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U.S. DISTRICT COURT
EASTERN DISTRICT OF LA

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LORETTA G. WHYTE
CLERK



MINUTE ENTRY
BARBIER, J.
DECEMBER 20, 2001

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ANDY BALLESTER, ET AL.

CIVIL ACTION

VERSUS

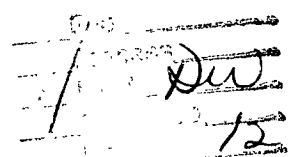
NO: 01-3461

THOR SHIPPING, LTD., ET AL.

SECTION: "J" (4)

Before the Court is Plaintiffs' Motion to Remand (Rec. Doc. 3). Defendants, Thor Shipping, Ltd., Dorchester Maritime, Ltd., and Captain Andrzej Raczysnski, oppose the motion. The motion is set for hearing on December 19, 2001. Counsel for Captain Andrzej Raczysnski requested oral argument on the motion. The Court, through no fault of counsel, received the request on December 18, 2001, and attempted to accommodate the request and schedule argument for December 19, 2001. However, the Court was advised that counsel for Captain Raczysnski could not attend. Due to the Court's calendar, it would have to delay the motion until late

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January 2002 if it were to allow oral argument. Because the motion to remand calls into question the subject matter jurisdiction of the Court and therefore needs to be resolved as quickly as possible, and because the Court, upon reviewing the motion, finds that oral argument is not necessary to resolve the issues raised therein, the Court hereby **DENIES** the request for oral argument. Upon considering the memoranda, the pleadings, and the applicable law, the Court concludes that Plaintiffs' Motion to Remand (Rec. Doc. 3) should be **GRANTED**.

Background

On March 2, 2000, Andy Ballester, Rogelio Uy, Jonel Estucado, Alberto Escote,¹ and John Dabrowski² were seamen employed on board the M/V JOHANN SCHULTE, a vessel owned by Defendant, Thor Shipping, Ltd., and managed by Defendant, Dorchester Maritime Ltd., both of which are Manx companies. On that date the vessel was in international waters approximately 100 miles east of Bermuda on a

¹ Mssrs. Ballester, Uy, Estucado, and Escote are citizens of the Philippines.

² Mr. Dabrowski was a citizen of Poland.

voyage from Antwerp, Belgium to Houston, Texas. While on deck, high seas struck the vessel, and Plaintiffs, Andy Ballester, Rogelio Uy, and Jonel Estucado, were injured. Alberto Escote and John Dabrowski were killed in the accident, and their personal representatives are Plaintiffs in this suit. The vessel flew the flag of Isle of Man.

Plaintiffs initiated suit in the 25th Judicial District Court for the Parish of Plaquemines, State of Louisiana, on October 17, 2001, by causing a non-resident writ of attachment to issue on the vessel. Defendants removed the case on two grounds: (1) that the Plaintiffs' claims being asserted for two of the seamen's deaths arise under the Death on the High Seas Act (DOHSA), 46 U.S.C. §761, and therefore confer subject matter jurisdiction on the Court; and (2) that Plaintiffs' other claims are removable under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 201, et seq., because the seamen's employment contracts require arbitration in the Philippines.

Discussion

The party invoking the removal jurisdiction of federal courts bears the burden of establishing federal jurisdiction. Frank v. Bear Stearns & Co., 128 F.3d 919, 921 (5th Cir. 1997) (citing Carpenter v. Wichita Falls Indep. Sch. Dist., 44 F.3d 362, 365 (5th Cir. 1995)). The removal statute ties the propriety of removal to the original jurisdiction of the federal district courts. Id. Absent diversity of citizenship, removal is appropriate only for those claims within the federal question jurisdiction of the district courts. Id. (citing 28 U.S.C. § 1331). It is well settled that federal question jurisdiction exists only when plaintiff's well-pleaded complaint raises issues of federal law. See Heimann v. National Elevator Indus. Pension Fund, 187 F.3d 493, 499 (5th Cir. 1999) (citing Gully v. First National Bank, 299 U.S. 109, 57 S. Ct. 96, 81 L. Ed. 70 (1936); Louisville & Nashville R. Co. v. Mottley, 211 U.S. 149, 29 S. Ct. 42, 53 L. Ed. 126 (1908)).

I. Convention on Arbitral Awards

In the instant case, Defendants argue that the claims for injuries brought by Andy Ballester, Rogelio Uy, and Jonel Estucaso were properly removable from state court pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention"), 9 U.S.C. § 205, because the three seamen's employment contracts require arbitration of their claims in the Philippines. Defendants recognize that in Jaranilla v. Megasea, CA No. 01-1449 (Oct. 12, 2001), the Court recently found that the Convention does not apply to employment contracts of seaman because such contracts are excluded from the definition of commercial contracts under United States arbitration law.³ The Court reached that conclusion based not only on the plain language of the Convention when read in conjunction with the Federal Arbitration Act, but also on the legislative history of Congress's enactment of

³ In fact, counsel for Defendants Thor Shipping and Dorchester Maritime was also defense counsel in the Jaranilla matter, and made the same arguments to the Court as related to that matter. Plaintiffs attach a copy of the Court's written reasons in Jaranilla to their present motion to remand.

the Convention. The Defendants have raised no new arguments in this case involving the application of the Convention to seamen's employment contracts and, accordingly, the Court concludes that its reasoning in Jarinilla applies to the instant case as well. Because the Convention, as enacted by Congress, does not apply to seamen's employment contracts, this case was not properly removable under the Convention's provisions.

II. Death Claims

As to the claims brought by the personal representatives of Abelardo Escote and John Dabrowska, the Defendants argue that the wrongful death claims can only be brought under DOHSA, 46 U.S.C. § 761, et seq., as the deaths occurred on the high seas. Defendants further argue that, while Plaintiffs do not name DOHSA in their petition, such "artful" pleading cannot be used to defeat a proper removal. Plaintiffs, on the other hand, allege that all of the seamen involved in the accident at issue are covered by the Jones Act, 46 U.S.C. § 688, and argue that, therefore, their claims may not be removed. See Burchett v. Cargill, 48 F.3d 173, 175 (5th

Cir.1995) (explaining that it is settled that as a general rule Jones Act cases are not removable). Alternatively, Plaintiffs argue that even if the wrongful death claims do arise under DOHSA, they are still not removable.

Accepting as true for purposes of this motion Defendants' argument that Plaintiffs' wrongful death claims are only cognizable under DOHSA, the Court concludes that the claims were still not properly removable from state court. While state and federal courts have concurrent original jurisdiction over DOHSA cases, neither the Supreme Court nor the Fifth Circuit has addressed the specific question of whether DOHSA claims may be removed to federal court when originally filed in state court. See, e.g., In re: Medscope Marine Limited, et al., 972 F.2d 107, 109 (5th Cir. 1992) (finding that the court was not required "to solve the DOHSA removability conundrum" at that time). While the Fifth Circuit in Medscope chose not to address the issue, the Court pointed to the case of Filho v. Pozos Int'l Drilling Services, Inc., 662 F.Supp. 94 (S.D.Tex. 1987), as providing a "persuasive, well-reasoned, and

scholarly opinion" as to why DOHSA claims are nonremovable. Id. at n.17.

In Filho, the district court concluded that DOHSA grants only admiralty jurisdiction and is therefore nonremovable once brought in state court.⁴ Filho, 662 F.Supp. at 98. The Court cited the express language of the statute itself, which provides in relevant part:

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any state ... the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty,...

46 U.S.C. §761 (emphasis added). The Court found that in order to determine the congressional intent regarding the removability of DOHSA claims, it need look no further than the language of the statute itself, which states that an action under it sounds in admiralty. Id. at 98.

⁴ It is well-established that an admiralty claim falls only within the area of admiralty jurisdiction and is not a claim arising at law under the Constitution, laws, or treaties of the United States. See Romero v. International Terminal Operating Co., 358 U.S. 354, 79 S. Ct. 468, 3 L. Ed. 2d 368 (1959).

While a few courts have held to the contrary,⁵ the vast majority of courts that have addressed the issue reach the same conclusion as the court in Filho -- that the statute only confers admiralty jurisdiction on federal courts, not federal question jurisdiction, and that, therefore, DOHSA actions originally brought in state court are not removable. See, e.g., Cantuba v. American Bureau of Shipping, CA No. 95-0461, 1995 WL 143545 (E.D.La., Mar. 29, 1995); Saunee v. Harry's Dive Shop, CA No. 92-2013, 1992 WL 370095, (E.D.La., Nov. 30, 1992); Baker v. Bell Helicopter/Textron, Inc., 907 F.Supp. 1007, 1010 (N.D.Tex.1995); Zaini v. Shell Oil Co., 853 F.Supp. 960 (S.D.Tex. 1994); De Bello v. Brown & Root, Inc., 809 F.Supp. 482 (E.D.Tex.1992); Trinh v. Yamaha Boat Co., 122 F.Supp.2d 1364 (S.D.Ga. 2000); Argandona v. Lloyd's Registry of Shipping, 804 F.Supp. 326, 327 (S.D.Fla.1992).

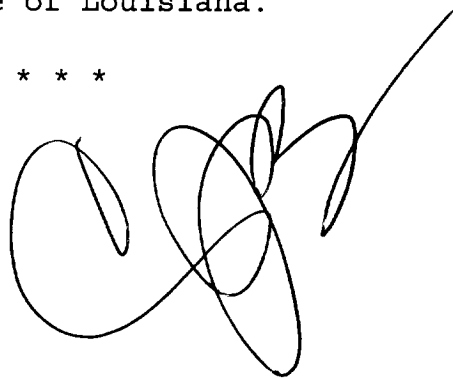
⁵ See, e.g., Phillips v. Offshore Logistics, 785 F.Supp. 1241 (S.D.Tex.1992) (holding that because the Supreme Court did not say that DOHSA claims cannot be removed from state court, it must have meant for DOHSA claims to be removable); Kearney v. Litton Precision Gear, 1988 WL 383575, 1988 U.S. Dist. LEXIS 16887 (C.D.Cal. March 17, 1988) (same).

The Court finds the reasoning of these other courts legally sound and concludes that Defendants have not met their burden of demonstrating that removal of the DOHSA claims was proper.

Conclusion

In light of the Court's determination that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards does not apply to seamen's employment contracts and that DOHSA does not confer federal question jurisdiction, the Court concludes that removal of this action from state court was improper. Accordingly, Plaintiffs' Motion to Remand (Rec. Doc. 3) is hereby **GRANTED**. This matter is hereby remanded to the 25th Judicial District Court for the Parish of Plaquemines, State of Louisiana.

* * * * *

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