MLA Marine Finance Committee

Joint Subcommittee on Maritime Liens and Ship Mortgages

Mike Frevola, Holland & Knight

Theme 1: Erosion of Federal Bench's Knowledge/Respect of Unique Maritime Rules

Montemp Maritime Ltd. v. Hanjin Shipping Co., No. 2:16-cv-06585-ODW(AGR), 2016 WL 4621194 (C.D.Cal. Sept. 6, 2016)

Court refused to grant ex parte writ of attachment to plaintiff because court held that – while prerequisites for maritime attachment under Rule B were met – plaintiff had not established right to ex parte relief (which the court analyzed under California ex parte attachment rules). Clearly wrong under Ninth Circuit's *Polar Shipping* decision decided 35 years ago.

Contrast with

SCL Basilisk AG v. Agribusiness United Savannah Logistics LLC, No. CV 416-162, 2016 WL 3926435 (S.D.Ga. July 18, 2016)

Plaintiff could not use Rule B because defendant was located within the district. Plaintiff sought to use Georgia state law pre-arbitral interim protection statute as a way of obtaining pre-judgment security. The court denied the request, holding that using the interim measures statute as a way to get around Rule B's limitations would be inconsistent with the purpose of Rule B and would hurt uniformity. Court stated that id the plaintiffs wanted to use a state law remedy, they should have used the state law attachment statute (which would require the plaintiff to post twice as much as the security sought as a bond).

Others:

DHL Project & Chartering Limited v. Newlead Holdings Ltd., No. CV 416-123, 2017 WL 1017598 (S.D.Ga. Mar. 15, 2017)

Court has refused to allow Rule B claimant DHL to intervene in Rule C arrest case brought by competing creditor so that DHL could challenge the legitimacy of the competing creditor's lien. Court held that DHL's claim and other creditor's claim were not sufficiently related for intervention.

In re Hanjin Shipping Co., No. 16-27041 (JKS), 2016 WL 6679487 (Bankr.N.J. Sept. 20, 2016)

Bankruptcy court has not yet issued stay in U.S. Chapter 15 because it has not recognized Korean main proceeding (in which stay was issued). Court issues stay preventing secured creditor maritime lien claimants from arresting vessels waiting outside U.S. waters to call in U.S. ports, and states that *"[a]llowing the enforcement of these inchoate lien rights after the issuance of the Korean stay Order is not consistent with the concept of a stay."*

Theme 2: The Revenge of the No Lien Clause

Bomin Greece S.A. v. M/V GENCO SUCCESS, No. 1:16-CV-1500 (GTS/CFH), 2017 WL 1208590 (N.D.N.Y. Mar. 31, 2017)

Dispute regarding bunker supplier's knowledge of no lien provision prior to supplying bunkers to vessel. Summary judgment denied and motion to vacate reserved until evidentiary hearing.

Cal Dive Offshore Contractors, Inc. v. M/V SAMPSON, No. 15-CV-2788 (JPO), 2017 WL 1157125 (S.D.N.Y. Mar. 27, 2017)

Dispute regarding whether provider of personnel for offshore oilfield construction was entitled to maritime lien for necessaries where charter (containing no lien clause) was provided to necessary provider before work began. Court denied summary judgment motions and teed up for trial issue of whether the necessary supplier actually knew of the no lien clause.

2016 WL 4621194
Only the Westlaw citation is currently available.
United States District Court,
C.D. California.

Montemp Maritime Ltd., Plaintiff,
v.
Hanjin Shipping Co. Ltd., Defendant.

Case No 2:16-cv-06585-ODW (AGR)
|
Signed 09/06/2016

Attorneys and Law Firms

J. Stephen Simms, Simms Showers LLP, Hunt Valley, MD, for Plaintiff.

ORDER DENYING PLAINTIFF'S *EX PARTE* APPLICATIONS FOR WRIT OF GARNISHMENT AND FOR AN ORDER FOR APPOINTMENT FOR SERVICE OF PROCESS OR MARITIME ATTACHMENT AND GARNISHMENT [2, 3, 4]

OTIS D. WRIGHT, II, UNITED STATES DISTRICT JUDGE

I. INTRODUCTION

*1 On August 31, 2016, Plaintiff Montempt Maritime Limited filed *ex parte* applications for a writ of garnishment, for an order for appointment for service of process or maritime attachment, and for garnishment. For the reasons discussed below, the Court **DENIES** Plaintiff's Applications. (ECF Nos. 2, 3 4.)[1]

[1] After carefully considering the papers filed in support of and in opposition to the Motion, the Court deems the matter appropriate for decision without oral argument. Fed. R. Civ. P. 78; L.R. 7-15.

II. FACTUAL BACKGROUND

Plaintiff Montemp Maritime Ltd. ("Montemp" or "Plaintiff") filed a Complaint in this admiralty action on August 31, 2016, alleging breach of contract and application for writs of maritime garnishment pursuant to Supplemental Admiralty Rule B against Defendant Hanjin Shipping Co, Ltd. ("Hanjin" or "Defendant"). (Compl. ¶¶ 13, 17.) Plaintiff contends that it has suffered damages of $1,688,345.70 as a result of Hanjin's failure to make payments for a time charter of a Vessel. On the same day, Plaintiff filed an *ex parte* Application for Writ of Garnishment. Plaintiff also seeks Appointment for Service of Process of Maritime Attachment and Garnishment, pursuant to Supplemental Maritime Admiralty Rule B. To date, the Court has not received any opposition.

III. LEGAL STANDARD

A. SUPPLEMENTAL ADMIRALTY RULE B

Rule B of the Supplemental Rules of Admiralty and Maritime Claims ("Rule B") governs the procedure by which a party may attach another party's assets in maritime cases. Rule B provides as follows:

> (a) If a defendant is not found within the district when a verified complaint praying for attachment and the affidavit required by Rule B(1)(b) are filed, a verified complaint may contain a prayer for process to attach the defendant's tangible or intangible personal property – up to the amount sued for – in the hands of garnishees named in the process.
>
> (b) The plaintiff or the plaintiff's attorney must sign and file with the complaint an affidavit stating that, to the affiant's knowledge, or on information and belief, the defendant cannot be found within the district. The court must review the complaint and affidavit and, if the conditions of this Rule B appear to exist, enter an order so stating and authorizing process of garnishment. The clerk may issue supplemental process enforcing the court's order upon application without further court order.
>
> (c) If the plaintiff or the plaintiff's attorney certifies that exigent circumstances make court review impracticable, the clerk must issue the summons and process of attachment and garnishment.

B. EX PARTE WRIT OF ATTACHMENT

Rule 64 of the Federal Rules of Civil Procedure provides, in relevant part, that "all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner

provided by the law of the state in which the district court is held ...." Fed.R.Civ.P. 64. Thus, Rule 64 permits state seizure provisions to be used in federal courts. *See Reebok Int'l v. Marnatech Enters.*, 970 F.2d 552, 558 (9th Cir. 1992). Pursuant to the California Code of Civil Procedure, the party seeking the attachment has the burden of proving:

> *2 (1) The claim upon which the attachment is based is one upon which an attachment may be issued.
>
> (2) The plaintiff has established the probable validity of the claim upon which the attachment is based.
>
> (3) The attachment is not sought for a purpose other than the recovery upon the claim upon which the attachment is based.
>
> (4) The affidavit accompanying the application shows that the property sought to be attached, or the portion thereof to be specified in the writ, is not exempt from attachment.
>
> (5) The plaintiff will suffer great or irreparable injury (within the meaning of Section 485.010) if issuance of the order is delayed until the matter can be heard on notice.
>
> (6) The amount to be secured by the attachment is greater than zero.

Cal. Civ. Proc. Code § 485.220(a).

IV. DISCUSSION

Plaintiff appears to have satisfied the requirements of Rule B by filing a verified Complaint containing a prayer for attachment and garnishment, along with an affidavit declaring that the Defendant cannot be found within the district.

However, Plaintiff has failed to demonstrate that it is entitled to the extraordinary relief of an *ex parte* order allowing maritime attachment and garnishment. Relief in the form of an *ex parte* writ of attachment requires a showing that Plaintiff will suffer great or irreparable injury if issuance of the order is delayed until the matter can be heard on notice. Cal. Civ. Proc. Code § 485.220(a). Here, even assuming Plaintiff has satisfied its burden of demonstrating the other elements required for an *ex parte* writ of attachment, the Court finds that Plaintiff has provided no information supporting a likelihood of great or irreparable injury if issuance of an order is delayed until a noticed hearing on Plaintiff's Application. *See id.* The Court finds nothing in the Plaintiff's Applications that indicates Hanjin is likely to hide or diminish its own assets prior to a noticed hearing.

Plaintiff has not demonstrated that *ex parte* relief is warranted in this action. The Court acknowledges that the relief sought pursuant to Rule B is available later in the litigation timeline; thus, the Court will consider the prayer for attachment and garnishment in the future as appropriate, not on the expedited timeline for which Plaintiff has provided no support.

V. CONCLUSION

For the reasons discussed above, the Court **DENIES** Defendant's *ex parte* Applications for Writ of Garnishment and for an Order for Appointment for Service of Process of Maritime Attachment and Garnishment. (ECF Nos. 2, 3, 4.)

IT IS SO ORDERED.

September 6, 2016.

All Citations

Slip Copy, 2016 WL 4621194

2016 WL 4621194
Only the Westlaw citation is currently available.
United States District Court,
C.D. California.

Montemp Maritime Ltd., Plaintiff,
v.
Hanjin Shipping Co. Ltd., Defendant.

Case No 2:16-cv-06585-ODW (AGR)
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Signed 09/06/2016

Attorneys and Law Firms

J. Stephen Simms, Simms Showers LLP, Hunt Valley, MD, for Plaintiff.

ORDER DENYING PLAINTIFF'S *EX PARTE* APPLICATIONS FOR WRIT OF GARNISHMENT AND FOR AN ORDER FOR APPOINTMENT FOR SERVICE OF PROCESS OR MARITIME ATTACHMENT AND GARNISHMENT [2, 3, 4]

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I. INTRODUCTION

*1 On August 31, 2016, Plaintiff Montempt Maritime Limited filed *ex parte* applications for a writ of garnishment, for an order for appointment for service of process or maritime attachment, and for garnishment. For the reasons discussed below, the Court **DENIES** Plaintiff's Applications. (ECF Nos. 2, 3 4.)[1]

[1] After carefully considering the papers filed in support of and in opposition to the Motion, the Court deems the matter appropriate for decision without oral argument. Fed. R. Civ. P. 78; L.R. 7-15.

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Plaintiff Montemp Maritime Ltd. ("Montemp" or "Plaintiff") filed a Complaint in this admiralty action on August 31, 2016, alleging breach of contract and application for writs of maritime garnishment pursuant to Supplemental Admiralty Rule B against Defendant Hanjin Shipping Co, Ltd. ("Hanjin" or "Defendant"). (Compl. ¶¶ 13, 17.) Plaintiff contends that it has suffered damages of $1,688,345.70 as a result of Hanjin's failure to make payments for a time charter of a Vessel. On the same day, Plaintiff filed an *ex parte* Application for Writ of Garnishment. Plaintiff also seeks Appointment for Service of Process of Maritime Attachment and Garnishment, pursuant to Supplemental Maritime Admiralty Rule B. To date, the Court has not received any opposition.

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> (a) If a defendant is not found within the district when a verified complaint praying for attachment and the affidavit required by Rule B(1)(b) are filed, a verified complaint may contain a prayer for process to attach the defendant's tangible or intangible personal property – up to the amount sued for – in the hands of garnishees named in the process.
>
> (b) The plaintiff or the plaintiff's attorney must sign and file with the complaint an affidavit stating that, to the affiant's knowledge, or on information and belief, the defendant cannot be found within the district. The court must review the complaint and affidavit and, if the conditions of this Rule B appear to exist, enter an order so stating and authorizing process of garnishment. The clerk may issue supplemental process enforcing the court's order upon application without further court order.
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B. EX PARTE WRIT OF ATTACHMENT

Rule 64 of the Federal Rules of Civil Procedure provides, in relevant part, that "all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner

provided by the law of the state in which the district court is held ...." Fed.R.Civ.P. 64. Thus, Rule 64 permits state seizure provisions to be used in federal courts. *See Reebok Int'l v. Marnatech Enters.*, 970 F.2d 552, 558 (9th Cir. 1992). Pursuant to the California Code of Civil Procedure, the party seeking the attachment has the burden of proving:

> ***2** (1) The claim upon which the attachment is based is one upon which an attachment may be issued.
>
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>
> (3) The attachment is not sought for a purpose other than the recovery upon the claim upon which the attachment is based.
>
> (4) The affidavit accompanying the application shows that the property sought to be attached, or the portion thereof to be specified in the writ, is not exempt from attachment.
>
> (5) The plaintiff will suffer great or irreparable injury (within the meaning of Section 485.010) if issuance of the order is delayed until the matter can be heard on notice.
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> (6) The amount to be secured by the attachment is greater than zero.

Cal. Civ. Proc. Code § 485.220(a).

IV. DISCUSSION

Plaintiff appears to have satisfied the requirements of Rule B by filing a verified Complaint containing a prayer for attachment and garnishment, along with an affidavit declaring that the Defendant cannot be found within the district.

However, Plaintiff has failed to demonstrate that it is entitled to the extraordinary relief of an *ex parte* order allowing maritime attachment and garnishment. Relief in the form of an *ex parte* writ of attachment requires a showing that Plaintiff will suffer great or irreparable injury if issuance of the order is delayed until the matter can be heard on notice. Cal. Civ. Proc. Code § 485.220(a). Here, even assuming Plaintiff has satisfied its burden of demonstrating the other elements required for an *ex parte* writ of attachment, the Court finds that Plaintiff has provided no information supporting a likelihood of great or irreparable injury if issuance of an order is delayed until a noticed hearing on Plaintiff's Application. *See id.* The Court finds nothing in the Plaintiff's Applications that indicates Hanjin is likely to hide or diminish its own assets prior to a noticed hearing.

Plaintiff has not demonstrated that *ex parte* relief is warranted in this action. The Court acknowledges that the relief sought pursuant to Rule B is available later in the litigation timeline; thus, the Court will consider the prayer for attachment and garnishment in the future as appropriate, not on the expedited timeline for which Plaintiff has provided no support.

V. CONCLUSION

For the reasons discussed above, the Court **DENIES** Defendant's *ex parte* Applications for Writ of Garnishment and for an Order for Appointment for Service of Process of Maritime Attachment and Garnishment. (ECF Nos. 2, 3, 4.)

IT IS SO ORDERED.

September 6, 2016.

All Citations

Slip Copy, 2016 WL 4621194

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2016 WL 3926435

American Maritime Cases

United States District Court for the Southern District of Georgia, Savannah Division

SCL BASILISK AG AND THORCO SHIPPING A/S
v.
AGRIBUSINESS UNITED SAVANNAH LOGISTICS LLC, *ET AL.*

Case No. CV416-162
July 18, 2016

ARBITRATION – 121. Federal Arbitration Act – 17. Proceedings for Security – JURISDICTION – 1121. Applicability of Maritime Law, Common Law and State Statutes – STATUTES – State – Georgia International Commercial Arbitration Code, Ga. Code Ann. s 9-9-30.
State law may be applied in a **maritime** case if: (1) no act of Congress speaks to the issue; (2) it does not contravene a characteristic feature of **maritime** law; and (3) does not interfere with its harmony and uniformity. Here, shipowner's petition for security for London arbitration pursuant to Ga. Code Ann. s 9-9-30 is denied. The application of Georgia law would circumvent **maritime** law and the Federal Arbitration Act speaks to the issue allowing only **admiralty** remedies for security in **maritime** arbitration. Even if applicable, Georgia law requires posting of a bond and shipowner has not done so.

Attorneys and Law Firms

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Julius H. Hines (K&L Gates LLP) and Mark H. Glidewell (Brannen, Searcy & Smith, LLP) *for Agribusiness United Savannah Logistics*

Opinion

William T. Moore, Jr., D.J.:

Before the Court is Plaintiffs' Petition and Application for an Order for Security in Aid of Foreign Arbitration Pursuant to O.C.G.A. s 9-9-30. (Doc. 1.) For the following reasons, Plaintiffs' petition is denied. There being no other pending issues, the Clerk of Court is directed to close this case.

BACKGROUND

The petition in this case is the result of a charter party [1] agreement that did not go as planned. Plaintiffs are the owner and management ***2244** company of the *SCL Basilisk*. On December 30, 2015, Plaintiff*SCL Basilisk* AG ("Basilisk") and Defendant Agribusiness United Savannah Logistics LLC ("Agribusiness Savannah") executed a voyage charter party for the carriage of grain from New Orleans to Portugal and Morocco. (Doc. 1 ¶14.) On January 15, 2016, Defendant Agribusiness Savannah requested that the charter party be changed to Defendant Sonada Agro Limited (UK) LLC ("Sonada"). (*Id.* ¶17.) Defendant Agribusiness Savannah requested the change for insurance coverage reasons. (*Id.*) Plaintiff Basilisk agreed to the change and on March 4, 2016, a letter of indemnity was issued by Defendant Sonada as charterer and Defendant Agribusiness Savannah as guarantor. (*Id.* ¶18.) The letter required the posting of security if the *SCL Basilisk* was arrested or detained and agreed for indemnification against "any liability, loss, damage or expense of whatsoever nature" that Plaintiff Basilisk could sustain. (*Id.* ¶¶19-20.) Plaintiff later discovered that Defendant Sonada had been incorporated two days before Defendant Agribusiness Savannah requested the change in charter party. (*Id.* ¶28.)

Unfortunately for all parties involved, the cargo onboard the *SCL Basilisk* was attached on January 20, 2016, pursuant to a Writ of Attachment issued by the United States District Court for the Eastern District of Louisiana. (*Id.* ¶21.) Defendants Sonada and Agribusiness Savannah were unable to post security to release the *SCL Basilisk* until February 24, 2016. (*Id.* ¶22.) As a result, Plaintiff Basilisk alleges that it incurred damages in the amount of $452,528.86. [2] (*Id.* ¶23.)

According to the Plaintiffs, Agribusiness DMCC and Agribusiness Inc. are suppliers of agricultural commodities. (*Id.* ¶25.) Plaintiffs allege that all Defendants, including the two which were parties to

the charter party agreement, "share common addresses or offices, and have overlapping directors, officers, managers, agents and em *2245 ployees." (*Id.* ¶26.) Plaintiffs also allege that the companies were set up by Abderrahim Abouelouafa -- the owner -- to avoid paying on debts owed (*id.* ¶27) and that the companies comingle funds and transfer assets without meaningful arms-length consideration (*id.* ¶9). Many of the Defendants are registered in Georgia, Louisiana and New York. (*Id.* ¶33.)

On February 11, 2016, Plaintiff Basilisk commenced proceedings against Defendants Sonada and Agribusiness Savannah in a London arbitration as required by the charter party agreement. (*Id.* ¶24.) Plaintiffs filed this petition on June 24, 2016, requesting that the Court enter an order requiring Defendants to post security pending the outcome of the London arbitration. (*Id.* at 12.) Rather than relying on **maritime** law to seek this recovery, Plaintiffs have alleged that the Court may order security issued pursuant to Ga. Code. Ann. s 9-9-30.

Because of the expedited nature of this suit and the possibility that recovery in the arbitration could be hampered if security is not posted, the Court scheduled a hearing in this matter for Monday, July 11, 2016, at 5:00 p.m. in Savannah, Georgia. The parties were directed to be prepared to present evidence concerning Plaintiffs' entitlement to relief pursuant to Ga. Code. Ann. s 9-9-30 and any affirmative defenses Defendants might have. Plaintiffs argued that they were entitled to recover against all Defendants, not just Defendants Agribusiness Savannah and Sonada, because the entities are "so entwined and fused that they collectively form a single unit." (Doc. 1 ¶39.) Defendants however, argued that the Court cannot require the posting of security pursuant to Ga. Code. Ann. s 9-9-30 because Plaintiffs are not entitled to the relief they seek under Georgia law.

ANALYSIS

I. RECOVERY PURSUANT TO MARITIME LAW

Maritime law[3] provides remedies for injured parties seeking security or attachment pursuant to a **maritime** transaction. The Supple *2246 mental Rules for Certain **Admiralty** and **Maritime** Claims (herein after "Rules") allow entities to sue in personam and attach property as security for the claim pursuant to Rule B. Rule B requires that a party file a verified complaint requesting attachment. Rule B(1)(a). It also requires that the plaintiff or the plaintiff's attorney sign and file an affidavit stating that the defendant cannot be found within the district. Rule B(1)(b). Parties may also sue a ship directly in rem pursuant to **Rule C**.

Neither of these options is available to Plaintiffs. Plaintiffs are the owners of the *SCL Basilisk* and are unable to pursue attachment under **Rule C** as such attachment would result in a suit against themselves. Plaintiffs also may not seek attachment pursuant to Rule B as, according to their filings, all Defendants are present in some fashion in this district. Accordingly, Plaintiffs must show that they may seek relief pursuant to some other avenue.

II. RECOVERY PURSUANT TO GA. CODE. ANN. s 9-9-30

Because traditional **maritime** provisions are unavailable, Plaintiffs have arrived at a novel solution. They argue that Ga. Code. Ann. s 9-9-30 -- Interim Measures of Protection by Court -- allows the Court to impose security that is not otherwise available pursuant to **maritime** law. Plaintiffs argue that the Court may use this provision to order the relief they seek. Ga. Code. Ann. s 9-9-30 is a provision in the Georgia International Commercial Arbitration Code. It states in its entirety that "[b]efore or during arbitral proceedings, a party may request from a court an interim measure of protection, and a court may grant such measure, and such request shall not be deemed to be incompatible with an arbitration agreement." Generally, the provisions of the code apply only if the arbitration occurs within the state of Georgia. Ga. Code. Ann. s 9-9-21. However, s 9-9-30 is one of six provisions that is applicable when an arbitration occurs outside the State of Georgia. Ga. Code. Ann. s 9-9-30 was enacted in July of 2012 and there is little guidance as to the purpose of the *2247 statute or what is meant by the term "interim measure". Accordingly, this is a matter of first impression.

Because this is a **maritime** case, the Court must determine whether it can apply Georgia law to supplement **maritime** law. Generally, courts are entitled to supplement **maritime** law with state law so long as "the application of state law does not frustrate national interests in having uniformity in **admiralty** law." *Coastal Fuels Mktg., Inc. v. Fla. Exp. Shipping Co.*, 2000 AMC 2234, 2238, 207 F.3d 1247, 1251 (11 Cir. 2000). "State law may be applied to issues of a **maritime** nature if: (1) there is not an act of Congress that

speaks to the issue; (2) the state law does not contravene a characteristic feature of the general **maritime** law; and (3) the state law does not interfere with the proper harmony and uniformity of **maritime** law." *Misener Marine Const., Inc. v. Norfolk Dredging Co.*, 2010 AMC 250, 258, 594 F.3d 832, 839 (11 Cir. 2010) *citing S. Pac. Co. v. Jensen*, 244 U.S. 205, 216, 1996 AMC 2076, 2084 (1917). Here, the Court believes that the Georgia law cited by Plaintiffs runs afoul of all three requirements.

As an initial matter, the Federal Arbitration Act ("FAA") in 9 U.S.C. s 8 addresses the intersection of **maritime** law, arbitration, and parties seeking security. It states

> [i]f the basis of jurisdiction be a cause of action otherwise justiciable in **admiralty**, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of **admiralty** proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

9 U.S.C. s 8. This provision is applicable even after a case has proceeded to arbitration. *See e.g., Paramount Carriers Corp. v. Cook Indus., Inc.*, 1979 AMC 875, 879, 465 F. Supp. 599, 602 (S.D.N.Y. 1979).
Ga. Code. Ann. 9-9-30 would bypass the requirements of the FAA. The FAA requires that entities may seek security by proceeding "according to usual course of **admiralty** proceedings." 9 U.S.C. s 8. ***2248** The usual course of **admiralty** proceedings where parties are seeking security requires libel or seizure pursuant to Rule B or **Rule C**. Both of these remedies are unavailable to Plaintiffs. Because there is an act of Congress that speaks to the issue, and because the application of s 9-9-30 would contravene the application of this act, the Court cannot grant the relief Plaintiffs seek. [4]

Even if 9 U.S.C. s 8 were inapplicable, the Court is concerned that Ga. Code. Ann. s 9-9-30 contravenes a characteristic feature of general **maritime** law and interferes with its harmony and uniformity. *Misener*, 2010 AMC at 258, 594 F.3d at 839, *citing Jensen*, 244 U.S. at 216, 1996 AMC at 2084. "**Maritime** attachment is by any test a characteristic feature of the general **maritime** law." *ContiChem LPG v. Parsons Shipping Co.*, 2001 AMC 13, 21, 229 F.3d 426, 433 (2 Cir. 2000) (*quoting Aurora Mar. Co. v. Abdullah Mohamed Fahem & Co.*, 1996 AMC 1755, 1758, 85 F.3d 44, 47 (2 Cir. 1996). Plaintiffs have stated that they are seeking to require Defendants to post security pursuant to s 9-9-30 *because* Plaintiffs are unable to meet the requirements of attachment pursuant to Rule B or **Rule C**. However, allowing such recovery pursuant to a Georgia Code provision could result in entities becoming subject to varying security and attachment requirements on a state-by-state basis. Moreover, it would allow entities to bypass the procedural requirements of Rule B and **Rule C**. This circumvention of **maritime** law is something that is unacceptable. *See e.g., IMTT-Gretna v. Robert E. Lee SS*, 1993 AMC 2473, 2476, 993 F.2d 1193, 1195 (5 Cir. 1993) ("To allow state law to supply a remedy when one is denied in **admiralty** would serve only to circumvent the **maritime** law's jurisdiction."); *White v. Mercury Marine,Div. of Brunswick, Inc.*, 1998 AMC 305, 310, 129 F.3d 1428, 1431 (11 Cir. 1997) (noting that application of Florida's continuing tort theory would be inconsistent with **maritime** law because "[t]he very existence of a federal general **maritime** statute of limitations implies that it should be applied uniformly across the nation"); *see also* ***2249** *Fernandez v. Aliff*, 2008 WL 2026010, *5 (D.P.R. May 8, 2008) (unreported) (prohibiting the recovery of damages for emotional injuries pursuant to state legislation where it would "circumvent **maritime** law").

Even if the Court did determine that Ga. Code. Ann. s 9-9-30 allowed recovery, the Court cannot discern what relief would be applicable. Plaintiffs argued at the hearing that the term "interim relief" should be broadly defined. They argued that under s 9-9-30, the Court has unfettered rights to order the security requested. However, Defendants argued that the Court may only grant remedies pursuant to Georgia and **maritime** law and must abide by the procedural requirements of those remedies. The Court agrees with Defendants that s 9-9-30 does not allow the Court to issue whatever "interim remedy" it thinks may be necessary. Instead, the more appropriate interpretation of s 9-9-30 is that it allows courts to grant remedies otherwise available under Federal and Georgia law.

Plaintiffs have acknowledged that they are not entitled to relief pursuant to Rule B and **Rule C** of the Supplemental Rules of **Maritime** Procedure. They have provided no other avenue of relief pursuant federal **maritime** law. As

a result, the Court turns to Georgia law to determine what relief may be applicable. The Georgia Code allows attachment pursuant to Chapter 3 of Title 18. However, this attachment is allowed only if the entities seeking attachment place a bond "in a sum equal to twice the amount claimed due in the plaintiff's application." Ga. Code. Ann. s 18-3-10. In this case, no such bond has been presented. Accordingly, Plaintiffs are not entitled to attachment pursuant to Ga. Code. Ann. s 9-9-30.

CONCLUSION

Before the Court is Plaintiffs' Petition and Application for an Order for Security in Aid of Foreign Arbitration Pursuant to O.C.G.A. s 9-9-30. (Doc. 1.) For the foregoing reasons, Plaintiffs' petition is denied. There being no further pending issues in this case, the Clerk of Court is directed to close this case.

All Citations

Not Reported in F.Supp.3d, 2016 WL 3926435, 2016 A.M.C. 2243

Footnotes

1 A charter party "is a specialized type of**maritime** contract for the hire of a vessel. The person who obtains the use and service of the ship is called the charterer, and the person hiring out the vessel is usually the shipowner." *See State Establishment for Agri. Prod. Trading v. M/V Wesermunde*, 1988 AMC 2328, 2330, 838 F.2d 1576, 1578 (11 Cir. 1988) (reversed on other grounds).

2 Plaintiffs also indicate that their total damages are $667,528.86.This includes $200,000 for "interest (calculated at the arbitration rate of 3.5% compounded quarterly)" and "recoverable costs, legal fees and expenses to be awarded in the London Arbitration as permitted under English Law." (Doc. 1 ¶43.) Because the Court is denying Plaintiffs' petition, there is no need to determine whether Plaintiffs should recover these fees.

3 Charter party agreements are subject to**maritime** law as "[a] charter party is a **maritime** contract and that as between the parties to it the Federal District Courts sitting in **admiralty** have jurisdiction to determine obligations arising from it." *J.B. Effenson Co. v. Three Bays Corp.*, 1957 AMC 16, 21, 238 F.2d 611, fnbreak615 (5 Cir. 1956). In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11 Cir. 1981*en banc*) the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

4 As a general matter outside of**maritime** law, state laws may not conflict with the Federal Arbitration Act. *See Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Perry v. Thomas*, 482 U.S. 483 (1987).

2017 WL 1017598
Only the Westlaw citation is currently available.
United States District Court,
S.D. Georgia, Savannah Division.

DHL PROJECT & CHARTERING LIMITED, Plaintiff,
v.
NEWLEAD HOLDINGS LTD.; Newlead Shipping S.A.; Newlead Bulkers S.A.; Newlead Castellano Ltd.; Grand Venetico Inc.; and Newlead Venetico Ltd., Defendants.

CV 416-123
|
Signed 03/15/2017

Attorneys and Law Firms

James H. Power, Marie E. Larsen, Holland & Knight, LLP, New York, NY, Travis D. Windsor, William E. Dillard, III, Brennan, Wasden & Painter, LLP, Savannah, GA, for Plaintiff.

ORDER

HONORABLE J. RANDAL HALL, UNITED STATES DISTRICT JUDGE

*1 Before the Court is Plaintiff DHL Project & Chartering Limited's ("DHL") Motion to Distribute Proceeds of the Sale Authorized as *Custodia Legis* Expenses. (Doc. 25.) Defendants' response to that motion was due on or before December 15, 2016; to date, Defendants have failed to respond to DHL's motion. On December 16, 2016, however, a response in opposition was filed by Ray Capital Inc., Oppenheim Capital Ltd., Cheyenne Holdings Ltd., and Labroy Shiptrade Limited's (collectively, the "Interested Parties"). (Doc. 31.) After a review of these and other related filings and for the reasons stated below, DHL's motion (doc. 25) is **GRANTED.**

I. BACKGROUND

On or about October 27, 2011, DHL and Defendant Newlead Shipping S.A. entered into a charter party contract for DHL's use of the shipping vessel M/V Newlead Venetico. (Doc. 1, ¶ 13.) On December 8, 2011, DHL sub-chartered the M/V Newlead Venetico (the "Venetico") to non-party Zheijiang Materials Industry Fuel Group Co., Ltd. (the "Sub-Charterer") for a shipment of cargo from Australia to China. (Id. ¶ 15.) Shortly after loading of the Sub-Charter's cargo onto the M/V Newlead Venetico on January 4, 2012, the Venetico was detained by the Australian **Maritime** Safety Authority due to various alleged deficiencies. (Id. ¶ 16.) Loading eventually resumed on or about March 3, 2012, and the Venetico commenced her voyage to the discharge port in China on or about March 5, 2012. (Id.) DHL and the Sub-Charterer subsequently initiated arbitration in Hong Kong, wherein the Sub-Charterer alleges that it incurred significant losses from the delayed delivery of its cargo. (Id. ¶¶ 18-19; see also Doc. 1-3.)

On April 19, 2016, the Interested Parties instituted an otherwise-unrelated action, *Ray Capital Inc., et al M/V Newlead Castellano, et al.*, Case No. 4:16-CV-123 (S.D. Ga.) (the "Ray Action"), by filing a verified complaint with this Court alleging a number of claims against M/V Newlead Castellano, IMO No. 9686338, *in rem* (the "Vessel") and Newlead Castellano Ltd. (Ray Action, Doc. 1.) Generally, the Interested Parties seek to foreclose on the Vessel in connection with promissory notes, guaranties, and preferred mortgages on the Vessel executed in their favor by Newlead Holdings Ltd. and/or Newlead Castellano Ltd. (Ray Action, Doc. 18.) On April 19, 2016, the Court entered orders in the Ray Action directing the issuance of a warrant for the **maritime** arrest—as well as the issuance of process of **maritime** attachment and garnishment—of the Vessel in favor of the Interested Parties. (Ray Action, Docs. 8, 10.) Notably, a substitute custodian was appointed to provide for the preservation, storage, and safekeeping of the Vessel during its arrest at the request of the Interested Parties, namely National **Maritime** Services of Fort Lauderdale, Florida (the "Custodian"). (Ray Action, Docs. 4, 7.)

On May 25, 2016, DHL instituted the instant action. (Doc. 1.) DHL's complaint alleges: (1) a breach of contract claim against Defendants Newlead Shipping S.A., Newlead Bulkers S.A., and Grand Venetico Inc.; and (2) an alter ego claim against Defendants Newlead Holdings Ltd. for its control of Defendants Newlead Shipping S.A., Newlead Bulkers S.A., Newlead Castellano Ltd., Grand Venetico Inc., and Newlead Venetico Ltd. [1] (Doc. 1, ¶¶ 21-69.) That same day, the Court entered an Order in this action directing the issuance of process of **maritime**

attachment and garnishment of the Vessel in favor of DHL pursuant to Supplemental **Admiralty** Rule B. (Doc. 2.)

*2 On July 14, 2016, upon the Interested Parties' motion in the Ray Action, the Court entered an order directing the interlocutory **admiralty** sale of the Vessel pursuant to Supplemental **Admiralty** Rule E(9) (a) (the "Order for Sale"). (Ray Action, Doc. 48, as subsequently amended in part by the Court's Order dated August 4, 2016, Doc. 65.) Notably, despite DHL having obtained the Order directing the issuance of **maritime** attachment and garnishment of the Vessel on May 25, 2016, DHL did not purport to serve the aforementioned Order (or the resulting process of **maritime** attachment and garnishment) on the Custodian until August 5, 2016. (See Doc. 14, at 2.) Upon receipt of the aforementioned Order and process on August 5, 2016, the Custodian instructed DHL to "immediately forward" $107,000.00 to the Custodian, this figure representing one-half of the anticipated custodial costs to be incurred by the Custodian from that date through the Vessel's anticipated date of sale. (Id. at 2, 10-11.) The Vessel was sold on August 8, 2016 pursuant to the Order for Sale, and the Court entered an Order confirming the sale on August 16, 2016.[2] (Ray Action, Docs. 65, 75.) DHL, however, waited until August 25, 2016 to tender payment to the Custodian in the amount of $84,462.20.[3] (Doc. 14, at 2; Doc 25-1, at 2.) On October 14, 2016, the Interested Parties filed a motion to vacate DHL's attachment and garnishment of the Vessel. (Doc. 16.) On November 18, 2016, the Court granted the Interested Parties' motion and vacated DHL's attachment and garnishment of the Vessel on the grounds that DHL had failed to demonstrate a *prima facie* **admiralty** claim as required under Supplemental **Admiralty** Rule B.[4] (Doc. 24.)

*3 In the Ray Action, the Interested Parties have made three requests for the Court's authorization of $704,690.91 USD in *in custodia legis* expenses incurred by the Custodian—and advanced by the Interested Parties—from the time of the Vessel's arrest on April 19, 2016 through its delivery to its new owner on August 21, 2016. (Ray Action, Docs. 28, 69, 86.) The Court has granted all three of these motions, thereby authorizing a total of $704,690.91 USD in *in custodia legis* expenses associated with the arrest of the Vessel to date. (Ray Action, Docs. 48, 81, 97.) The Court has also granted two motions by the Interested Parties seeking reimbursement from the Vessel's sale proceeds presently held in the Court's registry, for a total of $704,690.91 USD paid out to the Interested Parties in reimbursement for their *in custodia legis* expenses. (Ray Action, Docs. 81, 108; see also Ray Action, Docs. 77, 101.)

On September 29, 2016, DHL filed its own motion in the Ray Action seeking authorization to pay—and reimbursement from the Court's registry for their advancement of—the $84,462.20 USD paid by DHL to the Custodian on August 25, 2016. (Ray Action, Doc. 90.) On October 5, 2016, the Court denied as moot DHL's aforementioned motion, but noted that DHL was "not precluded ... from pursuing recovery of its *in custodia legis* expenses by properly moving for an order authorizing these expenses" in the instant action. (Ray Action, Doc. 94, at 9.) On December 1, 2016, DHL filed its present Motion to Distribute Proceeds of the Sale as *Custodia Legis* Expenses. (Doc. 25.)

II. DISCUSSION

"A **maritime** lien is a special property right in a ship given to a creditor by law as security for a debt or claim subsisting from the moment the debt arises." Dresdner Bank AG v. M/V Olympia Voyager, 465 F.3d 1267, 1272 (11th Cir. 2006) (internal quotations and citations omitted). Relevant here, "a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner ... has a **maritime** lien on the vessel." 46 U.S.C. § 31342 (a); see also Dresdner Bank AG, 465 F.3d at 1272. Despite this general rule, however, "no lien can attach to a vessel while she is in judicial custody." Dresdner Bank AG, 465 F.3d at 1272 (citations omitted). Indeed, "[c]laims arising out of the care and operation of the vessel while it is in the custody of the court are not actually considered liens, as no lien can attach to a vessel while she is in judicial custody." Donald D. Forsht Assocs., Inc. v. Transamerica ICS, Inc., 821 F.2d 1556, 1560-61 (11th Cir. 1987). Nonetheless, a person who provides such post-arrest services to a vessel may seek "reimbursement from the sale proceeds [of the vessel], ahead of all lienors, as an administrative cost.... as 'expenses of justice' in priority to all lien claims when the dictates of 'equity and good conscious' [sic] so require." Id. at 1561 (quoting New York Dock Co. v. Steamship Poznan, 274 U.S. 117 (1927)); Dresdner Bank AG, 465 F.3d at 1273; see also Payne v. S.S. Tropic Breeze, 423

F.2d 236, 239 (1st Cir. 1970) ("Expenditures while a ship is in *custodia legis* do not give rise to **maritime** liens. However, the Supreme Court has held that a district court, sitting in **admiralty**, has the equitable power to give priority to claims arising from the administration of property within the court's jurisdiction." (citing New York Dock Co., 274 U.S. 117)); but see Oil Shipping (Bunkering) B.V. v. Sonmez Denizcilik Ve Ticaret A.S., 10 F.3d 176, 178 (3d Cir. 1993) ("Since the seizure revokes all authority to incur liabilities on behalf of the ship, one who renders services without first requiring the Court's permission, does so at his risk."); Bassis v. Universal Line, S. A., 484 F. 2d 1065, 1068 (2d Cir. 1973) ("[T]hose furnishing custodial services to a ship *in custodia legis* are gambling on a wholly unpredictable result unless they take the precaution of having their services authorized in advance by an order of the custodial court." (internal quotations and citations omitted)).

*4 Here, contrary to DHL's assertions, the Court has not previously authorized DHL to incur any *in custodia legis* expenses in connection with the Interested Parties' arrest/attachment—let alone DHL's now-vacated attachment—of the Vessel. Rather, the Court has granted the Interested Parties—and the Interested Parties only—authority to incur *in custodia legis* expenses in connection with the Vessel. (See Ray Action, Docs. 48, 81, 97.) Accordingly, DHL is relegated to the equitable remedies and the calm discretion of this Court in seeking reimbursement for the monies it advanced to the Custodian. Here, the Court finds that the equities of the case and good conscience counsel in favor of reimbursing DHL the monies advanced from the proceeds from the sale of the Vessel's (i.e., the substitute *res*).

The Custodian, acting upon what originally appeared to be a valid attachment of the Vessel by DHL, instructed DHL to tender payment for the anticipated expenses to be incurred by the Custodian in connection with the Vessel from August 5, 2016 through its anticipated sale date. (See Doc. 25-1, at 5 ("I have discussed this unique situation with [Custodian's] counsel, Patrick Novak, in order to minimize our risk and ensure payment of custodial costs, which are projected to be approximately $214,000—from this point in time through the likely sale date. The attached order [i.e., the Order directing issuance of process of **maritime** attachment and garnishment of the Vessel in favor of DHL, Doc. 2] indicates [DHL] is responsible for their share; please immediately forward $107,000, representing half of the anticipated costs. Additionally, please execute and return the attached custody agreement.").) In response, DHL eventually advanced a portion of these *in custodia legis* expenses—albeit without the Court's explicit authorization to do so and subsequent to the Vessel's sale—on August 25, 2016, when it tendered $84,462.20 USD to the Custodian. (See Doc. 25-1, at 2, 13-14.) Further, the amounts tendered by DHL were actually applied by the Custodian to satisfy the expenses it incurred in preserving the Vessel for the benefit of the Interested Parties and other creditors. (See id., at 3; see also Ray Action, Doc. 86-1, at ¶ 13 & Ex. 1 (showing that DHL's advance of $84,462.20 USD was applied, along with the Interested Parties' advance of $704,690.91 USD, to satisfy the Custodian's total expenses of $789,153.11 USD associated with post-arrest preservation of the Vessel).) Significantly, the Interested Parties have been unable to advance a plausible reason why they would not otherwise have been responsible to the Custodian—and would not themselves have been able to seek authorization and/or reimbursement—for the amounts advanced by DHL had it elected not to do so. Moreover, the Court finds that it would be an unjust result to not reimburse DHL for the funds it advanced in connection with the Custodian's post-arrest preservation of the Vessel as DHL stands to obtain nothing from the Vessel's sales proceeds (i.e., the substitute *res*) presently held in the registry.[5] Therefore, in accordance with the dictates of equity and good conscience, the Court exercises its discretion to order that DHL be reimbursed for the funds it advanced to the Custodian that were used for the post-arrest care of the Vessel, namely $84,462.20 USD.

III. CONCLUSION

*5 Upon the foregoing and due consideration, Plaintiff DHL's motion (doc. 25) is **GRANTED** in the amount of $84,462.20 USD. The Clerk is **DIRECTED** to disburse $84,462.20 USD from the funds held in the Court's registry in relation to the Ray Action, *Ray Capital Inc., et al v. MI V Newlead Castellano, et al.*, Case No. 4:16-CV-123 (S.D. Ga.), to counsel for Plaintiff DHL's escrow account, the details of which shall be provided directly to the Clerk by counsel under separate cover.[6]

ORDER ENTERED at Augusta, Georgia, this 15th day of March, 2017.

All Citations

Slip Copy, 2017 WL 1017598

Footnotes

1 Notably, DHL has not alleged that it holds a **maritime** lien on the Vessel, nor has it moved to arrest the Vessel under Supplemental **Admiralty Rule C**. Rather, DHL states that the dispute underlying this action "is based on an indemnity claim for an arbitration award which may be issued against DHL in [the] Hong Kong arbitration [between DHL and the Sub-Charterer]. Thereafter, DHL will pursue recovery against Newlead Shipping and/or Grand Venetico Inc. in London. [DHL] brings this action solely to obtain quasi in rem jurisdiction over [the defendants in the DHL Action] and security for its claims." (Doc. 1, ¶ 71.)

2 As set forth in the Order for Sale, the interlocutory sale of the Vessel was warranted because of: (1) the great expense being incurred to keep the Vessel seaworthy (thereby deteriorating its value as collateral for the Interested Parties and other creditors); and (2) the limited tools available to the Vessel's crew to prevent corrosion and other physical deterioration. (Ray Action, Doc. 48.) See FED. R. CIV. P., SUPP. ADM. R. E(9) (a). Notice of the sale of the Vessel was duly published by the United States Marshal for the Southern District of Georgia, Savannah Division (the "Marshal") pursuant to Local **Admiralty** Rule 4. (Ray Action, Doc. 70-1.) On August 8, 2016, the sale of the Vessel was duly conducted in accordance with the Order for Sale by the Marshal at the premises of the entrance to the United States District Court, Savannah, Georgia. (Ray Action, Doc. 66.) At the sale, non-party Strategic Shipping, Inc. ("Strategic") presented a bid of $7,400,000.00 USD (plus the current market price of any fuel or gas oil remaining on board the Vessel at the time of its delivery to the successful bidder) (collectively, the "Sale Price") and was the highest bidder capable of performing at the auction. (Id.) On August 8, 2016, Strategic presented $1,000,000.00 USD to the Marshal as security for payment of the remainder of its bid. On August 11, 2016, Strategic made a wire transfer to the Clerk of this Court in the amount of $6,400,000.00 USD to be applied towards its bid upon the successful confirmation of the sale held on August 8, 2016. The Court confirmed the sale of the Vessel to Strategic on August 16, 2016 (the "Confirmation Order"). (Ray Action, Doc. 75.) As set forth in the Confirmation Order, any claims in the Vessel existing on the date of the Confirmation Order—including those claims held by the Interested Parties and other lienors—were terminated and the Vessel was sold to Strategic "free and clear of all liens and encumbrances," but any claims terminated thereby "would attach in the same amount and in accordance with their priorities to the proceeds of the sale as provided in 46 U.S.C. § 31326 (b) ...." (Id. at 7-8.) On August 19, 2016, the Marshal executed and delivered to Strategic a Bill of Sale for the Vessel. (Ray Action, Doc. 79.) The Vessel was delivered to Strategic on August 21, 2016. (Ray Action, Doc. 86-1, ¶ 8.) The net proceeds from the sale of the Vessel (i.e., the substitute *res*) are presently deposited in the registry of this Court.

3 On July 28, 2016, shortly before the sale of the Vessel, DHL filed a motion to consolidate the instant action with the Ray Action. (Doc. 11.) On August 25, 2016, the Court denied DHL's motion to consolidate on the grounds that the two actions did not present common questions of law or fact. (Doc. 13, at 3-4.) On September 8, 2016, DHL filed a motion to intervene in the Ray Action pursuant to Federal Rule of Civil Procedure Rule 24(a). (Ray Action, Doc. 80.) On October 4, 2016, the Court denied DHL's motion to intervene on the grounds that DHL had failed to demonstrate a sufficient interest relating to the property or transaction which is the subject of the Ray Action. (Ray Action, Doc. 94.) On October 11, 2016, DHL filed its Notice of Interlocutory Appeal seeking review of the Court's Order dated October 4, 2016. (Ray Action, Doc. 98.) DHL also filed an Emergency Motion for Stay Pending Appeal seeking an order staying the Ray Action (or in the alternative an order enjoining the distribution of the proceeds from the sale of the Vessel) during the pendency of DHL's appeal of this Court's denial of its motion to intervene. (Ray Action, Doc. 99.) On November 1, 2016, the Eleventh Circuit denied DHL's Emergency Motion for Stay Pending Appeal. (Ray Action, Doc. 107.) On November 18, 2016, this Court also denied DHL's motion to stay the Ray Action pending DHL's aforementioned appeal. (Ray Action, Doc. 109.)

4 On December 5, 2016, DHL filed a motion seeking reconsideration of the Order vacating its attachment and garnishment of the Vessel. (Doc. 27.) In a supporting affidavit attached thereto, DHL asserts that it has entered into a settlement agreement with the Sub-Charterer in relation to the Hong Kong arbitration. (Doc. 27-1, ¶ 24.) On February 22, 2017, DHL filed an "Unopposed Motion for Entry of Final Judgment" wherein DHL asserts it has entered into a final settlement agreement with Defendant Newlead Castellano Ltd. (Doc. 33.) Both of these motions (docs. 27 & 33) remain pending before the Court and will be addressed in subsequent separate orders.

5 Indeed, regardless of whether DHL is successful in its pending appeal, motion for reconsideration, and/or "Unopposed Motion for Entry of Final Judgment," DHL's interest, if any, in the Vessel (and any substitute *res* thereof) is subordinate

to those held by the Interested Parties. See 46 U.S.C. § 31326(b)(1) ("Each of the claims terminated under subsection (a) of this section attaches, in the same amount and in accordance with their priorities to the proceeds of the sale, except that ... the preferred mortgage lien ... has priority over all claims against the vessel (except for expenses and fees allowed by the court, costs imposed by the court, and preferred **maritime** liens ... [or] a **maritime** lien for necessaries provided in the United States."); Rainbow Line, Inc. v. M/V Tequila, 480 F.2d 1024, 1026 (2d Cir. 1973) ("... British law, which grants no lien for the breach of a charter party...."); see also Trinidad Foundry & Fabricating, Ltd. v. M/V K.A.S. Camilla; 966 F.2d 613, 615 (11th Cir. 1992) ("**Maritime** liens are.... an aspect of substantive, rather than procedural **maritime** law. The contract agreed to by the parties in the present case states that English law shall govern. Such clauses are enforceable. Therefore, English substantive **maritime** law governs this dispute." (citations omitted)); Doc. 1-1, at 8-9 ("This Charter Party shall be governed by and construed in accordance with English Law."). Given the sizeable claims asserted by the Interested Parties against the defendants in the Ray Action, it is highly unlikely that any proceeds from the Vessel's sale (*i.e.*, the substitute *res*) will remain in the Court's registry after the Interested Parties' claims are satisfied.)

6 As set forth in the Court's Order in the Ray Action dated August 8, 2016, (Ray Action, doc. 71), the Clerk is directed to deduct a fee from the income earned on the funds held in the Court's registry in relation to the Ray Action in the amount of ten (10%) percent of the income earned. See LR 67.3, SDGa.

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2016 WL 6679487
United States Bankruptcy Court,
D. New Jersey.

In re: Hanjin Shipping Co., Ltd., Debtor.

Case No: 16–27041 (JKS)
|
Signed 09/20/2016

Attorneys and Law Firms

Ilana Volkov, Cole Schotz P.C., Hackensack, NJ, for Debtor.

DECISION AND ORDER ON MARITIME LIENHOLDERS' MOTION FOR RECONSIDERATION

Hon. John K. Sherwood, Judge

*1 The relief set forth on the following pages, numbered two (2) through sixteen (16), is hereby **ORDERED.**

INTRODUCTION

1. Early in this international bankruptcy case, Hanjin Shipping Co., Ltd. (the "Debtor") sought protection of its cargo vessels as they entered ports within the United States from the lien claims of suppliers of goods and services to the vessels. The suppliers sought to enforce their liens or, in the alternative, the posting of a bond or some other security by the Debtor as substitute protection for their liens. Since the Debtor is a company based in South Korea and has commenced insolvency proceedings in its home country, the Court's role is to direct creditors to the Korean court for an orderly and fair distribution of the Debtor's assets. Thus, to the extent the Debtor can obtain financing to bring its ships to United States ports, it can do so under protection of a stay. The Debtor's suppliers can seek to enforce their lien claims in the insolvency proceedings pending in Korea.

2. This matter is before the Court on the Motion of OceanConnect Marine, Inc., Glencore, McAllister Towing & Transportation, Inc. and Moran Towing Corporation (the "Maritime Lienholders") for reconsideration of the Court's Order dated September 9, 2016 which denied their rights of arrest or security. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(P). Venue is proper under 28 U.S.C. § 1410. The Motion for reconsideration is denied. The Court's findings of fact and conclusions of law are set forth below.

BACKGROUND AND PROCEDURAL HISTORY

3. On August 31, 2016, Hanjin Shipping Co., Ltd. filed an Application under South Korea's Debtor Rehabilitation and Bankruptcy Act. Tai–Soo Suk (the "Foreign Representative") was appointed as custodian by the South Korean District Court. [1]

4. The Debtor is headquartered in Seoul, South Korea. It transports over 100 million tons of cargo per year and is the largest shipping company in Korea. [2] After the global recession and financial crisis of 2008, the international shipping business experienced a drastic reduction in demand for transportation of goods. Additionally, the Debtor and competing companies were further harmed by an excess supply of vessels that exceeded the demand for transported goods. Combined, these factors contributed to the Debtor's dire financial situation. [3]

5. On September 2, 2016, the Debtor filed a Petition for Recognition under Chapter 15 of the Bankruptcy Code in this Court. On that date, the Debtor also filed an emergent Motion for a Provisional Order of Recognition. [4] The Court scheduled a hearing on the emergent Motion for September 6, 2016.

6. The emergent Motion sought, among other things, to impose the automatic stay provided under the Bankruptcy Code (11 U.S.C. § 362) and sought provisional recognition of the stay Order issued by the Korean Court. [5]

*2 7. At the hearing on September 6, the Maritime Lienholders opposed the relief requested in part, essentially arguing that if they were going to be subject to the stay, their lien rights under United States maritime law deserved sufficient protection in the form of a bond, cash deposit or other security, and if such protection was not provided, the provisional stay should not apply. At the time of hearing, some thirteen (13) of the Debtor's cargo ships were outside of United States territorial waters and were loaded with containers of cargo to be delivered

to customers in the United States and Canada. It was argued that these ships were unable and/or unwilling to enter United States ports due to fear of "arrest" by holders of maritime liens. Counsel for the **Maritime** Lienholders argued that his clients' lien rights under United States maritime law were far superior to those rights in other countries, including Korea.[6] Thus, if the ships were allowed to enter United States ports, unload their cargo and leave, the **Maritime** Lienholders' rights under United States law would be severely prejudiced.

8. Given the extremely short notice for the hearing and the fact that this issue was raised for the first time at oral argument on September 6, 2016 the Court entered an Interim Provisional Order Granting Recognition of Foreign Main Proceeding and Certain Related Relief Pursuant to §§ 362, 365, 1517, 1519, 1520, 1521, and 105(a) of the Bankruptcy Code on September 6, 2016.[7] Importantly, the Interim Order provided that the automatic stay would protect the vessels from arrest if they entered United States ports, but the vessels could not depart the United States until the issue was resolved. A subsequent hearing on the Provisional Order was scheduled for September 9, 2016.

9. At the September 9 hearing, it was disclosed that despite entry of the Interim Provisional Order, none of the Debtor's cargo ships had entered United States ports and, in fact, one of the vessels bound for the West Coast had actually turned around.[8]

10. Multiple representatives of other constituents appeared at both the September 6 and September 9 hearings concerning the issuance of provisional relief. These parties included beneficial cargo owners ("BCOs"), whose products were stranded in cargo containers at sea, in warehouses and at port facilities. The BCOs expressed concern about negative financial impact on their businesses due to the non-delivery or delayed delivery of their goods.[9] In addition, operators of port facilities and warehouses, whose valuable space was or would soon be occupied by the Debtor's containers, stressed the negative financial ramifications of being unable to move the BCOs' cargo to its final destination.[10] In short, the impasse that existed due to the threatened arrest of the Debtor's vessels upon arrival at ports in the United States was causing imminent negative financial consequences for those parties.

11. Accordingly, during the September 9 hearing, the Court concluded that the restriction against the Debtor's ships being allowed to leave United States ports after unloading their cargo would be lifted and the **Maritime** Lienholders' recourse would be to file a claim in the Korean proceeding. The basis for this decision was set forth on the record, but the most compelling reasons were:

a. The fact that the Debtor's ships were not entering United States ports, in part, because of the threat of arrest to satisfy **maritime** liens;

b. The stay imposed by the Korean Court was intended to apply to all of the Debtor's creditors—allowing arrest at a United States port would violate the stay;

*3 c. The **maritime** liens were unripe and unenforceable under United States law unless and until the vessels entered a port within United States territorial waters; thus, the **Maritime** Lienholders were seeking permission to enforce United States **maritime** liens that would be enforceable only after the Korean insolvency proceeding was filed and in violation of the Korean stay Order;

d. The potentially severe negative impact that the immobilization of cargo would have on other United States constituents, especially the BCOs; and

e. The lack of liquidity available to the Debtor—as of the September 9 hearing date, it only had enough financing to pay the future (post-petition) expenses for docking, unloading and transporting four (4) vessels; to require the immediate posting of a bond or other liquid security for the pre-bankruptcy liabilities to **maritime** lienholders on as many as thirteen (13) ships seemed impossible.[11]

12. The **Maritime** Lienholders promptly filed the Motion for Reconsideration of the Court's decision and a hearing was held on September 15, 2016.

LEGAL ANALYSIS

13. In the Motion for Reconsideration, the **Maritime** Lienholders argue that the Court incorrectly held that they would be able to assert **maritime** liens against the Debtor's vessels (including chartered vessels) in Korea. They assert

that under Korean law, a ship cannot be arrested unless the claimant has a claim against the owner of the ship. [12] Since the Debtor does not own, but charters, most of the ships bound for United States ports, the **Maritime** Lienholders have a unique opportunity to enforce their liens against chartered ships that enter United States ports that will be lost once the ships depart. Thus, they argue that they are entitled to "sufficient protection" under 11 U.S.C. § 1522 and propose that this Court amend its Order to: (1) require the Debtor to post bond or security; (2) allow creditors to proceed to arrest the vessels now in the United States; or (3) waive the stay provided to the vessels (and their third party owners) under 11 U.S.C. §§ 1520 and 362.

The Korean Bankruptcy Proceeding

14. On August 31, 2016, the Debtor applied for protection under Korea's Debtor Rehabilitation and Bankruptcy Act with the 6th Bankruptcy Division of the Seoul Central District Court. [13] The Korean court entered a provisional Order granting relief and on September 1, 2016 allowed commencement of the rehabilitation proceeding. [14]

15. The provisional Order provided in part that "the exercise of security right on the basis of a rehabilitation claim or rehabilitation security right is hereby prohibited with respect to all rehabilitation creditors and rehabilitation secured creditors." [15]

Maritime Attachment Liens

16. Though the Court did not have a comprehensive understanding of how claims brought by **maritime** lienholders will be treated in Korea, it accepted for purposes of the hearing on September 9 the possibility that **maritime** lien rights are better in the United States for suppliers than they are elsewhere, including Korea. Within the United States, **maritime** liens often arise automatically, by operation of both state and federal law. [16] The Federal **Maritime** Lien Act creates **maritime** liens for "necessaries" ordered by authorized vessel agents. [17] The term "necessaries" "encompass[es] any item which is 'reasonably needed for the venture in which the ship is engaged." [18]

*4 17. The ability to enforce a **maritime** lien is governed by Title XIII, Rule B (*in personam*) and Title XIII, **Rule C** (*in rem*) of the Supplemental Rules for **Admiralty** or **Maritime** Claims and Asset Forfeiture Actions to the Federal Rules of Civil Procedure. An *in rem* arrest under **Rule C** can be brought by an entity providing supplies to a vessel even though the operator did not enter into a contract and has no personal liability for the "necessaries" that were provided. [19] Considering the unique leverage that a **Rule C** arrest gives to suppliers under United States law, the fact that the **Maritime** Lienholders wanted their liens recognized and protected by this Court does not come as a surprise.

Chapter 15's Universalist Approach

18. There are generally two schools of thought when it comes to multinational reorganizations: (1) universalism, where a bankruptcy progresses as a unified global proceeding that is administered by one court, with the assistance of courts in other nations; and (2) territorialism, where a debtor is forced to file an insolvency action in every country that its property may be found. [20]

19. Congress created Chapter 15 of the Bankruptcy Code in 2005 [21] and embraced the universalist approach by directing United States Bankruptcy Courts to consider issues in a global context:

> "In interpreting this chapter, the court shall consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions."

U.S.C. § 1508.

20. This approach is further evidenced by § 1507(b), which provides that upon granting recognition of a foreign main bankruptcy proceeding, a court may provide additional assistance, "consistent with the principles of comity."

21. Within the Third Circuit, courts are encouraged to follow this statutory directive. In *In re ABC Learning Centres Ltd.*, the Court embraced the universalist

approach described above, discouraging the piecemeal seizure and distribution of assets by individual nations and noting that Chapter 15 "encourages communication and cooperation with foreign courts" with respect to transnational insolvency cases. 728 F.3d 301, 306 (3d Cir. 2013). "The goal is to direct creditors and assets to the foreign main proceeding for orderly and fair distribution of assets, avoiding the seizure of assets by creditors operating outside the jurisdiction of the foreign main proceeding." *Id.* at 306–307.

Limits on the Universalist Approach

22. Although comity is a principal objective of Chapter 15, deference to comity is not without limit. Courts have ruled that deference to a foreign tribunal in accordance with international norms cannot override the plain language of the Bankruptcy Code when the language leaves no room for deference or discretion by the bankruptcy courts.[22]

*5 23. In addition to the plain language requirement, there is a limited public policy exception to Chapter 15's universalist approach. Under 11 U.S.C. § 1506, nothing in the Code "prevents the court from refusing to take an action...if the action would be manifestly contrary to the public policy of the United States." The Third Circuit has determined that this exception should be "narrowly construed" because the "word 'manifestly' in international usage restricts the public policy exception to the most fundamental policies of the United States." *In re ABC Learning Centres Ltd.*, 728 F.3d 301, 309 (3d Cir. 2013) (citing H.R. Rep. No. 109–31(1), 100th Cong., 1st Sess., at 109 (2005)). Further, this exception only applies "where the procedural fairness of the foreign proceeding is in doubt or cannot be cured by the adoption of additional protections" or where recognition "would impinge severely a United States constitutional or statutory right."[23]

Relief provided under 11 U.S.C. §§ 362 and 1519

24. It is well understood that the automatic stay imposed under 11 U.S.C. § 362 is applicable only to a debtor. Importantly, however, courts have applied the stay to non-debtors when it is ascertained that a claim against a third party "will have an immediate adverse economic consequence for the debtor's estate."[24]

25. In addition to § 362, § 1519 provides a court with the power to enter such provisional relief that is "urgently needed to protect assets of the debtor or the interests of creditors."[25] While courts have broad discretion in granting relief under § 1519, it is limited by 11 U.S.C. § 1522(a), which provides that the court may only grant relief if the interests of creditors and other interested parties, including the debtor, are "sufficiently protected."[26] 11 U.S.C. § 1522(b) acts in conjunction with § 1522(a), by providing that the court may impose conditions on this discretionary relief, such as the posting of security or a bond. Because Congress did not provide a definition of "sufficiently protected" or an accompanying formula to determine how the interests of these creditors should be accounted for, courts have great leeway to determine what this is. Some have fashioned remedies on a case-by-case basis by analyzing the requirements of § 1522(a), which is "logically best done by balancing the respective interests based on the relative harms and benefits in light of the circumstances presented...."[27] Further, "Standards that inform the analysis of § 1522 protective measures in connection with discretionary relief emphasize the need to tailor relief granted to the foreign representative and the interests of those affected by such relief, without unduly favoring one group of creditors over another."[28]

DISCUSSION

26. The fundamental question is whether the maritime lien rights available under United States law should be enforceable despite the issuance of the stay Order in Korea.

*6 27. The Debtor has made a prima facie case that the proceedings before the South Korean District Court will be recognized as the "Foreign Main Proceeding" and thus, the Debtor will qualify for protection of the automatic stay provided under § 362 of the Bankruptcy Code. Since the Court has not yet entered a formal recognition order, the Debtor sought provisional relief under § 1519, which provides a court the power to enter such provisional relief that is "urgently needed to protect assets of the debtor or the interests of creditors."[29] This is the relief granted in

the Court's Order of September 9, 2016 which includes the imposition of a stay under § 362 of the Bankruptcy Code and provisional recognition of the Korean stay Order.

28. The Korean stay Order was entered on August 31, 2016 and was intended to apply to all of the Debtor's creditors, including the **Maritime** Lienholders. It is widely recognized that the purpose of the automatic stay in insolvency proceedings is to preserve the status quo by providing a "breathing spell" to the besieged debtor.[30] The stay expressly provides that any attempt to obtain possession of property of the estate or act to create, perfect or enforce a lien against property of the estate is forbidden.[31] The status quo at the time of the South Korean filing was that all but one or two[32] of the Debtor's vessels were outside of United States territorial waters. Thus, these ships were not subject to the arrest provisions under United States maritime law that the **Maritime** Lienholders now seek to enforce. Allowing the enforcement of these inchoate lien rights after the issuance of the Korean stay Order is not consistent with the concept of a stay. In contrast, the Court understood that the **Maritime** Lienholders had arrested at least one vessel, the *MV Hanjin Montevideo*, in a United States port prior to the filing of this Chapter 15 case and "carved out" this vessel from the protections provided under the Provisional Order.[33] This was because the lien claims against the *Montevideo* were mature and enforceable when the issue was before the Court.

29. In light of the universalist approach under Chapter 15, a court must provide aid to the foreign main proceeding (here, Korea) absent plain language to the contrary or a vital public policy concern. Nothing in the Bankruptcy Code or in this country's vital public policy concerns would mandate that the **Maritime** Lienholders be permitted to enforce lien rights that were not enforceable under United States law when the Korean stay went into effect. To allow such enforcement would be to apply a "territorialism approach" to international insolvency in contradiction of Chapter 15's clear directive. To protect the interests of the Debtor's global rehabilitation and creditors as a whole, the Debtor's vessels had to be allowed to enter United States ports under the protection of the stay.

30. While it is true that the chartered vessels are not owned by the Debtor, the claims against these vessels are based in part upon liabilities of the Debtor. And, so long as these vessels are under charter by the Debtor, its property rights are impacted. In order to achieve the practical objective of moving cargo from the Debtor's vessels to intended destinations in the United States (and limit the harm to BCOs), it was necessary to extend the stay to vessels chartered by the Debtor. Also, there is supporting precedent from other jurisdictions, when faced with similar circumstances, that the stay should apply to all of the Debtor's vessels, owned and chartered.[34] But, to be clear, once these vessels are no longer under charter by the Debtor, they will not be protected by the stay and the **Maritime** Lienholders would be able to enforce their liens against such vessels in the United States.

*7 31. The language of § 1522(a) makes clear that courts must weigh the interests of all parties, including other creditors and the debtor, in providing discretionary relief. The Court weighed these interests and considered the practicalities involved. If the Debtor's vessels were not allowed to dock, unload their cargo, and depart under the protection of a stay, they would potentially avoid ports in the United States, leaving delivery of their cargo in limbo and causing BCOs, port operators and others harm. The relief granted by the Court was designed to minimize this harm by giving the Debtor assurances that its vessels would not be seized in the United States.

32. While it is true that § 1522(b) provides this Court with the ability to impose conditions related to discretionary relief, including the posting of security or some other form of protection, it does not mandate that it do so. At the time of hearing, thirteen (13) vessels were bound for United States ports and the Debtor had secured the financing necessary to dock and unload just four (4) of them. It was apparent that the Debtor did not have the financial wherewithal to tender any immediate form of security to the **Maritime** Lienholders and was unwilling to do so due to the entry of the stay Order in Korea. The Court was not inclined to allow the stalemate between the Debtor and the **Maritime** Lienholders to continue at the expense of the Debtor and its other creditors. As a whole, the Debtor's "foreign main proceeding" in Korea will be better off if the Debtor's vessels can promptly deliver their cargo. The **Maritime** Lienholders' claims against the vessels can be administered by the Court in Korea. There is nothing in the record that would indicate that the Korean Court will not provide due process to all parties.

CONCLUSION

33. For the foregoing reasons, the **Maritime** Lienholders' Motion for Reconsideration is denied.

All Citations

Slip Copy, 2016 WL 6679487, 2016 A.M.C. 2126

Footnotes

1 Debtor's South Korean petition is attached to the Chapter 15 Bankruptcy Petition (ECF 1).
2 Declaration of Tai–Soo Suk in Support of the Verified Chapter 15 Petition (ECF 3, at 3).
3 *Id.* at 4.
4 (ECF 5).
5 The stay Order is attached to the Declaration of Wan Shik Lee Nam (ECF 4, at Exhibit "B").
6 Transcript of Hearing Held 09/06/2016 at 123–133 (ECF 49).
7 (ECF 22).
8 Transcript of Hearing Held 09/09/2016 at 89 (ECF 104).
9 *See, e.g.*, Memorandum of Law Regarding Continued Hearing on Provisional Relief for Samsung Electronics (ECF 43) *and* Objection to Motion for Provisional Relief for Ashley Furniture Industries, Inc. (ECF 63).
10 *See, e.g.*, Objection to Interim Provisional Order for Maher Terminals, LLC (ECF 50) *and* Objection to Motion for Provisional Relief for World Fuel Services, Inc. (ECF 61).
11 Transcript of Hearing Held 09/09/2016 at 57–59 (ECF 104).
12 **Maritime** Lienholders' Motion for Reconsideration at 2 (ECF 85).
13 The South Korean Petition is attached to the Declaration of Wan Shik Lee Nam (ECF 4, at Exhibit "A").
14 *Id.* at Exhibits "B" and "C."
15 *Id.* at Exhibit "B."
16 *See generally* Robert Force, **Admiralty** and **Maritime** Law, Chapter 9, pp. 163–164 (Federal Judicial Center, 2004).
17 46 U.S.C. § 31301, *et seq.*
18 *Foss Launch & Tug Co. v. Char Ching Shipping U.S.A., Ltd.*, 808 F.2d 697, 699 (9th Cir. 1987).
19 *Belcher Co. of Alabama, Inc. v. M/V Maratha Mariner*, 724 F.2d 1161, 1163 (5th Cir. 1984).
20 Jay Lawrence Westbrook, *Chapter 15 at Last*, 79 Am. Bankr. L.J. 713, 715 (2005); *see also In re ABC Learning Centres, Ltd.*, 728 F.3d 301, 306 (3d Cir. 2013) ("Chapter 15 embrace[d] the universalism approach [and] rejected the territorialism approach, the 'system of full bankruptcies,' in favor of aiding one main proceeding.") (citing H.R. Rep. No. 109–31, 100th Cong., 1st Sess., at 109 (2005)).
21 Chapter 15 sought to incorporate the United Nations Commission on International Trade Law's Model Law on Cross–Border Insolvency. Both the United States and South Korea have been members of this Commission on a rotating basis. *See* United Nations Commission on International Trade Law, *A Guide to UNCITRAL: Basic Facts about the United Nations Commission on International Trade Law*, www.uncitral.org/uncitral/en/about_us.html (last visited Sep. 20, 2016).
22 *In re Fairfield Sentry Ltd.*, 768 F.3d 239, 245–246 (2d Cir. 2014).
23 *In re ABC Learning Centres Ltd.*, 728 F.3d 301, 309 (3d Cir. 2013) (quoting *In re Qimonda AG Bankr. Litig.*, 433 B.R. 547, 570 (E.D. Va. 2010).
24 *Queenie, Ltd. v. Nygard Intern.*, 321 F.3d 282, 287 (2d Cir. 2003) (citing *McCartney v. Integra National Bank North*, 106 F.3d 506, 510–511 (3d. Cir. 1997).
25 11 U.S.C. § 1519(a).
26 Notably, § 1522(a) makes use of the phrase "sufficiently protected" rather than "adequately protected" to avoid confusion with 11 U.S.C. § 362 and its similarly court-fashioned protection for secured creditors. *See Collier on Bankruptcy*, ¶ 1522.01, p. 1522–2, n.2 (16th ed. 2016) (citing H.R. Rep. No. 109–31, 100th Cong., 1st Sess., 116 (2005)).
27 *Jaffe v. Samsung Elecs. Co. Ltd.*, 737 F.3d 14, 27–28 (4th Cir. 2013).
28 *In re Tri–Continental Exchange Ltd.*, 349 B.R. 627, 637 (Bankr. E.D. Cal. 2006) (citing Guide to Enactment of Model Law, ¶ 161); *See also In re SIVEC SRL.*, 2011 WL 2445754 (Bankr. E.D. Okla. 2011).
29 11 U.S.C. § 1519(a).
30 *Mar. Elec. Co. v. United Jersey Bank*, 959 F.2d 1194, 1203 (3d Cir. 1991).

31 11 U.S.C. § 362(a).

32 The Court was advised at the hearing on September 6 that an arrest writ had been issued on another vessel, the *Seaspan Efficiency*. (Transcript of Hearing Held 09/06/2016 at 62 (ECF 49)) The treatment of that vessel has not been specifically addressed.

33 Transcript of Hearing Held 09/06/2016 at 143–144 (ECF 104).

34 *See In re: Daebo Int'l Shipping Co., Ltd.*, Case No. 15–10616 (Bankr. S.D.N.Y. Mar. 19, 2015) (DOC 21); *In re: STX Pan Ocean Co., Ltd.*, Case No. 13–12046, (Bankr. S.D.N.Y. July 1, 2013) (DOC 30); and *In re: Korea Line Corp.*, Case No. 11–10789 (Bankr. S.D.N.Y. Apr. 20, 2011) (DOC 56).

End of Document

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United States District Court,
N.D. New York.

Bomin GREECE S.A., Plaintiff,
v.
M/V GENCO SUCCESS (IMO 9121730), her engines, freights, apparel, appurtenances, tackle, etc., in rem, Defendant.

1:16-CV-1500 (GTS/CFH)
|
Signed 03/31/2017

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DECISION and ORDER

Hon. Glenn T. Suddaby, Chief U.S. District Judge

*1 Currently before the Court, in this maritime action by Bomin Greece S.A. ("Plaintiff") against M/V Genco Success ("Defendant" or the "Vessel"), are the following three motions: (1) Plaintiff's motion to strike the Statement of Interest of Genco Success Ltd. ("Claimant" or "Genco") and enter default judgment in favor of Plaintiff or, in the alternative, motion for summary judgment (Dkt. No. 15); (2) Claimant's motion to vacate the Court's Order for the **Maritime** Arrest of the Vessel (Dkt. No. 19); and (3) Claimant's cross-motion for an Order, pursuant to Fed. R. Civ. P. 56(d), denying Plaintiff's motion for summary judgment, or granting a continuance to enable discovery before decision (Dkt. No. 23). For the reasons set forth below, Plaintiff's motion is denied; decision on Claimant's motion to vacate is reserved, pending a hearing; and Claimant's cross-motion is granted.

I. RELEVANT BACKGROUND

Because the parties have (in their motion papers) demonstrated an adequate understanding of the action's procedural history, the Court will not recite that procedural history in this Decision and Order, which is intended primarily for the review of the parties. Instead, the Court will proceed directly to a summary of the parties' briefing on the three pending motions.

A. Parties' Briefing on Plaintiff's Motion to Strike Statement and Enter Default Judgment or, In the Alternative, for Summary Judgment

1. Plaintiff's Memorandum of Law

Generally, in support of its motion (filed on February 13, 2017), Plaintiff asserts two arguments. (Dkt. No. 15, Attach. 2.) First, Plaintiff argues, default judgment pursuant to Fed. R. Civ. P. 55 is warranted for the following reasons: (a) the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions ("Supplemental Admiralty Rule") provide in mandatory terms, in pertinent part, that a person who asserts a right of possession or any ownership interest in the property that is the subject of the action must file a verified statement of right or interest within 14 days after the execution of process, and serve an answer within 21 days after the filing of the statement of right or interest; (b) here, the execution of process (i.e., the Warrant of Arrest) was served on December 20, 2016, rendering the Verified Statement of Interest due on or before January 3, 2017, and the Answer due on or before January 24, 2017; (c) however, neither Claimant nor any other party has complied with either of these deadlines, nor has it shown good cause for failing to do so; and (d) as a result, Claimant's belated Statement of Interest (filed on January 31, 2017) should be struck, and default judgment should be entered in favor of Plaintiff. (*Id.*)

Second, Plaintiff argues, in the alternative, summary judgment pursuant to Fed. R. Civ. P. 56 is warranted for the following reasons: (a) the agreement for the supply of bunker fuel to Claimant incorporated Plaintiff's General Terms and Conditions (including its provisions for the application and enforcement of a **maritime** lien against the vessel) and is enforceable under the laws of the United States (as well as, alternatively, the laws of Greece); (b) Plaintiff's General Terms and Conditions apply United

States law and give rise to a **maritime** lien under the Commercial Instrument **Maritime** Lien Act ("CIMLA"); (c) CIMLA provides Plaintiff with a **maritime** lien for "necessaries to a vessel on the order of the owner or a person authorized by the owner," because (i) bunkers of fuel are "necessaries" under CIMLA, (ii) the bunkers of fuel were supplied "to a vessel," (iii) the bunkers of fuel were supplied "on the order of ... a person authorized by the owner" to bind the Vessel, and (iv) Claimant's "Letter of Protest" is nothing more than a "no lien" stamp, which does not provide the required actual notice to the supplier than a lien would not arise; (d) Plaintiff is entitled to costs for arresting the Vessel; and (e) Plaintiff is entitled to an award of prejudgment interest at the rate of nine (9) percent per year. (*Id.*)

2. Claimant's Opposition Memorandum of Law

*2 Generally, in opposition to Plaintiff's motion, Claimant asserts three arguments. (Dkt. No. 27.) First, Claimant argues, Plaintiff's motion to strike Claimant's Statement of Interest should be denied for the following reasons: (a) as an initial matter, Claimant's Stipulation of December 21, 2016, contained language constituting the required statement of interest; (b) in any event, Claimant's Statement of Interest of January 31, 2017, was filed as soon as Plaintiff suggested that the aforementioned language in the Stipulation was insufficient; (c) contrary to Plaintiff's suggestion, the Supplemental **Admiralty** Rules do not speak in mandatory terms but must be applied in the context of account common sense and subject to the district judge's express discretion to extend the time for filing a Statement of Interest; and (d) here, that discretion should be exercised under the circumstances, which include the fact that Plaintiff cannot establish that it has suffered undue prejudice or surprise. (*Id.*)

Second, Claimant argues, Plaintiff's motion for default should be denied for the following reasons: (a) as explained above, Claimant appeared in this action by filing a Stipulation and a valid Statement of Interest (and it would be unfair for Plaintiff to accept Claimant's security deposit and then prevent Claimant from participating in the action); (b) in any event, Plaintiff's motion is procedurally flawed in that it is not accompanied by either a previously entered Certificate of Default or attorney affidavit of service and failure to appear; and (c) moreover, Plaintiff's motion should fail on the merits based on a balancing of the three relevant factors (the willfulness of the default, the meritoriousness of the defense, and the prejudice to the movant). (*Id.*)

Third, Claimant argues, Plaintiff's motion for summary judgment should be denied for the following reasons: (a) the motion is premature in that before it is decided a hearing is necessary under Supplemental **Admiralty** Rule E(4)(f) and/or discovery is necessary under Fed. R. Civ. P. 56(d) as shown in the required declaration; (b) in any event, Plaintiff's motion must be denied because it relies on inadmissible evidence (i.e., the declaration of a person who has no personal knowledge of the relevant transaction, and an attorney affidavit), which may not be considered; (c) moreover, Plaintiff's motion must be denied because Claimant has adduced admissible evidence that, through the no-lien clause expressly contained in the contract, it provided notice to Petrogal (Plaintiff's agent) that Caltrek (the charterer of the Vessel) was not authorized to bind the Vessel to a **maritime** lien based on the delivery of fuel; (d) moreover, Plaintiff's motion must be denied because, even if actual notice was required to be given directly to Plaintiff, there are genuine disputes of material fact as to whether (i) Caltrek (the charterer of the Vessel) advised Plaintiff of the no-lien provision contained in the contract at the time of contracting, (ii) the pre-bunkering objection made by Claimant to Petrogal was communicated by Petrogal to Plaintiff, or (iii) other affirmative defenses are available to Claimant in connection with Plaintiff's extension of a 45-day line of credit to Caltrek in connection with the relevant fuel delivery; and (e) even if the Court were to grant summary judgment to Plaintiff on the basis of a **maritime** lien against the Vessel, Plaintiff would not be entitled to prejudgment interest at the rate of nine (9) percent per year (which is a *post*-judgment rate under a *New York State* statute) but only interest at the current federal prime rate. (*Id.*)

3. Plaintiff's Reply Memorandum of Law

Generally, in reply to Claimant's opposition, Plaintiff asserts three arguments. (Dkt. No. 31.) First, Plaintiff argues, its motion to strike Claimant's Statement of Interest should be granted because Claimant's Verified Statement of Interest was late under the rules and was in violation of the mutually agreed security stipulation. (*Id.*)

*3 Second, Plaintiff argues, its motion for default judgment should be granted because, again, Supplemental **Admiralty Rule C**(6) speaks in mandatory terms, and Claimant's reliance on Local Rule of Practice 55.2 is inapposite given that it was intended is tc ensure that parties have sufficient notice (which Claimant did have in this case). (*Id.*)

Third, Plaintiff argues, its motion for summary judgment should be granted for the following reasons: (a) the evidence relied on by Plaintiff is admissible and may be used as part of the record in deciding a motion for summary judgment; (b) Claimant's reliance on the notice it arguably gave to Caltrek and Plaintiff ignores the rebuttable statutory presumption that the supplier of necessaries may rely on the credit of the ship in providing goods and services and that the party disputing the existence of the lien bears the burden of proving that the opposite is true, and impermissibly attempts to shift that burden to Plaintiff to explain why it did not receive such notice and why Caltrek was not authorized to bind the Vessel, without sufficiently identifying the potential facts that may be learned in discovery which would defeat Plaintiff's motion for summary judgment; (c) Plaintiff is entitled to prejudgment interest at the applicable New York State statutory rate of nine (9) percent; and (d) in the alternative, to the extent that the Court grants Claimant's request for a stay, Plaintiff requests that the Court order the scheduling of expedited discovery. (*Id.*)

B. Statement of Undisputed Material Facts

Generally, unless otherwise noted, the following facts were asserted and supported by Plaintiff in its Statement of Undisputed Material Facts ("Rule 7.1 Statement") and either expressly admitted or denied without an accurate record citation by Claimant in its response thereto ("Rule 7.1 Response"). *Compare* Dkt. No. 15, Attach. 3 [Plf.'s Rule 7.1 Statement, asserting variation of above-stated facts and supporting that assertion with an accurate record citation to admissible record evidence] *with* Dkt. No. 26, at ¶ 1 [Claimant's Rule 7.1 Response].)

1. During the relevant time, Bomin was a foreign corporation organized under the laws of Greece and engaged in the business of providing bunkers of fuel to ships. [1]

2. On or about March 30, 2015, Caltrek Freight and Trading Ltd. ("Caltrek"), as charterers of the M/V GENCO SUCCESS ("the Vessel"), entered into an agreement with Plaintiff to provide bunkers of fuel for delivery to the Vessel at the port of Lisbon, Portugal. [2]

3. On March 30, 2015, Bomin confirmed the order with Caltrek at a rate of USD 320.00 per MT of IFO-380 CST (plus associated barging fee of USD 6,500 and agency fee of USD 4,000) to be delivered to the Vessel on April 5, 2015. [3]

4. On March 30, 2015, Bomin provided Caltrek with a copy of the Confirmation of Order for delivery of bunkers of fuel at the aforementioned rate to the Vessel to be delivered at Lisbon, Portugal, on April 5, 2016.

5. The Confirmation of Order states as follows, in pertinent part:

> We confirm you to arrange / having arranged the following bunker supplies as follows
>
> Master and/or Owner and/or Charterer and/or
>
> Operator and/or Manager of the M/V GENCO SUCCESS
>
> Customer
>
> Customer Caltrek Freight and Trading Ltd. ... [4]

6. The Confirmation of Order expressly states, in pertinent part, that "[t]his transaction will be governed by [Bomin's] General Conditions of Sale and Delivery ... a copy of which accompanies this Confirmation, and also available [sic] at www.bominflot.net. [5]

*4 7. Bomin's General Conditions of Sale and Delivery state, in pertinent part, as follows:

> 1.1 "Seller" shall mean any of the BOMINFLOT International Group of Companies, including its servants, agents, brokers, designated representatives, subsidiaries or affiliates wherever applicable.

1.2 "Buyer" shall mean the party and/or parties contracting to buy products and/or services as set out in the Seller's Confirmation of Order for Products and/or Services, including its servants, agents, brokers, designated representatives, subsidiaries or affiliates wherever applicable.

...

7.14 ... The Supplier's right to apply and enforce a **maritime** lien will not be altered, waived or impaired by the application to the Bunker Delivery Note of any disclaimer stamp.

9.1 Irrevocable payment shall be made by Buyer in full, as directed by Seller, within the time specified in the Contract. Timely payment is of the essence....

...

18.1 This Agreement is subject to General Maritime Law of the United States of America, place of jurisdiction the United States of America, or any other law and jurisdiction as specified in the Contract. However, nothing in this clause shall preclude Seller, in event of a breach of this Agreement by the Buyer, from taking any such action or actions as it shall in its absolute discretion consider necessary to enforce, safeguard or secure its rights under this Agreement in any court or tribunal of any state or country, including, but not limited to the action to enforce its rights of lien against ships, the existence and procedure of enforcement of such right of lien being determined by the local law of the place where enforcement is sought, or to otherwise obtain security by seizure, attachment or arrest of assets for any amount(s) owed to Seller.

8. Bomin currently possesses no records documenting that, before delivery, it was notified by either Caltrek or the Vessel's owner, Genco Success Ltd. ("Genco"), of an objection to the Confirmation of Order or Bomin's General Conditions of Sale and Delivery. [6]

9. On April 4, 2015, Galp Energia and/or Petrogal ("for account of" Bomin) delivered 250,549 MT of IFO-380 CST to the M/V GENCO SUCCESS at Lisbon, Portugal. [7]

10. According to documents and information obtained from Bomin's employees and representatives, the bunkers of fuel supplied to the M/V GENCO SUCCESS at Lisbon were necessary to the accomplishment of her mission, namely, trade worldwide as a commercial ship. [8]

11. Bomin currently possesses no records documenting that, before delivery, it received actual notice from either Caltrek or Genco that Caltrek was not authorized to bind the Vessel with respect to the bunkers of fuel provided at Lisbon. [9]

12. According to Bomin's standard internal procedures, the bunker delivery receipt for the supply of fuel to the M/V GENCO SUCCESS at Lisbon would have been sent to Bomin's Accounting Department, as proof of the exact quantity of fuel supplied and the precise date when delivery took place. [10]

13. For this transaction, Bomin's Accounting Department issued Invoice No. 02808, dated April 15, 2015, in connection with order number ID 609443 and delivery of bunker fuel on April 4, 2015, for the total sum of USD 90,675.68, and addressed that invoice to, *inter alia*, "Master and/or Owner and/or Charterer and/or Operator and/or Manager of the M/V GENCO SUCCESS." [11]

*5 14. Despite Bomin's issuance of the aforementioned Invoice, the outstanding principal balance of USD 90,675.68 (exclusive of interest and costs), remains undisputedly due and owing to Bomin. [12]

C. Parties' Briefing on Claimant's Motion to Vacate

1. Claimant's Memorandum of Law

*6 Generally, in support of its Supplemental Admiralty Rule E(4)(f) motion to vacate the arrest of the Vessel, Claimant argues that Bomin does not have a maritime lien under CIMLA for the following four reasons: (1) a **maritime** lien does not arise (due to the ordering of necessaries by one without authority to bind the vessel), where the vessel owner can show that the supplier of necessaries had actual knowledge of the existence of any lack of authority relied upon as a defense; (2) here, the supplier of necessaries (Petrogal) had actual notice of (a) the no-lien clause expressly contained in the relevant

contract before the bunkering of fuel and (b) the follow-up letter of protest made by agents of the owners of the vessel (Genco); (3) furthermore, if Petrogal breached its duty to communicate this no-lien clause to the seller of necessaries (Bomin), then such a breach of duty of "good business practice" should not result in a maritime lien against the vessel but a claim by Bomin against Petrogal; and (4) even if actual notice was required to be made directly to Bomin, at the very least a dispute of material fact exists as to whether that actual notice was made in this case. (Dkt. No. 19, Attach. 1.)

2. Plaintiff's Opposition Memorandum of Law

Generally, in opposition to Claimant's motion's motion to vacate, Plaintiff asserts three arguments: (1) CIMLA provides Plaintiff with a maritime lien, because the lien was for "necessaries" (specifically, bunkers of fuel) supplied to the Vessel on the order of a person (specifically, an agent of Caltrek) who was presumed under CIMLA to be authorized to bind the Vessel for necessaries; (2) the aforementioned presumption has not been rebutted by Claimant, because it has not persuasively shown that the supplier of the bunkers of fuel (specifically, Petrogal) had *actual knowledge* that Caltrek was not authorized to bind the Vessel through Caltrek's presentation to Petrogal of a "notice of protest and objection request," which Petrogal denies ever receiving; and (3) furthermore, the other forms of purported notice (specifically, the pre-bunkering oral statements by Caltrek's agents to the captain of Petrogal's bunker-supply barge (M/T SACOR II), and the post-bunkering "letter of protest" from Genco to Petrogal), which are mere no-lien stamps, are insufficient to confer actual knowledge to Petrogal. (Dkt. No. 28.)

3. Claimant's Reply Memorandum of Law

Generally, in reply to Plaintiff's opposition, Claimant asserts three arguments: (1) as acknowledged by Plaintiff, no **maritime** lien attaches to a vessel pursuant to CIMLA, where actual notice of a no-lien clause (and/or a lack of authority of a charterer to bind the vessel) was clearly and unambiguously provided to the supplier of necessaries before delivery of those necessaries; (2) here, Claimant has adduced two affidavits (from the Master and Chief Engineer of the Vessel, Qiao Jun Zhi and Zhuang Shao Guang) attesting to the fact that, at a pre-bunkering meeting, actual notice was provided to the supplier of the bunker fuel oil (Petrogal) or its agents (including employees of Petrogal's bunker-supply barge, M/T SACOR II) of the no-lien clause and the lack of authority of the charterer (Caltrek) to bind the Vessel, and Plaintiff's affidavit to the contrary (from Petrogal's Marine Sales Manager, Luis Sampaio Nunes) is ineffective because (a) it contains no indication he was present at the pre-bunkering meeting, and (b) it incorrectly attempts to argue that the arrival of the bunker-supply barge M/T SACOR II alongside the Vessel for the pre-bunkering meeting constituted delivery, rendering the notice at the meeting late; and (3) contrary to Plaintiff's argument, the express in-person no-lien notice provided by the agents of the owner of the Vessel (Genco) to the supplier (Petrogal) *before* the delivery of the fuel oil is not akin to a no-lien stamp (which *post*-dates delivery). (Dkt. No. 30.)

D. Parties' Briefing on Claimant's Cross-Motion for Further Discovery

1. Claimant's Memorandum of Law

Generally, in support of its cross-motion, Claimant argues that discovery is necessary under Fed. R. Civ. P. 56(d) as shown in the required declaration. (Dkt. No. 27.) More specifically, Claimant argues that the facts its seeks (presumably through document requests, interrogatories and/or depositions) are as follows: (a) evidence (including but not limited to correspondence) regarding Plaintiff's alleged notice of the no-lien provision of the contract by Caltrek at the time of contracting; (b) evidence (including but not limited to correspondence) regarding Plaintiff's alleged notice of the no-lien provision and/or charterer's lack of authority to bind the Vessel to a maritime lien as communicated by Petrogal prior to the loading of bunkers on the Vessel; and (c) evidence regarding whether Plaintiff should be denied a **maritime** lien against the Vessel based on any other affirmative defenses, such as Plaintiff's extension of credit to Caltrek beyond industry standards despite indications of a lack of creditworthiness. (*Id.*) Moreover, Claimant argues, these facts are reasonably expected to create a genuine dispute of material fact because, if evidence of such notice exists, it would support a juror's rational finding that, *inter alia*, (i) Caltrek (the charterer of the Vessel) advised Plaintiff of the no-lien provision contained in the contract at the time of contracting, and/or (ii) the pre-bunkering objection made

by Claimant to Petrogal was communicated by Petrogal to Plaintiff. (*Id.*) Furthermore, Claimant argues that, while it has not yet made efforts to obtain these facts, it has been unable to make such efforts because discovery has not yet begun nor discovery conferences held (due to the parties' efforts to engage in settlement discussions). (*Id.*) Finally, Claimant argues, it has supported these arguments with a declaration. (Dkt. No. 25, at ¶¶ 18-31.)

2. Plaintiff's Opposition Memorandum of Law

*7 Generally, in opposition to Claimant's cross-motion, Plaintiff argues that Claimant fails to sufficiently identify the potential facts that may be learned in discovery which would defeat Plaintiff's motion for summary judgment. (Dkt. No. 31.) More specifically, Plaintiff argues that, given the facts that are undisputed thus far, Claimant's request for further facts is both futile and contrary to the relevant legal standard on the pending claims and defenses, which places the burden on Claimant to provide proof of notice (not Plaintiff's burden to find proof of non-notice). (*Id.*)

II. GOVERNING LEGAL STANDARDS

Because the parties have (in their motion papers) demonstrated an adequate understanding of legal standards governing the three pending motions and the pending claims and defenses, the Court will not recite those legal standards in this Decision and Order, which (again) is intended primarily for the review of the parties. Instead, the Court will reference those legal standards only where necessary below in Part III of this Decision and Order.

III. ANALYSIS

A. Plaintiff's Motion to Strike Statement and Enter Default Judgment or, In the Alternative, for Summary Judgment

After carefully considering the matter, the Court denies Plaintiff's threshold motion to strike Claimant's Verified Statement of Interest and nunc pro tunc extends the deadline for the filing of that Statement to January 31, 2017, because the Court finds that Claimant has shown excusable neglect for purposes of Fed. R. Civ. P. 6(b)(1)(B). The Court renders this finding for the reasons stated in Claimant's opposition memorandum of law. *See, supra,* Part I.A.2. of this Decision and Order. Among these reasons is the lack of prejudice to Plaintiff.

Moreover, the Court denies Plaintiff's related motion for default judgment for the reasons stated in Claimant's opposition memorandum of law. *See, supra,* Part I.A.2. of this Decision and Order. To those reasons, the Court would add only two points. First, not only did Plaintiff not comply with Local Rule of Practice 55.2's requirement that it attach to its motion the Clerk's certificate of entry of default, Plaintiff did not comply with Fed. R. Civ. P. 55(a)'s requirement that, before a plaintiff files a motion for default judgment, it must obtain the clerk's entry of default. Second, while Plaintiff argues that the intent of these rules is to give a defendant notice of the action, it appears to the Court that the intent is also to give a defendant notice of its dilatory behavior, notice of the plaintiff's intent to file a motion for default judgment, and an opportunity to cure its dilatory behavior before that filing. In any event, the Court has, in the past, rather strictly enforced Fed. R. Civ. P. 55(a)'s requirement, regardless of its perceived intent.

Finally, the Court denies Plaintiff's alternative motion for summary judgment. As an initial matter, the Court finds that more discovery is required for the reasons stated by Claimant. *See, supra,* Part I.A.2. of this Decision and Order. To those reasons, the Court adds that it disagrees with Plaintiff to the extent that Plaintiff argues that a non-movant on a motion for summary judgment is never entitled under Fed. R. Civ. P. 56(d) to additional discovery to meet its burden on the movant's claim or the non-movant's own affirmative defense(s), especially where the movant is relying on an affiant, whom the non-movant has never had the opportunity to examine in a deposition. The Court notes also that among the facts that it understands Claimant will attempt to obtain in discovery is whether, before delivery of the bunkers, Genco and/or Caltrek gave actual notice to Petrogal or its agents that Caltrek was not authorized to bind the Vessel with respect to the bunkers.

*8 For all these reasons, the Court denies Plaintiff's motion to strike Claimant's Statement of Interest and enter default judgment in Plaintiff's favor or, in the alternative, motion for summary judgment.

B. Claimant's Motion to Vacate

After carefully considering the matter, the Court is inclined to agree with the arguments presented in the

memoranda of law in support of Claimant's motion to vacate. *See, supra,* Parts I.C.1. and I.C.3. of this Decision and Order. However, the Court is mindful of (1) the question of fact that appears to have been created by the dueling affidavits of the parties (i.e., the affidavits of the Master and Chief Engineer of the Vessel on the one hand, and the affidavit of Petrogal's Marine Sales Manager on the other hand), and (2) Claimant's right to a prompt hearing on its motion under Supplemental Admiralty Rule E(4)(f) at which Plaintiff must show why the arrest of the Vessel should not be vacated. [13] As a result, the Court will reserve decision on Claimant's motion to vacate, pending the outcome of such a hearing.

The parties are advised that, at the hearing, the Court is particularly interested in the following facts: (1) who attended, and what happened, at the pre-bunkering meeting on board Petrogal's bunker-supply barge, M/T SACOR II, on April 4, 2015; (2) following Petrogal's rejection of Genco's notice of protest and objection to any lien, when, how, and to whom the Master and Chief Engineer of the Vessel continued to protest that no lien was created; (3) following the aforementioned rejection, when, how and why Petrogal proceeded with the transfer of fuel oil from the barge to the Vessel as ordered by the charterer, Caltrek; and (4) what personal knowledge Petrogal's Marine Sales Manager has (if any) regarding what happened at the pre-bunkering meeting.

C. Claimant's Cross-Motion for Further Discovery

After carefully considering the matter, the Court grants Claimant's cross-motion for the reasons stated in Claimant's memorandum of law and Part A of the Analysis Section of this Decision and Order. *See, supra,* Parts I.D.1. and III.A. of this Decision and Order. The Court notes that, with regard to Plaintiff's alternative request for expedited discovery (presented for the first time in their joint reply/opposition brief), the Court denies that request without prejudice, because the issues presented by that request (including whether expedited discovery would provide Claimant with an adequate opportunity to discover the facts identified) are, under the circumstances, best left to the sound discretion of United States Magistrate Judge Christian F. Hummel.

ACCORDINGLY, it is

ORDERED that Plaintiff's motion to strike Claimant's Statement of Interest and enter default judgment in favor of Plaintiff or, in the alternative, motion for summary judgment (Dkt. No. 15) is **DENIED**; and it is further

*9 **ORDERED** that decision on Claimant's motion to vacate the Court's Order for the Maritime Arrest of Claimant Vessel (Dkt. No. 19) is **RESERVED** pending a hearing; and it is further

ORDERED that counsel are directed to appear on **APRIL 13, 2017 at 9:30 am** in Syracuse, NY before Chief Judge Glenn T. Suddaby for the above-referenced hearing. Any witness and exhibits lists are due by April 10, 2017; and it is further

ORDERED that Claimant's cross-motion for an Order, pursuant to Fed. R. Civ. P. 56(d), denying Plaintiff's motion for summary judgment, or granting a continuance to enable discovery before decision (Dkt. No. 23) is **GRANTED**.

All Citations

Slip Copy, 2017 WL 1208590

Footnotes

1 (*Compare* Dkt. No. 15, Attach. 3, at ¶ 1 [Plf.'s Rule 7.1 Statement, asserting variation of above-stated facts and supporting that assertion with an accurate record citation to admissible record evidence] *with* Dkt. No. 26, at ¶ 1 [Claimant's Rule 7.1 Response, failing to deny that Plaintiff engaged in the business of providing bunkers of fuel to vessels, and incorrectly suggesting that a verified pleading is not admissible record evidence on a motion for summary judgment].) *See also Patterson v. County of Oneida*, 375 F.3d 206, 219 (2d Cir. 2004) ("[A] verified pleading ... has the effect of an affidavit and may be relied upon to oppose summary judgment."); *Fitzgerald v. Henderson*, 251 F.3d 345, 361 (2d Cir. 2001) (holding that plaintiff "was entitled to rely on [his verified amended complaint] in opposing summary judgment"), *cert. denied*, 536 U.S. 922 (2002); *Colon v. Coughlin*, 58 F.3d 865, 872 (2d Cir. 1995) ("A verified complaint is to be treated as an affidavit for summary judgment purposes.").

2 (*Compare* Dkt. No. 15, Attach. 3, at ¶ 2 [Plf.'s Rule 7.1 Statement, asserting variation of above-stated facts and supporting that assertion with an accurate record citation to admissible record evidence] *with* Dkt. No. 26, at ¶ 2 [Claimant's Rule 7.1 Response, effectively denying, with accurate record citations, all but the above-stated facts].)

3 The Court notes that, in its denial of the above-stated fact, Claimant incorrectly implies that a custodian (or other qualified witness) of contemporaneously made records that are kept in the regular course of business (and have not been shown to be untrustworthy) for purposes of Fed. R. Evid. 803(6), may not serve as a competent affiant regarding those records for purposes of a motion for summary judgment (which requires merely that the material contained in the exhibits "can[ ] be presented in a form that would be admissible in evidence [at trial]"). Fed. R. Civ. P. 56(c)(2). (*See also* Dkt. No. 15, Attach. 4, at ¶¶ 4-5 [Bereilh Decl., stating that he is the Managing Director of Bomin and he bases his assertions on "official company records"].) The Court notes also that, while Claimant may be correct that barging fees and agency fees are not considered "necessaries" under the Commercial Instruments and Maritime Lien Act, 46 U.S.C. § 31341 et seq., the above paragraph does not assert that the referenced fees constitute "necessaries," and a denial must address an *asserted* fact, not an *implied* fact. *See, e.g., Yetman v. Capital Dis. Trans. Auth.*, 12-CV-1670, 2015 WL 4508362, at *10 (N.D.N.Y. July 23, 2015) (Suddaby, J.) (citing authority for the point of law that the summary judgment procedure involves the disputation of asserted facts, not the disputation of implied facts); *cf. Baity v. Kralik*, 51 F. Supp. 3d 414, 418 (S.D.N.Y. 2014) (noting that plaintiff's responses failed to comply with the court's local rules where "Plaintiff's purported denials ... improperly interject arguments and/or immaterial facts in response to facts asserted by Defendants, often speaking past Defendants' asserted facts without specifically controverting those same facts"); *Goldstick v. The Hartford, Inc.*, 00-CV-8577, 2002 WL 1906029, at *1 (S.D.N.Y. Aug. 19, 2002) (striking plaintiff's Rule 56.1 Statement, in part, because plaintiff added "argumentative and often lengthy narrative in almost every case the object of which is to 'spin' the impact of the admissions plaintiff has been compelled to make").

5 (Dkt. No. 15, Attach. 3, at ¶ 6 [Plf.'s Rule 7.1 Statement, asserting variation of above-stated facts and supporting that assertion with an accurate record citation to admissible record evidence].)

6 (*Compare* Dkt. No. 15, Attach. 3, at ¶ 9 [Plf.'s Rule 7.1 Statement, asserting variation of above-stated facts and supporting that assertion with an accurate record citation to admissible record evidence] *with* Dkt. No. 26, at ¶ 9 [Claimant's Rule 7.1 Response, effectively denying all but the above-stated facts].)

7 (*Compare* Dkt. No. 15, Attach. 3, at ¶ 10 [Plf.'s Rule 7.1 Statement, asserting variation of above-stated facts and supporting that assertion with an accurate record citation to admissible record evidence] *with* Dkt. No. 26, at ¶ 10 [Claimant's Rule 7.1 Response, effectively denying all but the above-stated facts].)

8 (*Compare* Dkt. No. 15, Attach. 3, at ¶ 11 [Plf.'s Rule 7.1 Statement, asserting variation of above-stated facts and supporting that assertion with an accurate record citation to admissible record evidence] *with* Dkt. No. 26, at ¶ 11 [Claimant's Rule 7.1 Response, effectively denying all but the above-stated facts]; *see also* Dkt. No. 1, Attach. 1, at ¶ 3 [Plf.'s Verification, stating basis for Plaintiff's belief of the truth of the Complaint's allegations].)

9 (*Compare* Dkt. No. 15, Attach. 3, at ¶ 12 [Plf.'s Rule 7.1 Statement, asserting variation of above-stated facts and supporting that assertion with an accurate record citation to admissible record evidence] *with* Dkt. No. 26, at ¶ 12 [Claimant's Rule 7.1 Response, effectively denying all but the above-stated facts].)

10 (*Compare* Dkt. No. 15, Attach. 3, at ¶ 13 [Plf.'s Rule 7.1 Statement, asserting variation of above-stated facts and supporting that assertion with an accurate record citation to admissible record evidence] *with* Dkt. No. 26, at ¶ 13 [Claimant's Rule 7.1 Response, effectively denying all but the above-stated facts].)

11 (*Compare* Dkt. No. 15, Attach. 3, at ¶ 14 [Plf.'s Rule 7.1 Statement, asserting variation of above-stated facts and supporting that assertion with an accurate record citation to admissible record evidence] *with* Dkt. No. 26, at ¶ 14 [Claimant's Rule 7.1 Response, effectively denying all but the above-stated facts].) The Court notes that, while Claimant may be correct that the act of addressing an invoice to an entity does not (in and of itself) establish that the entity was a party to the underlying contract, the above paragraph does not assert that Genco was a party to the contract, and a denial must address an asserted fact, not an implied fact. *See, e.g., Yetman*, 2015 WL 4508362, at *10.

12 (*Compare* Dkt. No. 15, Attach. 3, at ¶ 16 [Plf.'s Rule 7.1 Statement, asserting variation of above-stated facts and supporting that assertion with an accurate record citation to admissible record evidence] *with* Dkt. No. 26, at ¶ 16 [Claimant's Rule 7.1 Response, effectively denying all but the above-stated facts].) The Court notes that, while Claimant objects that the above paragraph incorrectly implies that the principal balance is owed by Genco instead of Caltrek, that Bomin is entitled to a lien against the Vessel, and that the lien covers barging and agency fees, the above paragraph does not assert those facts, and a denial must address asserted facts, not implied facts. *See, e.g., Yetman*, 2015 WL 4508362, at *10.

13 The Court notes that, although Local **Admiralty** Rule e(8) requires that such hearing occur seven days within the filing of a motion to vacate unless the Court orders otherwise, the Court finds that grounds exist to hold that hearing outside the seven-day period under the circumstances, because of (1) the filing of the two other motions addressed in this Decision and Order, and (2) congestion on the Court's docket.

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2017 WL 1157125
Only the Westlaw citation is currently available.
United States District Court,
S.D. New York.

CAL DIVE OFFSHORE CONTRACTORS, INC., et al., Plaintiffs,
v.
M/V SAMPSON, et al., Defendants.

15–CV–2788 (JPO)
|
Signed 03/27/2017

Synopsis

Background: Service provider brought action against vessel, her engines, tackle, appurtenances, and equipment, in rem, and against investment company, vessel's title owner, and entity that entered into charter party with owner, in personam, to enforce maritime lien. Defendants moved to dismiss.

Holdings: The District Court, J. Paul Oetken, J., held that:

[1] investment company that was not owner of vessel and did not make appearance to claim vessel could not be responsible for any potential in rem liability of vessel;

[2] service provider stated breach of oral contract between it and investment company for provision of above-deck personnel;

[3] factual issue existed as to whether qualified representative of service provider had actual knowledge of no-lien provision despite receiving entire charter party;

[4] later oral contract for provision of personnel to vessel was not enforceable under either **maritime** law or New York law; and

[5] oral agreement between vessel's title owner and service provider to pay service provider if entity that chartered vessel failed to pay for pipe-laying personnel was not **maritime** in nature, and thus state law applied which made such promise unenforceable under New York's Statute of Frauds.

Ordered accordingly.

West Headnotes (24)

[1] **Admiralty**

A maritime lien arises to secure creditors who provide necessaries, i.e., supplies, repairs and equipment, ordered on the credit of the ship and which are generally beneficial to the ship.

Cases that cite this headnote

[2] **Admiralty**

Any entity that supplies a vessel with "necessaries," on the order of the owner or a person authorized by the owner has a maritime lien on the vessel and is entitled to bring a civil action in rem to enforce that lien. 46 U.S.C.A. § 31342.

Cases that cite this headnote

[3] **Admiralty**

When a maritime lien attaches, a plaintiff may pursue an in rem action against the vessel involved and may bring an in personam action against any party that is directly liable in contract, tort, or some other substantive law; however, if there is no separate basis of substantive liability, the in personam liability does not attach merely because a maritime lien has come into existence. 46 U.S.C.A. § 31342.

Cases that cite this headnote

[4] **Admiralty**

Investment company that was not owner of vessel and did not make appearance to claim vessel could not be responsible for any potential in rem liability of vessel, even assuming existence of valid **maritime** lien.

Cases that cite this headnote

[5] **Admiralty**

A **maritime** lien gives the creditor a special property in the ship, which subsists from the moment the debt arises, and it gives him a right to have the ship sold that his debt may be paid out of the proceeds of the sale; it is a right in the vessel, a jus in re.

Cases that cite this headnote

[6] **Admiralty**

Service provider stated breach of oral contract between it and investment company for provision of above-deck personnel, on allegations that investment company requested that service provider supply above-deck crew, service provider agreed that it could be paid for its pipe laying services from investor's trust, and provider believed that it was relying on guarantee of investor that service provider would be paid if entity that chartered vessel failed to pay.

Cases that cite this headnote

[7] **Admiralty**

In order to recover on a claim for breach of oral contract, a plaintiff must prove (1) the terms of a **maritime** contract; (2) that the contract was breached; and (3) the reasonable value of the purported damages.

Cases that cite this headnote

[8] **Admiralty**

In the case of a **maritime** lien, the vessel itself is viewed as the obligor, regardless of whether the vessel's owner also is obligated.

Cases that cite this headnote

[9] **Admiralty**

A **maritime** lien gives the creditor the right to appropriate the vessel, have it sold, and be repaid the debt from the proceeds of the sale.

Cases that cite this headnote

[10] **Admiralty**

Under **maritime** law, charterers and their agents are presumed to have authority to bind the vessel by the ordering of necessaries.

Cases that cite this headnote

[11] **Admiralty**

When necessaries are ordered by one without authority to bind the vessel, and when the vessel owner can show that the supplier of necessaries had actual knowledge of the existence of any lack of authority relied upon as a defense, a **maritime** lien does not arise.

Cases that cite this headnote

[12] **Admiralty**

Because actual knowledge of a prohibition of lien clause is one way of obtaining actual knowledge of one's lack of authority to bind a vessel, a vessel owner may defeat a **maritime** lien by establishing that the supplier of necessaries either had actual knowledge that the person ordering the supplies lacked the authority to bind the vessel or had knowledge of a prohibition of lien clause in the charter; actual knowledge defeats a **maritime** lien because the supplier is then in a position to make an informed business decision, and may refuse to supply the vessel, make other arrangements for payment, or assume the risk.

Cases that cite this headnote

[13] **Admiralty**

The party seeking to bar a supplier's **maritime** lien has the burden of proving that the supplier actually knew of a no lien clause in the charter party or other contract.

Cases that cite this headnote

[14] **Admiralty**

Genuine issue of material fact existed as to whether qualified representative of service provider had actual knowledge of no-lien provision despite receiving entire charter party, precluding summary judgment on claim for in rem judgment against vessel. 46 U.S.C.A. § 31342; Fed. R. Civ. P. 56.

Cases that cite this headnote

[15] **Admiralty**

To demonstrate actual knowledge of the charterer's lack of authority to bind the vessel, there must be some affirmative communication by the vessel or her owner to one of the supplier's employees who has the ability to effect the negotiations and the contract prior to the time the contract is entered into.

Cases that cite this headnote

[16] **Admiralty**

Later oral contract for provision of personnel to vessel was not enforceable under either **maritime** law or New York law, where "Entire Agreement" clause in ship management agreement between service provider and title owner of vessel unambiguously prohibited modification of agreement by means of oral agreements.

Cases that cite this headnote

[17] **Federal Courts**

The law of the case doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.

Cases that cite this headnote

[18] **Federal Courts**

The law of the case doctrine admittedly is discretionary and does not limit a court's power to reconsider its own decisions prior to final judgment.

Cases that cite this headnote

[19] **Federal Courts**

Cogent or compelling reasons under the law of the case doctrine to not follow an earlier decision include an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.

Cases that cite this headnote

[20] **Admiralty**

Under federal **maritime** law, a court may not look beyond the written language of the document to determine the intent of the parties unless the disputed contract provision is ambiguous.

Cases that cite this headnote

[21] **Contracts**

Under New York law, a party can overcome a no-oral-modification clause by showing either partial performance or equitable estoppel.

Cases that cite this headnote

[22] **Admiralty**

Oral agreement between vessel's title owner and service provider to pay service provider if entity that chartered vessel failed to pay for pipe-laying personnel was not **maritime** in nature, and thus state law applied which made such promise unenforceable under New York's Statute of Frauds, which required guarantee agreements to be in writing; although underlying transaction was itself **maritime** in nature, direct subject-matter of suit was covenant to pay damages, which neither involved **maritime** service nor **maritime** transactions. N.Y. General Obligations Law § 5-701.

Cases that cite this headnote

[23] **Admiralty**

New York's Statute of Frauds does not apply to **maritime** contracts, because oral contracts are valid under **maritime** law. N.Y. General Obligations Law § 5-701.

Cases that cite this headnote

[24] **Admiralty**

To determine if a particular contract is a **maritime** one, a court looks to the nature and character of the contract, and the true criterion is whether it has reference to **maritime** service or **maritime** transactions.

Cases that cite this headnote

Attorneys and Law Firms

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OPINION AND ORDER

J. PAUL OETKEN, United States District Judge

*1 Plaintiffs Cal Dive Offshore Contractors, Inc., Cal Dive International, Inc., and Gulf Offshore Construction, Inc. (collectively "Cal Dive"), filed this action against Defendants M/V SAMPSON, her engines, tackle, appurtenances, equipment, etc. (the "SAMPSON"), *in rem*, and CVI Global Lux Oil and Gas 4 S.a.r.l. ("CVI") and CarVal Investors, LLC ("CarVal"), *in personam*, to enforce a **maritime** lien. (Dkt. No. 1.) This case was transferred to this Court from the Northern District of Florida (Dkt. No. 44), along with a motion to dismiss filed by CarVal (Dkt. No. 30). Cal Dive now seeks summary judgment that it is entitled to an *in rem* judgment against the SAMPSON. (Dkt. No. 69.) CVI seeks summary judgment that all of Cal Dive's claims—both *in rem* and *in personam*—fail as a matter of law. (Dkt. No. 75.) For the reasons that follow, CarVal's motion to dismiss is denied; Cal Dive's motion for summary judgment is denied; and CVI's motion for summary judgment is granted in part and denied in part.

I. Background

The following facts are taken from the parties' 56.1 statements and briefs and are undisputed unless otherwise noted.

At all relevant times, CVI was the title owner of the SAMPSON, a Panamanian flagged motor vessel capable of laying pipe for the oil industry. (Dkt. No. 78 ¶ 1; Dkt. No. 81 ¶ 1.) CVI chartered the SAMPSON to Oceanografía, S.A. de C.V. ("Oceanografía") pursuant to a charter party dated November 16, 2012 (and amended in December 19, 2012). (Dkt. No. 78 ¶ 2; Dkt. No. 81 ¶ 5.) Relevant to the present action, the charter party contained a no-lien clause prohibiting Oceanografía from incurring a lien against the SAMPSON. (Dkt. No. 78 ¶ 3; Dkt. No. 81 ¶ 8.) The parties dispute whether, at the relevant time, Cal Dive had actual knowledge of the no-lien clause contained in the charter party between CVI and Oceanografía. (Dkt. No. 78 ¶ 6; Dkt. No. 81 ¶ 11.)

Pursuant to the charter party, CVI would provide the below-deck crew to the SAMPSON and Oceanografía would provide the above-deck crew. (Dkt. No. 69 at 3;

Dkt. No. 44 at 2.) CVI contracted with Cal Dive to provide below-deck support pursuant to a Ship Management Agreement (Dkt. No. 1–1), executed on January 15, 2013. (Dkt. No. 81 ¶ 12.) Cal Dive also provided an above-deck pipe-laying crew to supervise and assist in the SAMPSON's pipe-laying activities (Dkt. No. 78 ¶ 4), though the parties disagree as to whether this crew was ordered by the charterer, Oceanografia, or by CarVal on behalf of the ship owner, CVI (Dkt. No. 69 at 3–4). [1] The current dispute relates to the failure to complete payment to Cal Dive for its pipe-laying services, leaving a balance due to Cal Dive of $1,623,459.92. (Dkt. No. 78 ¶ 7; Dkt. No. 81 ¶ 35.)

Both CarVal's motion to dismiss and the parties' cross-motions for summary judgment are currently pending before the Court.

II. CarVal's Motion to Dismiss

*2 Cal Dive seeks to enforce a **maritime** lien *in rem* against the SAMPSON under **Rule C** of the Supplemental Rules for Certain **Admiralty** and **Maritime** Claims, and *in personam* against CarVal under Rule B. (Dkt. No. 1 at 2.) CarVal has moved to dismiss the complaint against it for failure to state a claim. (Dkt. No. 30.)

A. Legal Standard

To survive a Rule 12(b)(6) motion to dismiss, a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). In considering a motion to dismiss, courts must accept as true all "factual allegations contained in the complaint," *Twombly*, 550 U.S. at 572, 127 S.Ct. 1955, and must draw "all inferences in the light most favorable to the non-moving party," *In re NYSE Specialists Sec. Litig.*, 503 F.3d 89, 95 (2d Cir. 2007) (Sotomayor, J.).

B. Discussion

The Complaint alleges that Cal Dive provided personnel to the SAMPSON to assist with "pipe laying and related activities." (Dkt. No. 1 at 4.) It further alleges that the total amount to be paid for Cal Dive's services was $3,574,305.92 (*id.* at 5), and that Cal Dive is still owed $1,623,459.92 (*id.* at 6). The Complaint claims that CarVal is liable both (1) through an *in rem* action against the SAMPSON [2]; and (2) directly, through an *in personam* action.

[1] [2] "[A maritime] lien arises to secure creditors who provide 'necessaries'—'supplies, repairs and equipment ... ordered on the credit of the ship and which are generally beneficial to the ship.' " *Marine Oil Trading Ltd. v. Motor Tanker PAROS*, 287 F.Supp.2d 638, 640–41 (E.D. Va. 2003) (quoting William Tetley, *Maritime Liens and Claims* 551 (2d ed. 1998)); *see also Clubb Oil Tools, Inc. v. M/ V George Vergottis*, 460 F.Supp. 835, 840 (S.D. Tex. 1978) (broadly interpreting "necessaries" to include labor provided for the ship). "[U]nder 46 U.S.C. § 31342, any entity that supplies a vessel with 'necessaries,' ... 'on the order of the owner or a person authorized by the owner' has a maritime lien on the vessel and is entitled to bring a civil action *in rem* to enforce that lien." *UPT Pool Ltd. v. Dynamic Oil Trading (Singapore) PTE. Ltd.*, No. 14 Civ. 9262, 2015 WL 4005527, at *4 (S.D.N.Y. July 1, 2015), *aff'd sub nom. Hapag–Lloyd Aktiengesellschaft v. U.S. Oil Trading LLC*, 814 F.3d 146 (2d Cir. 2016).

Accepting as true all "factual allegations contained in the complaint," *Twombly*, 550 U.S. at 572, 127 S.Ct. 1955, the Court concludes that the Complaint sufficiently alleges the existence of a proper maritime lien against the SAMPSON by alleging that Plaintiffs provided "necessaries" for the benefit of the ship (Dkt. No. 1 at 4), for which they were not reimbursed. [3]

*3 [3] And "[w]hen a maritime lien attaches, the plaintiff may pursue an in rem action against the vessel involved." *Dowell Div. of the Dow Chem. Co. v. Franconia Sea Transp., Ltd.*, 504 F.Supp. 579, 581 (S.D.N.Y. 1980), *aff'd*, 659 F.2d 1058 (2d Cir. 1981). Besides an *in rem* action against the vessel, "[t]he plaintiff also has the option of bringing an in personam action against any party that is directly liable in contract, tort, or some other substantive law." *Id.* However, if there is no "separate basis of substantive liability," the *in personam* liability does not attach "merely because a **maritime** lien has come into existence." *Id.*; *see also* Notes of Advisory Committee on **Rules**, **Rule C** Supplemental **Rules** for **Admiralty** and **Maritime** Claims of the Federal Rule of Civil Procedure

(noting that "no action *in personam* may be brought when the substantive law imposes no personal liability").

CarVal argues that the Complaint fails to state a plausible claim for relief against it under either an *in rem* or *in personam* theory of liability. The Court addresses each in turn.

[4] [5] First, CarVal argues that it "is not the owner of the SAMPSON and has not made an appearance to claim the SAMPSON, thus there is no possibility for Carval to be responsible for any potential *in rem* liability of the vessel." (Dkt. No. 30–1 at 5.) The Court agrees. A maritime lien "gives the creditor a special property in the ship, which subsists from the moment the debt arises, and it gives him a right to have the ship sold that his debt may be paid out of the proceeds of the sale. It is a right in the vessel, a jus in re." *Itel Containers Int'l Corp. v. Atlanttrafik Exp. Serv. Ltd.*, 982 F.2d 765, 768 (2d Cir. 1992) (quoting *The Poznan*, 9 F.2d 838, 842 (2d Cir. 1925) (internal quotation mark omitted)). As such, even assuming the existence of a valid maritime lien, the *in rem* action that arises from that lien is against the SAMPSON and does not state a claim against CarVal. *See* 2 C.J.S. Admiralty § 90 ("An action in rem in admiralty is a proceeding against a specific thing or res rather than against an individual, and in this form of proceeding, the owner of the property constituting the subject of the proceeding is not recognized until appearing, entering a claim, and defending."); *Dowell Div.*, 504 F.Supp. at 581 (S.D.N.Y. 1980) ("In the absence of a separate basis of substantive liability ... the shipowner cannot be held personally liable to the plaintiff merely because a maritime lien has come into existence.").

[6] Second, with respect to the *in personam* claims, CarVal argues that the Ship Management Agreement discussed in the Complaint "is a contract between CVI and [Cal Dive]," and does not implicate or bind CarVal. (Dkt. No. 30–1 at 5–6.) As such, "[t]he face of the contract and the allegations of the complaint establish that [CarVal] is not a party to the contract," and, therefore, that CarVal "can have no liability under the contract." (*Id.* at 6.)

For its part, Cal Dive argues that CarVal misses the point, as its "claims are not based upon the Ship Management Agreement." (Dkt. No. 34 at 3.) Instead, its claims against CarVal are "based upon the supply and related expenses of 'the pipe laying crew.' " (*Id.* at 4.) The Complaint alleges that "defendants [including CarVal] requested that [Cal Dive] supply the above deck crew." (Dkt. No. 1 at 4.) Further, the Complaint alleges that, for its pipe laying services, Cal Dive "agreed that it could be paid from defendants' trust" (*id.* at 5), and that Cal Dive believed that it was relying on "the guarantee of [CarVal] that [Cal Dive] would be paid if Oceanografia failed to pay" (*id.*).

[7] "[O]ral contracts are generally regarded as valid by maritime law." *Kossick v. United Fruit Co.*, 365 U.S. 731, 734, 81 S.Ct. 886, 6 L.Ed.2d 56 (1961). In order to recover on a claim for breach of oral contract, Cal Dive "must prove (1) the terms of a maritime contract; (2) that the contract was breached; and (3) the reasonable value of the purported damages." *Sweet Pea Marine, Ltd. v. APJ Marine, Inc.*, 411 F.3d 1242, 1249 (11th Cir. 2005). The facts as alleged in the Complaint are sufficient to establish an oral contract between Cal Dive and CarVal for the provision of above-deck personnel, which was allegedly breached, such that Cal Dive is still owed $1,623,459.92. *See also Dowell Div.*, 504 F.Supp. at 581 (S.D.N.Y. 1980) ("plaintiff ... may bring[ ] an *in personam* action against any party that is directly liable in contract"). Therefore, CarVal's motion to dismiss the claims against it is denied.

III. Summary Judgment

*4 Cal Dive seeks summary judgment that it is entitled to an *in rem* judgment against the SAMPSON. (Dkt. No. 69.) CVI seeks summary judgment that all of Cal Dive's claims—both *in rem* and *in personam*—fail as a matter of law. (Dkt. No. 75.)

A. Legal Standard

Summary judgment is appropriate when "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 fact is material if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A dispute is genuine if, considering the record as a whole, a rational jury could find in favor of the non-moving party. *Ricci v. DeStefano*, 557 U.S. 557, 586, 129 S.Ct. 2658, 174 L.Ed.2d 490 (2009) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)).

On summary judgment, the party bearing the burden of proof at trial must provide evidence on each element of its claim or defense. *Celotex Corp. v. Catrett*, 477 U.S.

317, 322–23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). "If the party with the burden of proof makes the requisite initial showing, the burden shifts to the opposing party to identify specific facts demonstrating a genuine issue for trial, *i.e.*, that reasonable jurors could differ about the evidence." *Clopay Plastic Prods. Co. v. Excelsior Packaging Grp., Inc.*, No. 12 Civ. 5262, 2014 WL 4652548, at *3 (S.D.N.Y. Sept. 18, 2014) (citing Fed. R. Civ. P. 56(c); *Liberty Lobby*, 477 U.S. at 250–51, 106 S.Ct. 2505). The court views all evidence "in the light most favorable to the nonmoving party" and summary judgment may be granted only if "no reasonable trier of fact could find in favor of the nonmoving party." *Allen v. Coughlin*, 64 F.3d 77, 79 (2d Cir. 1995) (internal quotation marks omitted).

B. Discussion

The Court first addresses whether either party is entitled to summary judgment on the question whether Cal Dive has a valid maritime lien against the SAMPSON that it may enforce through an action *in rem.* The Court then turns to whether summary judgment is warranted on the question whether defendants CVI and CarVal are directly liable *in personam.*

1. *In Rem* Action Against the SAMPSON

[8] [9] "In the case of a **maritime** lien, the vessel itself is viewed as the obligor, regardless of whether the vessel's owner is also obligated." *Triton Marine Fuels Ltd., S.A. v. M/V PACIFIC CHUKOTKA*, 575 F.3d 409, 414 (4th Cir. 2009); *see also* Black's Law Dictionary 943 (10th ed. 2014) ("[The **maritime** lien] arises by operation of law and exists as a claim upon the property, secret and invisible." (quoting Griffith Price, *The Law of Maritime Liens* 1 (1940))). "A **maritime** lien may be defined as: (1) a privileged claim, (2) upon **maritime** property, (3) for service done to it or injury caused by it, (4) accruing from the moment when the claim attaches, (5) traveling with the property unconditionally, (6) enforced by means of an action in rem." *Id.* (quoting Price at 1). "The lien gives the creditor the right to appropriate the vessel, have it sold, and be repaid the debt from the proceeds of the sale." *Trans–Tec Asia v. M/V HARMONY CONTAINER*, 518 F.3d 1120, 1128 (9th Cir. 2008).

[10] Only certain individuals have the authority to bind the vessel so as to give rise to a **maritime** lien. "It is a fundamental tenet of maritime law that '[c]harterers and their agents are presumed to have authority to bind the vessel by the ordering of necessaries.' " *Triton Marine Fuels Ltd.*, 575 F.3d at 414 (alteration in original) (quoting *Trans–Tec Asia*, 518 F.3d at 1127–28); *see also* 46 U.S.C. § 31341(a)(4)(B) ("[A]n officer or agent appointed by—a charterer" is "presumed to have authority to procure necessaries for a vessel."). " 'The § 31341 presumptions are of immense value to the supplier' because the supplier need not 'know anything about the authority of the manager of the ship beyond the fact that such individual apparently exercises that degree of control over the vessel that could be expected of any [entrusted] agent of the owner.' " *World Fuel Servs. Trading, DMCC v. M/V HEBEI SHIJIAZHUANG*, 12 F.Supp.3d 792 (E.D. Va. 2014) (alteration in original) (quoting 2 Benedict on Admiralty § 40, at 3–41 (7th ed. 1998)), *aff'd sub nom. World Fuel Servs. Trading, DMCC v. Hebei Prince Shipping Co.*, 783 F.3d 507 (4th Cir. 2015).

*5 [11] [12] [13] However, "when necessaries are ordered by one without authority to bind the vessel," and when the vessel owner can "show that the supplier of necessaries had actual knowledge of the existence of any lack of authority relied upon as a defense," no lien arises. *Belcher Oil Co. v. M/V GARDENIA*, 766 F.2d 1508, 1512 (11th Cir. 1985) (internal quotation marks omitted) (quoting *Jan C. Uiterwyk Co., Inc. v. M/V MARE ARABICO*, 459 F.Supp. 1325, 1331 (D. Md. 1978)); *see also Am. Oil Trading, Inc. v. M/V SAVA*, 47 F.Supp.2d 348, 352 (E.D.N.Y. 1999) ("[L]ack of authority to order necessaries defeats a maritime lien."). Because "[a]ctual knowledge of a prohibition of lien clause is ... one way of obtaining actual knowledge of one's lack of authority to bind a vessel," a vessel owner may defeat a maritime lien by establishing "that the supplier of necessaries either had actual knowledge that the person ordering the supplies lacked the authority to bind the vessel *or had knowledge of a prohibition of lien clause in the charter.*" *Belcher Oil Co.*, 766 F.2d at 1512–13 (emphasis added). Actual knowledge "defeats a maritime lien because '[t]he supplier is then in a position to make an informed business decision, and may refuse to supply the vessel, make other arrangements for payment, or assume the risk.' " *Am. Oil Trading, Inc.*, 47 F.Supp.2d at 352 (quoting *Gulf Oil Trading Co. v. M/V CARIBE MAR*, 757 F.2d 743, 749 (5th Cir. 1985)). "The party seeking to bar a supplier's **maritime** lien has the burden of proving that the supplier actually knew of a no lien clause in the charter party or other contract." *Id.*

[14] Here, the parties do not dispute that the above-deck crew provided by Cal Dive qualifies as necessaries, that Oceanografía was a charterer under the relevant charter party, or that the crew were delivered to the vessel as agreed. (*See* Dkt. No. 78 ¶¶ 2, 4; Dkt. No. 81 ¶ 5.) Rather, whether Cal Dive is entitled to a maritime lien in this case depends solely on whether or not Cal Dive had actual knowledge of Oceanografía's inability to bind the vessel.

[15] In this case, therefore, CVI must demonstrate that Cal Dive actually knew of the no-lien clause in the charter party between CVI and Oceanografía. "To demonstrate ... actual knowledge of the charterer's lack of authority to bind the vessel, there must be some affirmative communication by the Vessel or her Owner to one of the supplier's employees who has the ability to effect the negotiations and the contract prior to the time the contract is entered into." *O.W. Bunker Malta Ltd. v. M/V TROGIR*, No. 12 Civ. 5657, 2013 WL 326993, at *3 (C.D. Cal. Jan. 29, 2013) (citing *Gulf Oil Trading Co.*, 757 F.2d 743).

CVI argues that Cal Dive had actual notice of the no-lien provision contained in the charter party between CVI and Oceanografía because, among other reasons discussed below, Cal Dive, as ship manager, was in possession of the charter party. (*See* Dkt. No. 77 at 1.) Here, the Court concludes that a genuine dispute remains as to whether, despite receiving the entire charter party, a qualified representative of Cal Dive had actual knowledge of the no-lien provision in particular.

CVI argues that, prior to providing the pipe-laying personnel to the SAMPSON, Cal Dive was provided the charter party, which in turn "provides notice to the Cal Dive representatives to review the charter." (Dkt. No. 77 at 3.) Cal Dive does not claim that it did not receive the charter party, but rather asserts "that it never received affirmative communication of the existence of a no lien clause." (Dkt. No. 83 at 5.)

It remains unclear as to whether actual knowledge of a no-lien provision is conveyed, as a matter of law, upon the conveyance of the entire charter party without any explicit or affirmative reference to the no-lien provision. As one court found, evidence that a charterer "notified [the supplier] of the terms of their charter party" could constitute actual knowledge of the no-lien provision contained therein. *World Fuel Servs.*, 783 F.3d at 522; *see also* Charles S. Haight, Jr., *Current Developments in the American Law of Maritime Liens and Mortgages*, 9 MAR. LAW. 1, 10 (1984) (discussing the requirement for actual knowledge of a no-lien provision and observing that "[o]ne court, enforcing a lien for bunkers ordered by a charterer, observed that the supplier 'had no knowledge of the charter agreement' " generally, such that there was no actual knowledge of the no-lien provision in particular (quoting *Memphis Boat Refueling Service v. Ole Man River Towing, Inc.*, 550 F.Supp. 939, 941 (E.D. Mo. 1982))).

*6 However, other courts that have addressed whether a supplier has actual knowledge of a no-lien provision appear to have found that some specific, affirmative communication of the no-lien provision itself is necessary in order to demonstrate that the supplier had actual knowledge of such clause. *See, e.g.*, *O.W. Bunker Malta Ltd.*, 2013 WL 326993, at *3 (noting that "[a]nti-lien ... provisions in the charterer ... contract are generally insufficient to show that a supplier had actual knowledge," which must be shown by "some affirmative communication by the Vessel or her Owner to one of the supplier's employees"); *Am. Oil Trading, Inc.*, 47 F.Supp.2d at 352 ("The party seeking to bar a supplier's maritime lien has the burden of proving that the supplier *actually knew of a no lien clause* in the charter party or other contract." (emphasis added)). "It is not enough ... to have knowledge that the [vessel] was under charter, there must be actual knowledge of the no-lien provision in the charter party." *Id.* (citing *Lake U. Drydock Co. v. M/V POLAR VIKING*, 446 F.Supp. 1286, 1291 (W.D. Wash. 1978)); *see also Ramsay Scarlett & Co. v. S. S. Koh Eun*, 462 F.Supp. 277, 285 (E.D. Va. 1978) ("Knowledge of a charter alone does not bar a lien."). As one commentator has put it, "[a]ctual knowledge that the vessel is under charter will not bar a lien unless the prohibition of lien clause itself is brought to the supplier's attention." Schoenbaum, 1 Admiralty & Mar. Law § 9–3 (5th ed.).

In *Gulf Oil Trading Co. v. M/V CARIBE MAR*, 757 F.2d 743 (5th Cir. 1985), for example, a letter was delivered to the supplier after a first delivery, but before a second, specifically advising it of the no-lien clause. The Court held that, "[s]ince Gulf had received the letter informing it of the no lien provision before the second delivery of fuel to the vessel, Gulf was not entitled to assert a lien with respect to that delivery." *Am. Oil Trading, Inc.*, 47 F.Supp.2d at 352 (discussing *M/V CARIBE MAR*,

757 F.2d 743); *see also Gulf Oil Trading Co. v. M/V FREEDOM*, No. Civ. 84-425, 1985 WL 4787, at *2 (D. Or. July 25, 1985) (finding no actual knowledge where "[o]nly one prior receipt among others contained a no-lien stamp" and "[t]he primary purpose of the receipt is for use in the billing process" and "not to transmit information dealing with credit"). Similarly, in *Stevens Shipping & Terminal Co. v. M/V JAPAN RAINBOW II*, No. 01 Civ. 669, 2002 WL 1339145 (E.D. La. June 17, 2002), *aff'd*, 334 F.3d 439 (5th Cir. 2003), the district court found actual knowledge of the no-lien provision after the managing agent for the vessel "faxed a two-page Notice of the prohibition of liens clause contained in the subject charter party" to the supplier. *Id.* at *2.

In the absence of specific, affirmative communication of the no-lien provision, the Court is unable to determine at the summary judgment stage whether the supply by CVI of the entire charter party was sufficient to give actual notice of the particular no-lien provision to someone who has the ability to affect the negotiations.[4] This is further compounded by the fact that Cal Dive's primary witness, and a recipient of the charter party, Bill Breen, has refused to appear for depositions and has evaded service of a subpoena. (Dkt. No. 77 at 14.)

*7 There remains, therefore, a genuine dispute as to whether CVI has satisfied its "burden of proving that the supplier actually knew of a no lien clause in the charter party." *Am. Oil Trading, Inc.*, 47 F.Supp.2d at 352 (emphasis added). As such, Cal Dive's motion for summary judgment that it is entitled to an *in rem* judgment against the SAMPSON is denied. CVI's motion for summary judgment that the *in rem* claims fail is likewise denied.

2. *In Personam* Claims Against CVI

[16] CVI also moves for summary judgment that the *in personam* claims against it fail. (Dkt. No. 75 at 9–19.) In particular, it argues that (1) there is no written contract between parties for the pipe-laying personnel at issue, and the only written agreement between CVI and Cal Dive precludes oral contracts; (2) there is no evidence of an oral agreement between CVI and Cal Dive; and (3) CVI did not guarantee Oceanografia's payment and, if it did, such an agreement is invalid under New York's Statute of Frauds. (*Id.*) Cal Dive disputes each of these contentions, arguing that summary judgment is therefore inappropriate. (Dkt. No. 79 at 2–10.)

First, CVI points out that there is no written contract between CVI and Cal Dive that governs the supply of the above-deck, pipe-laying crew to the SAMPSON. (Dkt. No. 75 at 10.) Cal Dive neither challenges this contention nor provides evidence of an executed written contract between CVI and Cal Dive to supply above-deck, pipe-laying personnel.

Other written agreements between the parties allocate their respective responsibilities. The charter party, entered into on November 16, 2012, "divide [s] the vessel-related responsibilities between CVI and Oceanografia, with CVI solely responsible for marine operations and Oceanografia solely responsible for pipe-laying operations." (Dkt. No. 75 at 10.) That agreement explicitly provides that "the management and operation of all Pipelaying Equipment shall be in the exclusive control and command of the Charterer," Oceanografia. (Dkt. No. 75–4 ¶ 6.1.) It further provides that Oceanografia "shall provide any other crew or personnel required in addition to the Owner's Crew," where the Owner's Crew is explicitly defined in Schedule 1 of the charter party and does not include pipe-laying personnel. (*Id.* ¶ 8.1.) Months before that charter party was executed, on August 24, 2012, Oceanografia entered into a Bid Cooperation Agreement with Cal Dive to secure the pipe-laying contract. (Dkt. No. 75–3.) And not long after the charter party was executed, on January 15, 2013, CVI contracted with Cal Dive for vessel manning and management of the marine operations, which does not include pipe-laying personnel. (Dkt. No. 1–1 (the Ship Management Agreement).)

The Ship Management Agreement is central to the dispute at issue because it governs the relationship between CVI and Cal Dive. It contains two clauses that are relevant here: the forum-selection clause and the "Entire Agreement" clause. The United States District Court for the Northern District of Florida applied the forum-selection clause when it transferred the action to this district. (*See* Dkt. No. 44.) That court held that "this dispute relates to the parties' rights and responsibilities in performing their obligations related to supplying crew for this vessel and that their relationship is governed by the ... Ship Management Agreement." (*Id.* at 5.) Therefore, it applied the Ship Management Agreement's forum-selection clause, which specifies that "[t]he parties

hereto irrevocably submit to the non-exclusive jurisdiction of the state and federal courts sitting in New York, New York with respect to any litigation arising out of this Agreement, or performance hereunder." (*Id.* at 4 (quoting Dkt. No. 1–1 at 25).)

*8 Before the Florida court, Cal Dive argued that the "Ship Management Agreement does not apply to this particular dispute; therefore, ... the forum selection clause of that Agreement is similarly inapplicable." (*Id.*) In response, CVI argued that the Ship Management Agreement "is the only contract between [the parties] and that it governs their relationship and the present dispute over payment for personnel because the contract expressly provides for the supply and management of vessel crew as between CVI and Gulf." (*Id.* at 5.) The Florida court agreed with CVI and transferred the case pursuant to the forum-selection clause in the Ship Management Agreement.

Here, the parties rehash their arguments over the application of the forum-selection clause, but this time as applied to the "Entire Agreement" clause, which contains a no-oral-modification clause. It provides that the Ship Management Agreement "constitutes the entire agreement between the parties" and that "[a]ny modification of this Agreement shall not be of any effect unless in writing and signed by or on behalf of the parties." (Dkt. No. 1–1 ¶ 25.) CVI argues that the no-oral-modification clause precludes any subsequent oral contract for the provision of personnel to the SAMPSON not provided in the Ship Management Agreement. (Dkt. No. 75 at 14–15.) Cal Dive argues, as it did to the Florida court, that the Ship Management Agreement "does not apply to this dispute" as "this lawsuit has nothing to do with the [Ship Management Agreement]," but is instead "based upon the supply and related expenses of 'the pipe laying crew.' " (Dkt. No. 79 at 8.) Indeed, Cal Dive even reargues that, "because plaintiffs' claims have nothing to do with the [Ship Management Agreement] and do not arise out of that agreement, the [Ship Management Agreement], including its forum selection clause, is inapplicable." (*Id.* at 9.) This argument directly conflicts with the Florida district court's holding that the relationship between Cal Dive and CVI regarding vessel management and the provision of personnel to the SAMPSON is governed by the Ship Management Agreement. CVI, therefore, asks the Court to apply the law of the case doctrine. (Dkt. No. 82 at 2–3.)

[17] [18] "The law of the case doctrine 'posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.' " *DiLaura v. Power Auth.*, 982 F.2d 73, 76 (2d Cir. 1992) (quoting *In re PCH Assocs.*, 949 F.2d 585, 592 (2d Cir. 1991)); *see also Pescatore v. Pan Am. World Airways, Inc.*, 97 F.3d 1, 8 (2d Cir. 1996). And while the doctrine is "admittedly discretionary and does not limit a court's power to reconsider its own decisions prior to final judgment," *Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir. 1992), the Second Circuit has "repeatedly stated we will not depart from [the law of the case] absent 'cogent' or 'compelling' reasons," *Doe v. N.Y.C. Dep't of Social Servs.*, 709 F.2d 782, 789 (2d Cir. 1983).

[19] "[C]ogent or compelling reasons" not to follow an earlier decision include "an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Masciotta v. Clarkstown Cent. Sch. Dist.*, No. 14 Civ. 7128, 2016 WL 4449660, at *4 (S.D.N.Y. Aug. 23, 2016) (quoting *Bellezza v. Holland*, No. 09 Civ. 8434, 2011 WL 2848141, at *3 (S.D.N.Y. July 12, 2011) (internal quotation marks omitted)); *see also N. River Ins. Co. v. Phila. Reinsurance Corp.*, 63 F.3d 160, 165 (2d Cir. 1995) ("A court should be 'loathe' to revisit an earlier decision 'in the absence of extraordinary circumstances such as where the initial decision was clearly erroneous and would work a manifest injustice.' " (quoting *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817, 108 S.Ct. 2166, 100 L.Ed.2d 811 (1988))).

*9 Here, Cal Dive provides no cogent or compelling reason to depart from the Florida district court's conclusion that the Ship Management Agreement governs the relationship between the parties with respect to the provision of personnel to the SAMPSON. Cal Dive points to no intervening law, clear error, or manifest injustice, and provides no reason why this Court should depart from the conclusion of the Florida district court by treating the "Entire Agreement" clause differently from the forum-selection clause in the Ship Management Agreement.

[20] "Under federal **maritime** law, a court 'may not look beyond the written language of the document to determine the intent of the parties unless the disputed contract provision is ambiguous.' " *United States ex rel.*

E. Gulf, Inc. v. Metzger Towing, Inc., 910 F.2d 775, 779 (11th Cir. 1990) (quoting *Corbitt v. Diamond M. Drilling Co.*, 654 F.2d 329, 332–33 (5th Cir. 1981)). The "Entire Agreement" clause here unambiguously prohibits modification of the agreement by means of oral agreements. And Cal Dive puts forth no argument that either maritime law or New York law renders the no-oral-modification clause in the "entire agreement" clause unenforceable. (*See* Dkt. No. 79 at 3–6.)

[21] Under New York law, "[a] party can overcome a no-oral-modification clause by showing either partial performance or equitable estoppel." *Home Loan Inv. Bank, F.S.B. v. Goodness & Mercy, Inc.*, No. 10 Civ. 4677, 2012 WL 1078886, at *4 (E.D.N.Y. Mar. 30, 2012). Cal Dive argues neither. The Court acknowledges that, as balanced against the longstanding principle that oral contracts are generally valid under maritime law, "there is not a clear answer to whether this combination 'entire agreement' and 'no oral modification' clause is necessarily unenforceable." *Regions Equip. Fin. Corp. v. AT 2400, Official No. 530775*, 640 F.3d 124, 128 (5th Cir. 2011). Because the parties do not explicitly address this issue with respect to the oral contract at issue, and because the Court concludes that the parties intended the Ship Management Agreement to prohibit subsequent oral modification, any later-alleged oral contract relating to the provision of personnel to the SAMPSON is precluded.

[22] Finally, Cal Dive argues that "there is a dispute as to whether defendants orally guaranteed the payment if Oceanographia failed to pay argues that CarVal." (Dkt. No. 79 at 8.) Even assuming the existence of an oral guarantee to pay, however, such a promise would be unenforceable under New York's Statute of Frauds, which requires guarantee agreements to be *in writing*. N.Y. General Obligations Law § 5–701.

[23] Of course, "New York's Statute of Frauds does not apply to **maritime** contracts, because oral contracts are valid under **maritime** law." *Compania Tauben S.A. v. Stolt Tankers Inc.*, 179 Misc.2d 933, 686 N.Y.S.2d 916, 918 (N.Y. Sup. Ct. 1998) (citing *Kossick*, 365 U.S. at 733–34, 81 S.Ct. 886). The question, therefore, is whether CVI's alleged guarantee to pay for Cal Dive's services in the event of Oceanografia's failure to do so constitutes a maritime contract.

[24] The Supreme Court has "not draw[n] clean lines between maritime and nonmaritime contracts." *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 23, 125 S.Ct. 385, 160 L.Ed.2d 283 (2004). To determine if a particular contract is a maritime one, courts look to " 'the nature and character of the contract,' and the true criterion is whether it has 'reference to maritime service or maritime transactions.' " *Id.* at 24, 125 S.Ct. 385 (quoting *North Pacific S.S. Co. v. Hall Brothers Marine Ry. & Shipbuilding Co.*, 249 U.S. 119, 125, 39 S.Ct. 221, 63 L.Ed. 510 (1919)).

In this particular context, however, the Second Circuit has drawn a clean line. In *Fednav, Ltd. v. Isoramar, S.A.*, the Second Circuit held that "merely agreeing as surety 'to pay damages for another's breach of a maritime charter is not' a maritime contract." 925 F.2d 599, 601 (2d Cir. 1991) (quoting *Kossick*, 365 U.S. at 735, 81 S.Ct. 886). In *Fednav*, the Second Circuit found that a vessel owner's alleged agreement to contribute to its charterer's settlement of a cargo dispute with a third party was not a maritime contract because the alleged contribution agreement was "separate and distinct" from the cargo dispute settlement agreement and not maritime in nature. *Id.* Here, too, CVI's alleged agreement to pay Cal Dive if Oceanografia failed to pay for the pipe-laying personnel is not maritime in nature. "The reason for this rule is clear: 'The direct subject-matter of the suit is the covenant to pay such damages, which neither involves maritime service nor maritime transactions....' " *Id.* (quoting *Pacific Sur. Co. v. Leatham & Smith Towing & Wrecking Co.*, 151 F. 440, 443 (7th Cir. 1907)). It matters not that the underlying transaction is itself maritime in nature. *See id.* Therefore, state law applies, rendering the alleged oral guarantee unenforceable under New York's Statute of Frauds.

*10 CVI's motion for summary judgment that the *in personam* claims at issue fail is therefore granted.

IV. Conclusion

For the reasons stated above, CarVal's motion to dismiss is DENIED; Cal Dive's motion for summary judgment is DENIED; and CVI's motion for summary judgment is GRANTED IN PART and DENIED IN PART.

The Clerk of Court is directed to close the motions at Docket Numbers 68 and 74.

SO ORDERED.

All Citations

--- F.Supp.3d ----, 2017 WL 1157125

Footnotes

1 Pursuant to a separate agreement, Oceanografia and CVI were required to utilize only one company to provide both the below-deck and above-deck crew—in this case, Cal Dive. (Dkt. No. 81 ¶ 4.)

2 Though the Complaint is silent as to the statute under which the Court has jurisdiction over the action, the Court determines that the Complaint claims a **maritime** lien against the vessel pursuant to the **Maritime** Commercial Instruments and Liens Act of 1988 ("the Act"), which provides that "a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner ... has a **maritime** lien on the vessel," and "may bring a civil action *in rem* to enforce the lien." 46 U.S.C. § 31342.

3 The existence of a **maritime** lien is likewise disputed in the parties' briefing on the pending motions for summary judgment, discussed below.

4 CVI presents additional circumstantial evidence that Cal Dive was actually aware of the no-lien provision: (1) Cal Dive was involved in drafting the charter party; (2) Cal Dive reviewed and relied on the charter before providing the above-deck pipe-laying personnel; and (3) notice of the no-lien clause was explicitly posted on the SAMPSON. (Dkt. No. 77 at 1.)

Whether Cal Dive was involved in the drafting or reviewed and relied on provisions of the charter party is contested by Cal Dive. (See Dkt. No. 83 at 6–7.) For instance, CVI fails to demonstrate that a qualified representative participated in the drafting of the charter party or explicate the nature and extent of involvement in such drafting by such qualified individuals. (*See* Dkt. No. 77 at 4–5; Dkt. No. 83 at 6.) CVI also argues that Cal Dive is estopped from asserting lack of knowledge based on its representations in certain interrogatories, but its admission of actual knowledge of the no-lien provision in the interrogatory at issue appears directed to a time period after it entered into a contract for the supply of the above-deck/pipe-laying crew. (*See* Dkt. No. 83 at 7–8.)

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