ARTEMIS SHIPPING AND NAVIGATION COMPANY SA VERSUS TORMAR SHIPPING AS

CIVIL ACTION NO 03-217 c/w 03-219, 03-589 SECTION "I" (2)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

2003 U.S. Dist. LEXIS 22314

December 9, 2003, Decided
December 9, 2003, Filed; December 11, 2003, Entered

DISPOSITION: [*1] Motions for summary judgment of Defendants Atlas, Armada, Topal and VIS denied. Summary judgment granted in favor of Plaintiffs Artemis and Navimax.

CORE TERMS: claimant, ranking, attachment, arbitral, summary judgment, charter, maritime, bunkers, registry, rules of procedure, substantive right, rank, charter party, nonmoving party, admiralty law, pro rata, ranked, conveniens, Supplemental Rule, territory, choice of law, moving party, preempted, enforcing, sharing, setoff, binding arbitration, attaching creditor, matter in dispute, procedural law

COUNSEL: For Artemis Shipping and Navigation Company SA, PLAINTIFF (2:03cv217): Derek Anthony Walker, Daniel Alfred Tadros, Chaffe, McCall, Phillips, Toler & Sarpy, LLP, New Orleans, LA USA.

For Armada Bulk Carriers, Ltd, Atlas Shipping as, INTERVENORS (2:03cv217): Robert J Barbier, Robert P Blackburn, Terriberry, Carroll & Yancey, New Orleans, LA USA.

For Tormar Shipping as, DEFENDANT (2:03cv217): Tormar Shipping as, Lier Stranda Industriomrade, Drammen, NORWAY.

JUDGES: JOSEPH C. WILKINSON, JR., UNITED STATES MAGISTRATE JUDGE.

OPINIONBY: JOSEPH C. WILKINSON, JR.

OPINION:

ORDER AND REASONS

These consolidated cases arise out of the nonpayment of charter hire by TorMar Shipping AS ("TorMar"), a foreign corporation that has failed to pay charter hire under six different charter parties to the six claimants in these cases: Artemis Shipping and Navigation Company SA ("Artemis"), Atlas Shipping AS ("Atlas"), Armada Bulk Carriers, Ltd. ("Armada"), Topal Navigation ("Topal"), [*2] Navimax Corporation ("Navimax") and VIS Navigation Co., Inc. ("VIS").

I. PROCEDURAL BACKGROUND

Artemis filed its verified complaint against TorMar in C.A. No. 03-217 on January 22, 2003. Artemis claims that TorMar owes it $ 143,109.08. On January 23, 2003, Artemis obtained a writ of attachment, pursuant to Rule B of the Supplemental Rules for Certain Admiralty and Maritime Claims, against certain bunkers of fuel oil that were owned by TorMar and were carried aboard the M/V ROSINA TOPIC, a vessel that could be found in the Eastern District of Louisiana. C.A. No. 03-217, Record Doc. No. 3. The M/V

ROSINA TOPIC was chartered by TorMar from Topal.

Also on January 23, 2003, Navimax filed its verified complaint against TorMar in C.A. No. 03-219. Navimax claims that TorMar owes it $ 76,632.20. On the same date, Navimax obtained a writ of attachment against the bunkers aboard the M/V ROSINA TOPIC. C.A. No. 03-219, Record Doc. No. 3.

On February 3, 2003, the court ordered and confirmed the private sale of the bunkers pursuant to Supplemental Rule E(9), which permits the sale of property and the deposit of the proceeds of sale into the registry of the court "to be disposed of according [*3] to law." Topal bought the bunkers for $ 60,491.60 and placed the proceeds of the sale into the registry of the court. The court ordered all claimants to the proceeds to file their claims by March 10, 2003. The attachments of Artemis and Navimax to the bunkers were released and then attached to the proceeds of the sale. Record Doc. Nos. 24, 25.

The other four claimants subsequently intervened in C.A. No. 03-217 to assert their respective claims to and attach the funds in the registry of the court. Armada claims that TorMar owes it $ 138,240.91; Atlas claims $ 443,372.87; Topal claims $ 447,506.41; and VIS claims $ 44,658.29. Thus, with the exception of VIS, each separate claimant's claim considerably exceeds the funds in the registry of the court.

Each of the six separate charter parties between TorMar and the claimants provided that any dispute between TorMar and the other party should be submitted to binding arbitration in London. Topal, VIS and Navimax each obtained an arbitration award against TorMar in London. On June 23, 2003, this court confirmed the three arbitration awards against TorMar. The court deferred ruling on Navimax's simultaneous request for entry of judgment, "pending [*4] a ranking of liens." Record Doc. No. 67.

On June 26, 2003, this matter was referred to the undersigned United States Magistrate Judge for all proceedings and entry of judgment in accordance with 28 U.S.C. § 636(c) upon written consent of all parties who had appeared in the actions. Record Doc. No. 70.

Following a status conference, the court ordered the parties to file motions for summary judgment on the issue of what law governs the ranking of claims in this proceeding. Record Doc. No. 76. All parties timely filed their motions. Record Doc. Nos. 78, 79, 80, 81, and opposition memoranda. Record Doc. Nos. 83, 84, 85, 87.

TorMar made no appearance in any of the actions. Default judgment was entered in favor of Artemis and against TorMar in Civil Action No. 03-217 in the amount of $ 141,463.80. Record Doc. No. 90.

II. ANALYSIS

A. Summary Judgment Standards

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c) [*5] . The moving party bears the initial burden of identifying those portions of the pleadings and discovery in the record that it believes demonstrate the absence of a genuine issue of material fact, but it is not required to negate elements of the nonmoving party's case. Edwards v. Your Credit, Inc., 148 F.3d 427, 431 (5th Cir. 1998) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548(1986)).

> When a moving party alleges that there is an absence of evidence necessary to prove a specific element of a case, the nonmoving party bears the burden of presenting evidence that provides a genuine issue for trial. "There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted."

Thomas v. Barton Lodge II, Ltd., 174 F.3d 636, 644 (5th Cir. 1999) (citing Celotex, 477 U.S. at 322-23; quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)).

A fact is "material" if its resolution [*6] in favor of one party might affect the outcome of the action under governing law. Anderson, 477 U.S. at 248; Hamilton v. Segue Software Inc., 232 F.3d 473, 477 (5th Cir. 2000). An issue is "genuine" if the evidence is sufficient for a rational trier of fact to return a verdict for the nonmoving party. Id.

To withstand a properly supported motion, the nonmoving party who bears the burden of proof at trial must come forward with evidence to support the essential elements of its claim. National Ass'n of Gov't Employees v. City Pub. Serv. Bd., 40 F.3d 698, 712 (5th Cir. 1994) (citing Celotex, 477 U.S. at 321-23). "[A] complete failure of proof concerning an essential element of the nonmoving party's case renders all other facts immaterial." Celotex, 477 U.S. at 323.

The court must consider all evidence in the light most favorable to the nonmoving party. National Ass'n of Gov't Employees, 40 F.3d at 712-13. "Conclusory allegations unsupported by specific facts, however, will not prevent the award of summary judgment; 'the plaintiff [can] not rest on his allegations ... to get [*7] to a jury without any "significant probative evidence tending to support the complaint."'" Id. at 713 (quoting Anderson, 477 U.S. at 249).

B. The Arguments of the Parties

The summary judgment motions present an issue of law: what law governs the ranking of the parties' attachments of the proceeds of the sale of TorMar's bunkers. Each claimant's claim is based on TorMar's breach of its contractual obligations to pay charter hire to that claimant under the terms of six separate charter parties. Each charter party provides, in identical or substantially similar language, that it is to be governed by English law.

The Atlas charter party provides: "P 17. That should any dispute arise between Owners and the Charterers, the matter in dispute shall be referred to [binding arbitration in London.] ... Clause 39: Arbitration. This Charter Party shall be Governed by English Law." Record Doc. No. 81, Atlas and Armada's Joint Exh. A, Atlas Charter Party.

The Armada charter party provides: "That should any dispute arise between Owners and the Charterers, the matter in dispute shall be determined in accordance with Clause 48 ... Clause 48. Jurisdiction. [*8] The construction, validity and performance of this Charter Party shall be governed by English Law." Record Doc. No. 81, Atlas and Armada's Joint Exh. B, Armada Charter Party.

The Artemis, Navimax, Topal and VIS charter parties each contain the following identical language: "That should any dispute arise between [claimant] and [TorMar], the matter in dispute shall be referred to

[binding arbitration in London.] ... This charter party to be governed by and construed in accordance with English law." Record Doc. No. 80, Topal and VIS's Joint Motion for Summary Judgment, at pp. 2, 3, 4-5.

Analysis of the issue posed by the motions for summary judgment requires the court to address (1) the effect of the charter parties on the choice of law to be applied to ranking the claims, (2) the effect of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the Convention"), 9 U.S.C. § 201 et seq., on the choice of law to be applied to ranking the claims, and (3) how to rank the claims pursuant to the applicable law.

Atlas, Armada, Topal and VIS contend that English law applies to ranking of the claims pursuant to the charter parties and the [*9] Convention. They note that all claimants are essentially equal in rank; i.e., each has an unsecured claim and each has attached the sale proceeds in an in personam action under Rule B. None of the claimants has a maritime lien.

Topal and VIS argue in their joint motion that the Convention mandates that English law should apply to the ranking of all claims because all of the contracts are governed by English law and because the ranking of claims is a matter of substantive, rather than procedural, law. Topal and VIS contend that Article III of the Convention requires the court to honor the contractual choice of law and apply the substantive law of England to the priority of claims. If this argument is accepted, Topal and VIS have provided evidence that English law requires that the funds in the registry of the court be divided among all claimants pro rata in proportion to their claims.

Atlas and Armada adopt the arguments of Topal and VIS. Atlas and Armada also make an equitable argument that the court should distribute the funds pro rata because there is no meaningful way to distinguish the positions of the claimants and because admiralty is the law of equity.

In opposition to [*10] those arguments, Artemis and Navimax contend that Article III mandates that the federal procedural law of the United States applies to prioritizing the claims. They argue that the case law developed under Supplemental Rule B provides that the claimant who first attached the property is ranked first and that the first-ranked claimant should receive the entirety of the funds, which are insufficient to satisfy all of the claims. Artemis and Navimax attached the bunkers on the same day. Based on the current memoranda, it appears that they are willing to be ranked first jointly.

C. The Charter Parties' Choice of Law Is Irrelevant to Ranking

The unambiguous language of each charter party provides that a dispute between the parties to each contract shall be governed by English law. In the instant case, each party's dispute with TorMar has been or could be resolved either by an arbitral award or default judgment against TorMar. The issue of how to rank the competing claims is not a contractual issue. Thus, the choice of English law in the charter parties is irrelevant to the issue before the court.

D. The United States Is the "Territory Where the Award Is Relied Upon"

Article III [*11] of the Convention provides: "Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles." 9 U.S.C. § 201, Art. III (emphasis added). Topal and VIS contend that the emphasized language requires this court to enforce and rank the arbitral awards in

accordance with English law. Artemis and Navimax argue that the same language means that United States procedural law should apply because the parties with arbitral awards are "relying upon" the awards by enforcing them in the United States.

Topal and VIS provide no legal authority for their interpretation that the language in the Convention concerning "the territory where the award is relied upon" means England. To the contrary, it is clear that "the territory where the award is relied upon" is the United States, where the parties with awards seek to enforce them. "The proceedings for enforcement of foreign arbitral awards are subject to the rules of procedure that are applied in the courts where enforcement is sought." In re Arbitration between [*12] Monegasque De Reassurances S.A.M. v. Nak Naftogaz of Ukraine, 311 F.3d 488, 495 (2d Cir. 2002) (emphasis added); accord Daihatsu Motor Co., Inc. v. Terrain Vehicles, Inc., 1992 U.S. Dist. LEXIS 7804, No. 92 C 1589, 1992 WL 133036, at *2, 3 (N.D. Ill. 1992) (Hart, J.).

In reaching this conclusion, the Second Circuit examined the legislative history of the Convention and found that the drafters' determination "to apply the various procedural rules' relied upon by the courts of the several signatory nations where enforcement was to be sought was reached only after proposals were made to establish uniform standards." In re Monegasque, 311 F.3d at 496 (emphasis added) (citing Leonard V. Quigley, Accession by the United States to the United Nations Convention on the Recognition & Enforcement of Foreign Arbitral Awards, 70 Yale L.J. 1049, 1065 (1961)). "It therefore seems clear that 'the Contracting States have been left free to establish different procedures for the recognition and enforcement of foreign awards and domestic awards ....'" Id. (quoting Quigley, 70 Yale L.J. at 1065)(emphasis added). Finally, the appellate court [*13] stated that "the signatory nations simply are free to apply differing procedural rules ... Whatever rules of procedure for enforcement are applied by the enforcing state must be considered acceptable, without reference to any other provision of the Convention." Id. (emphasis added).

Therefore, pursuant to the Convention, "the rules of procedure" of the United States apply to enforcement in this country of the arbitral awards obtained by Topal, VIS and Navimax.

Topal and VIS next argue that English law applies because the ranking of claims is substantive, not procedural. If ranking is substantive, then Article III does not require that the court apply United States law to that issue. Article III requires only that the enforcing country "enforce [the award] in accordance with [its] rules of procedure." 9 U.S.C. § 201, Art. III; see In re Monegasque, 311 F.3d at 495 ("The proceedings for enforcement of foreign arbitral awards are subject to the rules of procedure that are applied in the courts where enforcement is sought ... [because] the doctrine of forum non conveniens [is] procedural rather than substantive," it applies [*14] in this proceeding to confirm a foreign arbitral award pursuant to Article III.) (internal quotation omitted).

Topal and VIS admit in their memorandum that attachment under Supplemental Rule B is a procedural device to obtain security for an eventual award. Neither Rule B nor Rule E(9) contains any ranking mechanism. However, the case law has developed a system for ranking competing claims under Rule B, which ranks the claim of the first attaching creditor first, to the exclusion of all other claimants if the attached property is insufficient to satisfy lower-ranked claims. Topal and VIS contend that the judge-made rules do not apply in this case because the ranking law is substantive and thus not applicable under the Convention.

Topal and VIS cite Federal Courts, 32 Am. Jur. 2d § 399 (1995), for the

proposition that "substantive law defines the remedy and the right, while the law of procedure defines the modes and conditions of the application of the one to the other." They note that procedural rules do "not bear on the substantive right to recover." American Dredging Co. v. Miller, 510 U.S. 443, 454, 127 L. Ed. 2d 285, 114 S. Ct. 981 (1994). They argue that ranking affects [*15] their substantive rights to recover and is therefore substantive in nature.

Topal and VIS cite Aurora Maritime Co. v. Abdullah Mohamed Fahem & Co., 85 F.3d 44 (2d Cir. 1996), in which the Second Circuit affirmed the denial of a motion by a bank, HSBC, to vacate two claimants' earlier-filed Supplemental Rule B attachments of defendant's funds on deposit in the bank. HSBC argued that it was entitled under New York law to a setoff of the funds in defendant's accounts with it to repay defendant's debt to HSBC and that the setoff outranked the other creditors' maritime attachments. The court held that the state remedy was preempted by federal admiralty law.

Topal and VIS rely on the following portion of the Second Circuit's opinion to argue that ranking of attachments is substantive.

> The rationale underlying maritime attachment is twofold. First, attachment provides a means to assure satisfaction if a suit is successful. HSBC seizes on this fact to argue that Rule B is merely a "procedural" rule that does not affect a litigant's "substantive right to recover," and thus does not warrant preemption under American Dredging. n1 However, this argument ignores the second [*16] purpose of maritime attachment, namely, to insure a defendant's appearance in an action, an aspect of attachment inextricably linked to a plaintiff's substantive right to recover ...
>
> Without maritime attachment, defendants, their ships, and their funds could easily evade the enforcement of substantive rights of admiralty law. By permitting a bank to set off amounts owed to it against a defendant's account notwithstanding an earlier maritime attachment, therefore, Section 151 threatens to undermine the power of federal admiralty courts sitting in New York to enforce substantive admiralty law.

Id. at 48 (quotation and citations omitted) (emphasis added).

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n1 In American Dredging, a Jones Act plaintiff brought an in personam action in state court. The Supreme Court held that Louisiana's forum non conveniens law, which conflicted with federal forum non conveniens law, was not preempted by federal admiralty law. One reason for the lack of preemption was that the doctrine "is procedural rather than substantive." American Dredging, 510 U.S. 453, 114 S. Ct. at 988. Because "forum non conveniens does not bear upon the substantive right to recover, and is not a rule upon which maritime actors rely in making decisions about primary conduct--how to manage their business and what precautions to take," the Louisiana law was not preempted. Id. at 988-89.

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Aurora Maritime Co. does not assist Topal and VIS. First, the facts and the issue in that case are distinguishable from the instant action. In that

case, the bank was trying to use state law to vacate previous maritime attachments; the issue was whether the setoff laws of the individual states could preempt federal admiralty law. That is not the case here, where the sole issue is the ranking of otherwise equal attachments under maritime law. Second, the appeals court did not hold that the sole purpose of Rule B was to protect substantive rights, nor that the first purpose of Rule B was not procedural.

I find that the priority of claimants, each of whom has attached a defendant's property under Rule B, is not substantive. Each claimant's substantive right arises from TorMar's breach of contract. Contract law gives the claimants a right to recover damages. The contracts and the Convention provide the remedies of damages and an arbitral award. How the claims should be ranked has no effect on the claimaints' substantive right to recover from TorMar. See, e.g., Banco de Credito Industrial S.A. v. Tesoreria General, 990 F.2d 827, 832 (5th Cir. 1993) (citing [*18] Brandon v. S.S. Denton, 302 F.2d 404, 410-11 (5th Cir. 1962)) ("After Spanish law determines ... the substantive nature [of Tesoreria General's claim], the law of the forum (U.S.) will rank Tesoreria General's lien claim in the pecking order of the sale proceeds distribution."). If the funds in this court's registry are insufficient to satisfy the damages claimed by the lower-ranked claimants, those claimants can take their arbitral awards and their damages claims to another forum where TorMar has assets and pursue their right to recover. That right is neither extinguished nor affected by the merely procedural ranking of claims in this proceeding.

Because the Convention requires the application of United States procedural law and because the ranking of claims is procedural, the court applies the ranking system developed by the district courts under Rule B. The general rule is that the first maritime attachment in time is the first in right. A. Coker & Co. v. National Shipping Agency Corp., 1999 U.S. Dist. LEXIS 17415, No. 99-1440, 1999 WL 1009808, at *2 (E.D. La. Nov. 5, 1999) (Vance, J.) (citing Triton Container Int'l, Ltd. v. Baltic Shipping Co., 1995 U.S. Dist. LEXIS 15443, No. 95-0427, 1995 WL 608485, [*19] at *4 (E.D. La. Oct. 12, 1995) (Sear, C.J.); Starboard Venture Shipping v. Casinomar Transp, 1993 U.S. Dist. LEXIS 15891, 1993 WL 464686 (S.D.N.Y. Nov. 9, 1993); Antria Shipping Co. v. Triton Int'l Carriers, Ltd., 1980 A.M.C. 681 (E.D. Pa. 1978), aff'd, 609 F.2d 500 (3d Cir. 1979); Grant Gilmore & Charles L. Black, Jr., The Law of Admiralty § 9-1, at 586 (1975)). Thus, "within the class of attaching creditors[,...] the first to attach prevails. And since there is no dispute that Triton was the first attaching creditor in this action, Triton is entitled to be paid in preference to subsequent attaching creditors." Triton Container Int'l., 1995 U.S. Dist. LEXIS 15443, 1995 WL 608485, at *4.

The court in Triton Container declined the invitation of the lower-ranked creditor "to depart from the general rule and use its equity power to order pro rata sharing among attaching creditors ... [The other creditor] has shown no reason, such as fraud, collusion, or bad faith on the part of Triton, which would justify a pro rata sharing in this case." Id. I similarly find that Atlas and Armada have provided no justification to resort to equitable pro [*20] rata sharing in the instant case.

CONCLUSION

Accordingly, IT IS ORDERED that the motions for summary judgment of Atlas, Armada, Topal and VIS are DENIED.

IT IS FURTHER ORDERED that summary judgment is GRANTED in favor of Artemis and Navimax and that the first attaching creditor is entitled to the funds in the registry of the court.

Artemis and Navimax attached the bunkers on the same day. Based on their joint motion for summary judgment, it appears that they are willing to be ranked first jointly. If this is correct, they should so advise the court by a joint letter no later than December 18, 2003, and judgment will be entered in their favor.

However, if that assumption is not correct, the court will give Artemis and Navimax an opportunity to move for summary judgment on the issue of which of them is to be ranked first. Their motions, if any, must be filed no later than January 6, 2004. Opposition memoranda, if any, must be filed no later than January 13, 2004.

New Orleans, Louisiana, this 9th day of December, 2003.

JOSEPH C. WILKINSON, JR.

UNITED STATES MAGISTRATE JUDGE