

ANTON MOE, *ET AL.*

v.

KEY BANK OF WASHINGTON

United States District Court, Western District of Washington (Tacoma), April 20, 2000

No. C99-5369

2000CHARTER — 142. Seaworthiness —

2000MORTGAGES OF VESSELS — 13. Rights of Mortgagor —

2000PERSONAL INJURY — 13138. Miscellaneous Persons — Mortgagee — 135. Contributory Negligence

2000TITLE TO VESSELS — 18. Who is Owner.

The mortgagee of a fishing vessel with whom her insolvent owner and master has agreed to surrender the vessel and, for a fee and without transfer of title, to bring her to a convenient port for foreclosure, and who does not exercise control over her operation does not become owner pro hac vice for that voyage so as to become obligated to provide a seaworthy vessel and so be liable for the master's fall on a slippery deck; the master's claim of negligence is barred by the primary duty rule since any failure of care was his own.

Kirk I. Mortensen and J. Gary Nece *for Moe*

Christopher W. Nicoll and John J. Soltys (Cozen and O'Connor) *for Key Bank of Washington*

Robert J. Bryan, D.J.:

This matter comes before the court on the following motions:

- (1) Plaintiff's Motion for Partial Summary Judgment;
- (2) Defendant's Motion for Summary Judgment; and
- (3) Plaintiff's Motion to Dismiss Counterclaim for Lack of Jurisdiction.

In 1991, Anton Moe, as the principal shareholder and president of Endurance Corporation, purchased the fishing vessel *Endurance* with a loan from Defendant Key Bank of Washington ("Key Bank"). Key Bank secured the loan with a preferred ship mortgage.

In November 1996, Mr. Moe determined that he could no longer operate the vessel because of lack of income, and that he was falling further behind

2000 AMC 2652

in making the loan payments. In fact, he was financially unable to bring the vessel from her location in Dutch Harbor, Alaska to Seattle, Washington. A meeting was held in Tacoma, Washington on November 18, 1996 with Peter Lofgren, Vice President of Special Credits for Key Bank, Mr. Moe, and Lanny Edgeman, a friend and advisor of Mr. Moe, to discuss Mr. Moe's financial difficulties and what options were available. The parties dispute what transpired as a result of the meeting. Mr. Moe states that Key Bank accepted surrender of the vessel and hired

him to bring the vessel back to Seattle from Alaska for the sum of \$7,500. The defendant states that it did not accept surrender of the vessel because then the bank would be foreclosed from collecting any deficiency judgment after sale of the vessel. Further, the bank states that, if the boat was surrendered, Mr. Moe would have been required to sign a release for the vessel. Instead, the defendant states that it agreed to allow Mr. Moe to skipper the vessel from Alaska and to advance money to pay the expenses of the voyage. According to Key Bank, Mr. Moe was expected to repay these expenses out of the proceeds of the upcoming judicial sale of the vessel.

During the return voyage, Mr. Moe slipped and fell as a result of hydraulic fluid on the soles of his shoes. On his return to Seattle, the vessel was arrested and returned to Key Bank.

The plaintiff filed this lawsuit for damages arising out of Mr. Moe's injuries during the voyage from Alaska to Seattle, Washington. He claims that Key Bank was his employer and the owner *pro hac vice* of the vessel. The plaintiffs bring claims for damages under the Jones Act, 46 U.S.C. app. §688(a), including loss of consortium, and for unseaworthiness. The defendant counterclaimed for payment of the balance of the loan owed by the plaintiff in the amount of \$300,000.

The plaintiff moved for partial summary judgment on the issue of whether Key Bank is the owner *pro hac vice* of the vessel. The defendant filed a cross motion for summary judgment of dismissal of all of the plaintiff's claims. 1(1) The plaintiff also filed a motion to dismiss the defendant's counterclaims for lack of jurisdiction. For ease of discussion and resolution, the court will discuss all three motions together.

The following issues are presented in the three motions:

(1) Whether Key Bank was the owner *pro hac vice* of the vessel *Endurance*, thereby having the duty of maintaining a seaworthy vessel.

2000 AMC 2653

(2) Whether the primary duty rule should be applied to the facts of this case.

(3) Whether the court has original jurisdiction over the defendant's counterclaims, and if not, whether the court should exercise supplemental jurisdiction over those claims.

It is basic maritime law that the owner of a vessel has the nondelegable duty of maintaining a seaworthy vessel. *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 1946 AMC 698(1946). Here, the issue is whether Key Bank is the owner *pro hac vice* of the *Endurance*.

An owner *pro hac vice* of a vessel is "one who stands in the place of the owner for the voyage or service contemplated and bears the owner's responsibilities, even though the latter remains the legal owner of the vessel. In effect, for liability purposes, an owner *pro hac vice* is treated as a shipowner." *McAleer v. Smith*, 1995 AMC 2174, 2176, 57 F.3d109, 112 (1 Cir. 1995) (citations and internal quotations omitted). There are only two recognized types of owners *pro hac vice*: demise, or bareboat, charterers and captains of fishing vessels operated under agreements, called "lays." *Stephenson v. Star-Kist Caribe, Inc.*, 1979 AMC 1459, 1462, 598 F.2d 676, 679 (1 Cir. 1979). A demise charterer is "one who contracts for the vessel itself and assumes exclusive possession, control, command and navigation thereof for a specified period, in contrast to a time or voyage charterer who contracts not for the vessel itself but for a specific service of the vessel, such as carriage of goods, which is rendered by the owner's master and crew." *McAleer*, 1995 AMC at 2177, 57 F.3dat 112-13 (citations and internal quotations omitted).

Demise charters are created when "the owner of the vessel ... completely and exclusively relinquish[es] possession, command, and navigation thereof to the demisee. [They are] therefore tantamount to, though just short of, an outright transfer of ownership. However, anything short of such a complete transfer is a time or voyage charter party or not a charter party at all." 1995 AMC at 2177, 57F.3d at 113 (quoting *Guzman v. Pichirilo*, 369 U.S. 698, 699-700, 1962 AMC 1142, 1143-44(1962) (internal quotation and citations omitted).

To establish ownership by demise is a heavy burden.

The owner who attempts to escape his normal liability for the unseaworthiness of his vessel on the ground that he has temporarily been relieved of this obligation has the burden of establishing the facts which give rise to such relief. Thus, assuming arguendo that a demise charter party would isolate the owner from liability, the owner has the burden of showing such a charter. This burden is heavy, for courts are reluctant to find a demise when the dealings between the parties are consistent with any lesser relationship.

The defendant argues that it was not an owner of the vessel on which the plaintiff was injured. It relies on the only case which involves an attempt by an injured seaman to assign liability to a creditor of the vessel. *See Stephenson*, 1979 AMC at 1465, 598 F.2d at 681 (A creditor, to be held liable, “must exercise exclusive actual control over the vessel’s operations. That is, either he or his agent must be in charge of the myriad details of operating the vessel, such as engaging the master, hiring the crew, and furnishing the fuel, food and supplies.”) (citations omitted). Key Bank contends that it had no control over the vessel at all during the voyage, that possession was never transferred to the bank, and that no agent of Key Bank ever set foot on the vessel.

The plaintiff relies on his version of the facts. He argues that at the November 18, 1996 meeting, he surrendered the vessel, gave up any further attempts to use the vessel for fishing, and made it clear to the bank that he wanted to be free from any further connection with the vessel. The plaintiff argues that these facts clearly show that he gave up any control of the vessel and any action on his part regarding the vessel was solely at the direction of the bank. The plaintiff relies on the case of *Torch, Inc. v. Alesich*, 148 F.3d 424 (5 Cir. 1998). There, the court found a demise charter where Torch leased and stored the vessel, hired her crew, and provided repairs and insurance.

Generally, ownership of a fishing vessel of this size must be documented and registered, which includes evidence of title. *See* 46 U.S.C. §12105; 46 CFR §§67.01-5; 67.50. When title or ownership changes, documentation of the transfer must be produced. *See* 46 CFR §67.59. *See also* 70 AmJur2d, Shipping §138 (2000). Here, there is no documentation which verifies any change in status between the plaintiff and the bank. There is no evidence that the defendant here had any control over the vessel. There is no showing of any action on the part of the bank demonstrating assumption of control, possession, or command of the vessel. The defendant simply provided the

2000 AMC 2655

financial means for the plaintiff to bring the vessel back to Washington for her arrest and surrender. Under the above referenced law, these acts are not sufficient to show a transfer of ownership from the plaintiff’s corporation to the bank. Even if the plaintiff’s version of the November 18, 1996 meeting is true, issues of fact on ownership are not created. The *Torch* case does not help the plaintiff’s argument. The facts there are quite different than here. Here, the defendant did nothing to demonstrate any more interest in the vessel than its currently held preferred ship mortgage. Key Bank was not the owner, or owner *pro hac vice*, of the vessel *Endurance*.

The defendant’s motion for summary judgment on this issue should be granted, and the plaintiff’s motion for partial summary judgment should be denied as moot.

The primary duty rule was adopted by the Ninth Circuit in *Reinhart v. United States*, 1972 AMC 1167, 457 F.2d 151 (9 Cir. 1972), following the Second Circuit’s decision in *Walker v. Lykes Bros. S.S. Co.*, 1952 AMC 269, 193 F.2d 772 (2 Cir. 1952). Under this rule,

a seaman-employee may not recover from his employer for injuries caused by his own failure to perform a duty imposed on him by his employment. For example, the plaintiff in *Reinhart*, as Chief Mate of the ship, bore primary responsibility for inspecting and correcting the dangerous condition which caused his injury. In holding that the plaintiff’s suit against the shipowner was barred, we made clear that the plaintiff must have breached some positive duty for the rule to apply, for

mere contributory negligence is not a bar to recovery.

The Ninth Circuit has limited the primary duty rule in three ways:

2000 AMC 2656

First, the “primary duty” rule will not bar a claim of injury arising from the breach of a duty that the plaintiff did not consciously assume as a term of his employment. Second, the rule does not apply where a seaman is injured by a dangerous condition that he did not create and, in the proper exercise of his employment duties, could not have controlled or eliminated. Third, the rule applies only to a knowing violation of a duty consciously assumed as a term of employment. It does not apply to a momentary lapse of care by an otherwise careful seaman.

The defendant argues that the primary duty rule bars the plaintiff from recovery. The plaintiff argues that the dangerous condition that caused his injuries was the nondelegable duty of the owner of the vessel, which he contends is Key Bank. Since the court has already determined that Key Bank was not the owner of the vessel, the primary duty rule should apply. The defendant is not liable for the plaintiff’s damages. Any responsibility for the condition of the vessel rested with the plaintiff.

The defendant’s motion for summary judgment should be granted, and the plaintiff’s motion for partial summary judgment should be denied as moot. The plaintiffs’ claims against the defendant should be dismissed.

The only claims remaining in this case are the defendant’s counterclaim against the plaintiffs for the balance of the loan owing to the bank. This claim, as argued by the plaintiffs, is a contract dispute governed by state law. The only basis for federal jurisdiction of this claim is supplemental jurisdiction pursuant to 28 U.S.C. §1367. There is no other indication of federal jurisdiction. 2(2)

Under 28 U.S.C. §1367(c)(3), the court should decline to exercise supplemental jurisdiction over a state law claim where it has dismissed all claims over which it had original jurisdiction. Since the court has dismissed all of the plaintiff’s claims, the court should decline supplemental jurisdiction

2000 AMC 2657

over the state law counterclaim. The plaintiff’s motion to dismiss is granted with leave for the defendant to refile its claim in state court.

Therefore, it is hereby ordered that

- 1) Plaintiff’s Motion for Partial Summary Judgment is denied as moot.
- 2) Defendant’s Motion for Summary Judgment is granted. The plaintiffs’ claims are dismissed.
- 3) Plaintiff’s Motion to Dismiss Counterclaim for Lack of Jurisdiction is granted. The defendant’s counterclaim is dismissed with leave to refile in state court.