part of an effort to minimize delay of the treasure hunting enterprise. Beacon alleged that, contrary to the assertions made by Underwater's principals ("Chatterton"), Underwater failed to use the money for repair of the Vessel and it became clear to Beacon that Underwater had no intentions of resuming operations and had effectively abandoned the vessel in the Dominican Republic. Beacon therefore instituted claims for breach of contract against Underwater and Chatterton and fraud claims against Chatterton.

Before the Court was Chatterton's motion to dismiss Beacon's breach of contract and fraud claims. Chatterton argued that the breach of contract claim should be dismissed because he was not a party to the agreement between Beacon and Underwater. The Court agreed noting that it is well-established that a non-party cannot be bound to an agreement and found that the alleged fraudulent conduct by Chatterton was "unrelated" to Beacon's allegations of specific provisions of the agreement and that therefore the allegations were insufficient to support finding Chatterton liable for Underwater's breach of contract via a "piercing of the veil" theory.

The Court similarly dismissed Beacon's fraud claim against Chatterton, holding that the claim was barred by the maritime economic loss rule and was not pled with particularity as required by Federal Rule of Civil Procedure 9(b).

Minford v. Berks Cnty. (Inc.)/Cnty. of Berks (Inc.), No. 14-MC-224, 2014 WL 4858112 (E.D. Pa. Sept. 29, 2014). *No federal subject matter jurisdiction under* 28 U.S.C. § 1333 *or the Public Vessels Act for pro se plaintiff's petition for declaratory judgment regarding ownership of plaintiff's name.*

Pro se plaintiff filed a petition for declaratory judgment seeking that the court declare that ownership to the proprietary rights in his name belonged to him and for the court to order the county government to cease debt collection efforts. Plaintiff asserted a number of bases for federal subject matter jurisdiction including federal jurisdiction under the admiralty statute, 28 U.S.C. § 1333 and the Public Vessels Act, 46 U.S.C. §§ 31101–31113.

Rejecting plaintiff's alleged bases for the federal subject matter jurisdiction under 28 U.S.C. § 1333, the Court found that the plaintiff did not include any allegations that would implicate the section by failing to "identify any incident with a legitimate, potential impact on maritime commerce and bearing a substantial relationship to traditional maritime activity." The Court further found that the plaintiff failed to "allege that any incident occurred on navigable waters and it would appear that he cannot do so considering he is apparently attempting to stop Berks County and its agents from collecting money from him."

Turning to plaintiff's basis for federal subject matter jurisdiction pursuant to the Public Vessels Act, the Court similarly found that the plaintiff failed to include any allegation that invoked admiralty jurisdiction and that therefore the Public Vessels Act was inapplicable.

Physical: 636 Court Street, Jacksonville, North Carolina, USA 28540
Mailing: P.O. Box 1398, Jacksonville, North Carolina, USA 28541
Telephone: 910.347.0161 Facsimile: 910.347.0164
Jason R. Harris jrharris@welchharris.com
M. Ellen Shults egshults@welchharris.com