RECENT DEVELOPMENTS IN SALVAGE LAW

Maritime Law Association, Salvage Committee, Spring 2011[1]

Jason R. Harris
Welch and Harris, L.L.P.
Jacksonville, North Carolina

Odyssey Marine Exploration, Inc. v. The Unidentified, Shipwrecked Vessel or Vessels, 2011 WL 1158691 (11th Cir., March 31, 2011). Contract to provide research to assist in locating and recovering a sunken vessel is maritime in nature and subject to admiralty law.

Keith Bray, a citizen of Great Britain and researcher of sunken vessels, orally agreed with the plaintiff, a deep sea exploration and recovery salvor, to provide research and data concerning the location of the sunken Spanish cargo vessel MERCHANT ROYAL in exchange for certain proceeds from the recovery and research costs. Bray alleged that the salvor failed to keep him informed of search efforts and informed him that it had no plans to search for the vessel. The parties later executed a written contract in which the salvor paid Bray a cash sum as payment in full for his research file. Bray then learned that the salvor was still looking for the MERCHANT ROYAL and had found what it believed to be the vessel. The salvor filed an *in rem* proceeding to claim ownership and Bray moved to intervene, seeking to rescind the written agreement and reinstate the original oral agreement.

As it turned out, the subject of the *in rem* action was *not* the MERCHANT

[1]Notes: on citations: citations to the cases which are the subject of this update are cited as follows: "At [Westlaw page number];" questions or comments should be directed to Jason R. Harris of Welch and Harris, L.L.P., 201 New Bridge Street, Post Office Box 1398, Jacksonville, North Carolina 28540, Telephone: (910) 347-0161, Facsimile: (910) 347-0164, JRHarris@welchharris.com. Please note that this update is not exhaustive nor is it necessarily limited to the period since the last update authored in the Fall of 2010.

ROYAL. Thus, the right to the MERCHANT ROYAL was no longer before the District Court. The District Court ordered Bray to show cause why his intervening complaint should not be dismissed. The District Court concluded that neither the research agreement nor the oral agreement amounted to maritime commerce. The 11th Circuit disagreed, "[e]specially where, as Bray alleges happened here, the agreement allocated a partial share of the vessel's recovery in recognition of the parties' joint efforts to recover the MERCHANT ROYAL." At 2. The Court held that the agreement was maritime in nature and subject to admiralty law.

Northeast Research, LLC v. One Shipwrecked Vessel, Her Tackle, Equipment, Appurtenances and Cargo, etc., 2011 WL 1135656 (W.D.N.Y., March 25, 2011)[2]. Sunken vessel deemed abandoned despite familial conveyances and technical diving due to depth of wreckage.

Plaintiff salvor sought title to what it believes is the Dunkirk Schooner CALEDONIA built in 1799 and used in the fur trade and later renamed the GENERAL WAYNE, and used to transport runaway slaves to Canada as part of the underground railroad. The vessel was found 170' deep in Lake Erie by technical diving. The salvor obtained conveyances of rights to the vessel from some (but apparently not all) of the descendants of the owners of the GENERAL WAYNE. Plaintiff filed suit and the State of New York intervened asserting title under the Abandoned Shipwreck Act of 1987, 43 U.S.C. 2101, *et seq*., the Submerged Lands Act, 43 U.S.C. 1302 and certain state laws.

The key issue was whether the vessel was abandoned (which is required under the ASA for the state to have title). The Court concluded that the vessel, whether it was the CALEDONIA/GENERAL WAYNE or not, was abandoned and the State had title.

[2]Committee member Peter Hess represented Plaintiff.

The Court identified "a split of circuit authority as to whether abandonment must be proven by an express relinquishment of title or whether abandonment can be inferred from the surrounding circumstances." At 3. It elected to apply the latter test and required the state's level of proof to be by clear and convincing evidence. Here, the facts the Court relied upon included the passage of over 150 years with no efforts to locate and salvage the vessel (even if it was because the owners feared prosecution for smuggling fugitive slaves) and the State's expert opinion that the technology to locate and recover the vessel purportedly existed since 1850. "What matters is not whether the schooner would have been located, but rather whether anyone even tried looking for it." At 5. The Court also reasoned that there was a lack of evidence that the former owners bequeathed their interest to descendants who conveyed their interest in the vessel.

Anchor Ventures, LLC v. Marine Property from Unidentified Sailing Vessel, 2010 WL 4941441 (W.D.Wash., Nov. 30, 2010). Court finds abandonment.

Plaintiff located an unidentified anchor and chair in Admiralty Inlet near Whidbey Island, Washington, that it believes dates from 1800-1840. Plaintiff did not locate any shipwreck or other marine artifacts within a one mile radius. It alleged the items were abandoned and that it was entitled to be awarded title. Although the items were "likely embedded in land belonging to [Washington]", the state made no claim of ownership or constructive possession. Curiously, the state asked that any award be expressly subjected to applicable local and federal statutes and regulations relating to recovery of the anchor, though it specified no such laws. The Court found that the Abandoned Shipwreck Act (43 U.S.C. 2101, *et seq*.) did not apply because "isolated artifacts and materials not in association with a wrecked vessel, whether intact or broken and scattered or embedded" are excluded from the definition of "shipwrecks".

55 C.F.R. 50121. The items were not found near nor associated with any actual wrecked vessel. The Court concluded that the items were "a long forgotten antique to which no realistic claim of original title can be laid or presumed" and awarded plaintiff title to the items (though urging it and the State to agree on the method of recovery so as to comply with all relevant laws and regulations, again the precise nature of which were not disclosed). At 2.

Tait v. United States, 2011 WL 124536 (E.D.Va., Jan. 11, 2011). Government failed to prove items taken by criminal defendant from area of vessel were not abandoned.

In 2009, Diane Tait was on the beach in the Chincoteague National Wildlife Refuge when she and her boyfriend encountered the F/V FREDA MARIE half in the water and half on the sand. There were a number of others playing on or around the vessel. Witnesses testified that the vessel had been there "a long time", "a couple weeks before", and "about a month". At 11. There were no signs of the crew nor any posted signs or ropes. Tait took a portion of line that was in the sand and surf near the vessel and a buoy floating in the water. Law enforcement charged her with removing private property from federal land in violation of 50 C.F.R. 26.61. This matter came before the District Judge on appeal from a decision by a Magistrate who concluded that the vessel was presumably valuable and a person owning such valuable property is unlikely to abandon it.

The Court determined that to prosecute a defendant for violating the regulation, the Government must prove that the property is public property or private property and "where the facts before a court allow for a reasonable possibility that property is abandoned, the Government must exclude such a reasonable hypothesis of innocence in

seeking to prove a criminal violation for unauthorized removal of private property under this regulation." At 7. In short, the central issue was whether the Government proved beyond a reasonable doubt that the line and buoy were private property and not abandoned at the time they were taken.

The government referred to the boat as abandoned during the trial. There was apparently no evidence concerning the ownership of the boat or any investigation into that issue. The Court put some stock in the fact that the buoy was found in the water and the line was not visibly attached to the vessel "making the analystical connection even more attenuated." At 12. Based on what it described as "scant evidence showing that the items in question were private property", the Court concluded that there was not adequate evidence that the elements of the crime were proven beyond a reasonable doubt. At 12.

Reliable Salvage and Towing, Inc. v. 35' Sea Ray, 2011 WL 1058863 (M.D.Fla., March 21, 2011). Owner failed to pay demanded contractual rate, Court finds pure salvage, grants 10% award and attorneys' fees.

On March 16, 2008, Michael Bivona ran his 35' Sea Ray onto a shoal in Gasparilla Pass near Boca Grande, Florida. He called Sea Tow, with which he was a member. They advised him to wait until high tide (around 8:30 p.m. or 9:00 p.m.) and they would tow him, but to do so in advance would require at least two vessels. In the meantime, Bivona noticed one of plaintiff's vessels working in the area and hailed it for assistance. Bivona's vessel was floated after several hours of work by three of plaintiff's vessels. Two of the vessels washed a channel to Bivona's vessel to create a trough which technique is apparently harsh on the vessels. At one point, a midship cleat on the Sea Ray tore loose while under strain and shot back at one of the towing vessels. The

plaintiff's captain reported that the high tide on that day would only raise the water level at that location by about four inches. There was also an impending storm. The vessel was successfully freed.

On scene, Bivona signed a form that contained an arbitration provision and required payment for "all charges including attorney's fees and costs should collection procedures be necessary". The plaintiff demanded $7,523.10 for its run time, $200.00/foot at 32' plus attorney's fees. Bivona acknowledged owing the sum, but disputed the claim for attorney's fees. The salvor demanded arbitration but Bivona refused.

The Court analyzed the document signed by Bivona and concluded it was not completed nor were the services rendered adequately described therein. Thus, essential terms were missing. It distinguished *Key Tow, Inc. v. M/V JUST J's*, 2005 WL 3132454 (S.D.Fla., 2005)(in which the Court found inadequate terms but an enforceable verbal contract because of a history of the parties doing business) because the parties had no prior history of dealing. There was no contract. The Court instead found there was pure salvage.

The Court assigned a value of $140,000.00 (the vessel was purchased in 2005 for $220,000.00, the average price in 2010 was $102,000.00, the salvage occurred in 2008) and rendered an award of 10%, thus $14,000.00.

While acknowledging that attorneys' fees in an admiralty case are generally only available when statutorily or contractually authorized, it noted another circumstance when one party "willfully and persistently refused to pay the plaintiff what was plainly owed to him." At 13, citing *Southeastern Marine, LLC v. Motor Yacht Ocean Club*, 2010 WL 2540701 (M.D.Fla., June 21, 2010). The Court found that Bivona's defense was

frivolous and brought in bad faith as he acknowledged responsibility for $7,523.10 in fees, but had not paid it for over three years.

Port Everglades Launch Service, Inc. v. M/Y SITUATIONS, 2011 WL 1196017 (S.D.Fla., March 29, 2011). Low order salvage for dockside dewatering and tow.

On Sunday morning, June 21, 2009, the M/Y SITUATIONS, a 100' Broward, was seen taking on water near a home on Ponce De Leon Drive, Fort Lauderdale, Florida. The owner and captain were out of state at the time. Local law enforcement contacted Plaintiff (who does business as Cape Ann Towing & Salvage). Cape Ann arrived with a truck and later with two tugs. The vessel was bow down and there were several feet of water in the bow and 18"-20" of water above the floorboards in the midship engine room with water waist deep in some areas. The engine room portholes were open and only 12 inches above the waterline. Cape Ann deployed three pumps and began the dewatering process. Oil was observed in the water and five sections of pollution containment boom and 50-100 absorbent pads were deployed. The source of the water intrusion was found to be the result of a failed fitting on the aft air conditioning raw water pump. The dewatering took about 2 hours. The vessel was then towed to a marina. The tow took approximately 90 minutes. Demobilization took an additional 2 hours. Weather was not a factor and the operation took place during daylight. A diver was on standby but was not used.

The Court carefully considered evidence of the value of the yacht. The owner's evidence was that the value of the yacht was $552,625.00; the salvor's valuation was $982,200.00. The yacht was listed for sale at $1,550,000.00. The Court determined the fair market value of the yacht to be $695,816.00 (the owner's expert's fair market

value, plus one-third of the difference between each party's expert valuation). The cost to repair was $238,291.62. Thus the Court assigned a post-casualty value of $457,524.38.

The salvor's initial demand was $187,510.00. It sought an award of 7%-8%, plus an equitable uplift for being a professional salvor of 1%-2%. The defendants argued the award should be 5%. The Court determined this to be a low order salvage and awarded 5%, plus 1% uplift for being a professional salvor (6% award of $457,524.38 = $27,451.46), plus prejudgment interest.

Rozenberg v. Schachner, 2011 WL 844755 (E.D.N.Y., March 8, 2011). *Pro se* BOATUS member fails to show soft aground and negligent towing.

The plaintiff ran his 26' Sea Ray aground near Breezy Point in Jamaica Bay. He unsuccessfully attempted to free the vessel and called for assistance from BOATUS, of which he was a member. The responding captain told the boater that he could not safely tow the vessel free with a single line. He quoted the boater $3,500.00 to tow the vessel to deeper water. The boater refused and the captain left the area. Later that day, with the boater apparently becoming anxious about the situation, negotiations continued and a price of $3,000.00 was agreed upon. Although Plaintiff had a camera and had opportunities to photograph the scene at critical times, he failed to do so. Two vessels employed a "Y" shaped tow line to the grounded vessel and freed her.

Sometime later, the plaintiff discovered a crack in the aluminum gimbal housing which his mechanic attributed to a negligent towing of the boat from her side, thereby putting more pressure on the outboard stern drive than the gimbal housing could withstand and causing nearly $7,000.00 of damage.

The tower's theory was that the damage occurred due to the rocking of the vessel

as it became grounded. The Plaintiff was apparently told by a competitor of the salvor that if they did not wait until high tide, the boat would likely be damaged as a result of the towing operation. However, Plaintiff wanted to be towed right away. Two or three days after the incident, while at his house the Plaintiff signed an invoice in which he waived his right to bring a property damage claim. The Court determined that the plaintiff failed to prove a negligent towing operation. The Court also concluded that the boater failed to prove that he was soft aground and was not entitled to a refund for the $3,000.00 tow.

Absolute Marine Towing & Salvage, Inc. v. Universal Strategic Management, Inc., 2011 WL 249498 (M.D.Fla., Jan. 26, 2011). Tower's hiree unable to invoke arbitration provision in contract between tower and owner.

The owner of the M/V IT'S HAPPNIN contracted with Absolute Marine Towing & Salvage, Inc. to tow a catamaran from the Bahamas to Melbourne, Florida. The contract contained an arbitration provision concerning "disputes rising out of this agreement". Absolute orally contracted with the defendants ("Universal") for them to perform the tow. During the tow, the vessel sank and Absolute sued Universal. Universal attempted to invoke the arbitration provision in the agreement between the vessel owner and Absolute. Universal's contention was that they were third-party beneficiaries and the factual allegations at issue arise out of the contract between the owner and the plaintiff. The Court disagreed concluding that there was no evidence that the owner and Absolute intended Universal to primarily and directly benefit from the contract between the owner and Absolute and, therefore, Universal was not a third-party beneficiary. The Court narrowly construed the "rising out of" provision of the written contract between the owner and Absolute by concluding that the facts alleged in the Complaint concerned

towing of the vessel pursuant to the contract between Absoute and Universal, not the contract between the owner and Absolute. The Court refused to compel arbitration.

T. Moore Services v. Rentrop Tugs, Inc., 2011 WL 201633 (W.D.La., Jan. 20, 2011). Government's claim pursuant to the Rivers and Harbors Act trumps Limitation Action.

T. Moore Services purchased scrap rigs lying on the bottom of Lake De Cade and defendants were allegedly involved in floating and towing the rigs. The rig HERCULES 61 was raised, towed to T. Moore's yard, then took on water, rolled and sank. T. Moore sued defendants involved in the towing, each of whom filed petitions seeking exoneration from and limitation of liability pursuant to 46 U.S.C. 30505, *et seq*. The limitation actions were consolidated. The United States sought to hold the owners and operators of the Rig HERCULES 61 responsible to mark and remove the wreckage. The United States filed a claim in the limitation proceedings seeking an order lifting the stay to allow them to proceed outside of the limitation action, to file a complaint and consolidate it with the limitation action.

The Court stated that "[t]he Fifth Circuit has consistently held that, where the rights of the United States are concerned, the Limitation Act will accede to the Rivers and Harbors Act." At 2, citing *In re Southern Scrap Material Co., LLC*, 541 F.3d 584, 593 (5th Cir. 2008)(see Spring 2009 edition of this publication). The government's motion was allowed.

O'Connor v. Smith, 2010 WL 4366914 (S.D.Tx., October 28, 2010). Artist/Salvor enjoined from trespass.

Readers may recall from the Spring 2010 edition of this update the case of *Nathan Smith v. The Abandoned Vessel*, 610 F.Supp.2d 739 (S.D.Tx., 2009) in which a

colorful artist claimed that he discovered a treasure ship in Melon Lake in Texas. Despite Smith's evidence (including a piece of wood he believed was part of the vessel that he tested by microwaving it), his claims of title and salvage were unsuccessful.

The Plaintiff in the instant action owned the land surrounding Melon Lake. Together with Texas as an intervenor, Plaintiff sought a permanent injunction enjoining the artist/salvor from trespassing on his land. The Court was suspicious of Smith's claim that there may be a vessel embedded in the lake. It acknowledged that Smith effectively sought to trespass and had no right to salvage the vessel, to the extent it existed. Following a balanced analysis the Court allowed summary judgment in favor of the Plaintiff and granted a permanent injunction against Smith barring him from boring holes in Melon Lake or entering Plaintiff's property to access the lake.