UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

KAREN MCGRATH, ET AL.	**CIVIL ACTION**
VERSUS	**NO: 06-11413-CJB-SS** **c/w 07-318; 08-1475; 08-4044**
CHESAPEAKE BAY DIVING, INC., ET AL.	

ORDER

PLAINTIFF'S MOTION FOR LEAVE TO FILE THIRD SUPPLEMENTAL AND AMENDING COMPLAINT (Rec. doc. 363)

GRANTED IN PART AND DENIED IN PART

Before the undersigned is the motion of the plaintiff, Brian Bradford ("Bradford"), for leave to file a third supplemental and amending complaint to seek punitive damages regarding maintenance and cure from Bisso Marine Co., Inc. ("Bisso Marine") and 2-W Diving, Inc. ("2-W Diving) and punitive damages from the non-employer defendants under the general maritime law. Rec. doc. 400 at 3. He does not seek leave to assert claims for punitive damages under the Jones Act.[1] Bisso Marine and 2-W Diving, Inc. did not file oppositions. Bradford alleges that he is their general employee or borrowed servant. Atlantic Sounding Co., Inc. v. Townsend, ___U.S. ____, 129 S.Ct. 2561 (June 25, 2009), held that a seaman was entitled, as a matter of general maritime law, to seek punitive damages for his employer's alleged willful and wanton disregard of its maintenance and cure obligation. The Supreme Court abrogated Guevara v. Maritime Overseas Corp., 59 F.3d 1496 (5th Cir. 1995) (punitive damages were not available in cases of willful non-payment in any

[1] He also seeks leave to amend to correct the name of Entech Enterprises, Inc. to Environmental Technology of America, Inc. The motion is granted for this purpose.

action for maintenance and cure under the general maritime law). Bradford's motion to assert the claims for punitive damages regarding maintenance and cure from Bisso and 2-W Diving is granted.

The remaining issue is whether Atlantic Sounding permits Bradford to seek punitive damages from the non-employer defendants under the general maritime law.[2] Bradford contends that Atlantic Sounding holds that the common law tradition of punitive damages extends to maritime claims and overrules contrary interpretations of Miles v. Apex Marine, Corp., 498 U.S. 19, 111 S.Ct. 317 (1990). He argues that his amended complaint will be in accord with the pre-Miles rule for punitive damages as observed in Dyer v. Merry Shipping Company, Inc., 650 F.2d 622 (5th Cir. 1981). In Merry Shipping, the Fifth Circuit held that,

> [P]unitive damages may be recovered under general maritime law upon a showing of willful and wanton misconduct by the shipowner in the creation or maintenance of unseaworthy conditions. We do not now decide whether such damages may be recovered under the Jones Act.

Id. at 623. The opposing parties contend that Atlantic Sounding is concerned with a single issue – punitive damages in maintenance and cure claims. They urge that the decision did not overrule the Fifth Circuit's decision in Murray v. Anthony J. Bertucci Const. Co., Inc., 958 F.2d 127 (5th Cir. 1992) (neither the spouse of injured seaman nor his children had a claim for loss of society under general maritime law), and Scarborough v. Clemco Industries, 391 F.3d 660 (5th cir. 2004) (plaintiffs could not recover nonpecuniary damages against non-employer third-party in maritime wrongful death action). They contend that the motion should be denied as futile as to them. A district court

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[2] The following parties filed oppositions: Chesapeake Bay Diving, Inc. (Rec. doc. 390); International Subsea, Inc. ("International Subsea") (Rec. doc. 388); Global Enterprises, LLC and Maritime Management Services, Inc. (Rec. doc. 387); Environmental Technologies of America, Inc.(Rec. doc. 391); and Marine Response Consultants, Inc. (Rec. doc. 386). International Subsea contends that because of age of the case and the need to re-depose persons if Bradford is permitted to assert claims for punitive damages, the motion should be denied. The fact that Atlantic Sounding was decided at an advanced stage of this proceeding, does not defeat Bradford's motion for leave to amend.

is properly within its discretion to deny a motion for leave to amend if the amendment is futile. Stripling v. Jordan Production Company, L.L.C., 234 F.3d 863, 873 (5th Cir. 2000).

In 1990, the Supreme Court decided Miles and held that there is a general maritime cause of action for the wrongful death of a seaman and the damages recoverable in such an action did not include loss of society. It said:

> The Jones Act also precludes recovery for loss of society in this case. The Jones Act applies when a seaman has been killed as a result of negligence, and it limits recovery to pecuniary loss. The general maritime claim here alleged that Torregano had been killed as a result of the unseaworthiness of the vessel. It would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action in which liability is without fault than Congress has allowed in cases of death resulting from negligence. We must conclude that there is no recovery for loss of society in a general maritime action for the wrongful death of a Jones Act seaman.

111 S.Ct. at 326-26. It added that its decision restored "a uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act, or general maritime law." Id. at 326 (emphasis added).

In 1992, the Fifth Circuit decided Murray. It concluded that Miles, "properly extended," precluded an injured seaman's spouse from recovering loss of society. 958 F.2d at 128. The defendant argued that since Miles held that there was no recovery of nonpecuniary damages in a general maritime law action for wrongful death of a seaman there could be no recovery of such damages in a seaman's personal injury action. Id. at 129-30. Based on Miles, it concluded that it was required to look to the Jones Act to consider the scope of the damage award for a seaman's injury. Id. at 131. The Jones Act limits a seaman's recovery for injury to pecuniary losses and precludes recovery for nonpecuniary losses, such as loss of society. Id. at 131. The Fifth Circuit said:

> If we recognize Mrs. Murray's loss of society claim, we would create the very sort of anomaly *Miles* sought to avoid. Therefore, we follow the Supreme Court's lead in *Miles* and hold that the spouse of an injured seaman has no cause of action for loss of society under the general maritime law.

Id. at 132 (footnote omitted). Murray is silent about the issue of punitive damages.

In 1995, the Fifth Circuit decided Guevara. This *en banc* decision overruled Holmes v. J. Ray McDermott & Co., 734 F.2d 1110 (5th Cir. 1984) (an award of punitive damages under the general maritime law may be made when an employer willfully and callously refuses to pay maintenance or cure to an injured seaman). Guevara only addressed the issue of whether punitive damages were still available in maintenance and cure cases. 59 F.3d at 1499. It discussed the legal developments since Holmes v. J. Ray McDermott and their effect. It stated that although Merry Shipping dealt with punitive damages in an unseaworthiness context, its analysis was wholly applicable to maintenance and cure cases. 59 F.3d at 1504. It described the key proposition in Merry Shipping as: "It does not follow . . . that if punitive damages are not allowed under the Jones Act, they should also not be allowed under general maritime law." 650 F.2d at 626. The Fifth Circuit stated that:

> After *Miles,* it is clear that *Merry Shipping* has been effectively overruled. Its holding-that punitive damages are available in a wrongful death action brought by the representative of a seaman under the unseaworthiness doctrine of the general maritime law-is no longer good law in light of the *Miles* uniformity principle because, in the factual scenario of *Merry Shipping,* the Jones Act damages limitations control.

Guevara, 59 F.3d at 1496 (emphasis added).[3]

[3] "The status of the law of the Fifth Circuit post-*Miles* and post-*Guevara* is that because punitive damages do not compensate pecuniary losses, they are not recoverable under the general maritime law, whether sought by a seaman against his employer or a non-seaman." In re Diamond B Marine Services, Inc., 2000 WL 222847, *1 (E.D.La.)(Schwartz, J.) (denying motion for leave to assert claims for punitive damages under the general maritime law).

In 2004, the Fifth Circuit decided Scarborough. It framed the issue before it as whether the Miles uniformity principle prevented the recovery of nonpecuniary damages in a suit brought by a Jones Act seaman or his survivors against a non-employer third-party. Id. at 666. It said that, "[t]he plain language of *Miles* encompasses the factual scenario before the court today." Id. at 666. It cited the Guevara procedures for the determination of whether the Miles uniformity principle limits the available damages in a particular case. Id. at 667. It found that the facts before it may not meet the Guevara court's principles for application of Miles. Id. at 668. Nevertheless it found that Guevara instructed that nonpecuniary damages were not available. It stated that:

> The facts in this case are analogous to causes of action brought pursuant to the Jones Act. It would be improper for this court to allow the surviving spouse and heirs of a Jones Act seaman to recover nonpecuniary damages in this case when Congress has disallowed the recovery of identical damages in a Jones Act suit. The genesis of Appellants' claims is maritime through and through. *Miles* plainly limits recovery to pecuniary damages. We will not retreat from the bright line directive of *Miles.* The *Miles* opinion is concerned with uniformity in the damages recoverable by a Jones Act seaman and his survivors, not with uniformity of the types of damages to which various defendants are subjected.

Id. at 668.

In Atlantic Sounding, the Supreme Court stated that:

> The settled legal principles . . . establish three points central to resolving this case. First, punitive damages have long been available at common law. Second, the common-law tradition of punitive damages extends to maritime claims. And third, there is no evidence that claims for maintenance and cure were excluded from this general admiralty rule.

129 S.Ct. at 2569. It noted that Miles did not address either maintenance and cure actions in general or the availability of punitive damages for such actions. Id. at 2572. Although it recognized that the reasoning of Miles remained sound, it found that the application of that reasoning did not lead to the conclusion that punitive damages were not available for maintenance and cure claims. Id. at

2572. It held that,

> The availability of punitive damages for maintenance and cure actions is entirely faithful to these general principles of maritime law, and no statute casts doubt on their availability under general maritime law.

Id. at 2573 (emphasis added). It did not address whether the Jones Act, by incorporating the provisions of the Federal Employers' Liability Act (46 U.S.C. § 30104(a)), prohibited the recovery of punitive damages in actions under that statute. Id. at 2575, n. 12.

Atlantic Sounding was considered by In re Maryland Marine, Inc., 2009 WL 2047269 (E.D.La.) (Berrigan, J.). The relatives and the estates representing passengers in a pleasure craft, who died in a collision with a tug-barge in Alabama navigable waters, asserted claims for loss of society. The issue was whether the claims were available under the general maritime law. The Court held that as a result of Atlantic Sounding "a Jones Act seaman can only recover pecuniary damages in a wrongful death action under the Jones Act, he can recover punitive damages in a maintenance and cure general maritime law action." Id. at *4. The claimants argued that this demonstrated that "the Jones Act and DOHSA do not constitute caps on the types of available damages for wrongful deaths at sea, contrary to the Miles uniformity principle, which Claimants contend has been widely misconstrued." Id. at *4 (brackets and quotation marks omitted). The Court rejected this argument and said, in part, "the *Atlantic Sounding* holding rests on the tradition of awarding punitive damages at common law for particularly reprehensible conduct, and the fact that the tradition extends to claims under the general maritime law. Id. at *4. The Court found that support for the proposition that claimants are entitled to loss of society damages is lacking in both current case law and statute. Id. at *4. The Court suggested the possibility of presenting the loss of society claim as a separate part of the damages sought in the case so as to avoid a re-trial "in the

event the law changes." Id. at *5.

Atlantic Sounding did not overturn Miles. The issue raised by Bradford is whether Atlantic Sounding demonstrates that the Miles uniformity principle was incorrectly applied in Scarborough. In its discussion of Miles, the Supreme Court said "[t]he Court concluded that Congress' judgment must control the availability of remedies for wrongful-death actions brought under general maritime law." 129 S.Ct. at 2572. It held,"[t]he reasoning of *Miles* remains sound." Id. at 2572. The decision does not demonstrate that the application of the Miles uniformity principle in Scarborough was incorrect. Bradford's motion for leave to amend to assert claims for punitive damages under the general maritime law against the non-employer defendants is futile and must be denied.

IT IS ORDERED that Bradford's motion for leave to file third supplemental and amending complaint (Rec. doc. 363) is GRANTED in PART and DENIED in PART in accord with the terms of this order.

New Orleans, Louisiana, this 21st day of August, 2009.

SALLY SHUSHAN
United States Magistrate Judge

West Reporter Image (PDF)

620 F.Supp.2d 747

Motions, Pleadings and Filings
Judges and Attorneys

United States District Court,
E.D. Louisiana.
Karen McGRATH, et al.
v.
CHESAPEAKE BAY DIVING, et al.

Civil Action Nos. 06-11413, 08-1475, 08-4044.
May 22, 2009.

Background: Diver employed by salvage subcontractor who was injured during operation to salvage platforms toppled by hurricanes brought action against platforms' owner, salvage contractor and subcontractors, charterer of vessel used in operation, vessel's owner, and vessel's operator. Vessel's owner moved for partial summary judgment on cross-claim against charterer for defense and indemnification.

Holdings: The District Court, Carl J. Barbier, J., held that:
(1) plain language in charter's indemnity provision required charterer to indemnify vessel's owner only for claims made by charterer's employees, contractors, and subcontractors, and
(2) genuine issues of material fact precluded summary judgment as to whether charterer was required to defend and indemnify vessel's owner against claims brought by diver.

Motion denied.

West Headnotes

[1] KeyCite Citing References for this Headnote

208 Indemnity
208II Contractual Indemnity
208k26 Requisites and Validity of Contracts
208k27 k. In General. Most Cited Cases

208 Indemnity KeyCite Citing References for this Headnote
208II Contractual Indemnity
208k26 Requisites and Validity of Contracts
208k30 Indemnitee's Own Negligence or Fault
208k30(8) k. Maritime Cases. Most Cited Cases

Under federal maritime law, indemnity clauses in maritime contracts are generally enforceable, even for a party's own negligence, as long as the indemnity provision is clear, express, and unambiguous.

[2] KeyCite Citing References for this Headnote

208 Indemnity
208II Contractual Indemnity
208k33 Particular Cases and Issues
208k33(8) k. Maritime Cases. Most Cited Cases

A maritime contract containing an indemnity agreement should be read as a whole and its words given their plain meaning unless the provision is ambiguous.

[3] KeyCite Citing References for this Headnote

208 Indemnity
208II Contractual Indemnity
208k33 Particular Cases and Issues
208k33(8) k. Maritime Cases. Most Cited Cases

Courts should construe an indemnity clause in a maritime contract to cover all losses which reasonably appear to have been within the parties' contemplation.

[4] KeyCite Citing References for this Headnote

208 Indemnity
208II Contractual Indemnity
208k33 Particular Cases and Issues
208k33(8) k. Maritime Cases. Most Cited Cases

An indemnity provision in a maritime contract should not be read to impose liability for those losses or liabilities which are neither expressly within its terms nor of such a character that it can be reasonably inferred that the parties intended to include them within the indemnity coverage.

[5] KeyCite Citing References for this Headnote

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k176 Questions for Jury
95k176(1) k. In General. Most Cited Cases

Interpretation of the terms of a maritime contract is a matter of law.

[6] KeyCite Citing References for this Headnote

208 Indemnity
208II Contractual Indemnity
208k33 Particular Cases and Issues
208k33(8) k. Maritime Cases. Most Cited Cases

Plain language of terms of indemnity provision in charter for vessel used in operation to salvage toppled platforms required charterer to indemnify vessel's owner only for claims made by charterer's employees, contractors, and subcontractors, and thus charterer would be required to indemnify owner against injury claims brought by employee of platform owner's salvage subcontractor only if platform owner's salvage subcontractor was deemed a subcontractor of charterer pursuant to sublease provision in charter.

[7] KeyCite Citing References for this Headnote

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases
170Ak2512 k. Shipping and Seamen, Cases Involving. Most Cited Cases

Genuine issues of material fact existed as to whether platform owner's salvage subcontractor could be deemed a contractor of salvage vessel charterer, precluding summary judgment as to whether charterer was contractually required to defend and indemnify vessel's owner against claims brought by salvage contractor's employee for injuries allegedly sustained during salvage operation. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.App.(2006 Ed.)

***748** Bobby J. Delise, Delise & Hall, New Orleans, LA, Alton Jerold Hall, Jr., Delise & Hall, Covington, LA, for Karen McGrath.

John Daniel Rayburn, Jr., Susan A. Daigle, Daigle, Jamison & Rayburn, LLC, Lafayette, LA, for Chesapeake Bay Diving.

ORDER AND REASONS

CARL J. BARBIER, District Judge.

Before the Court is defendants Global Enterprises, LLC, formerly **Global Explorer**, LLC (collectively "Global") and Maritime Management Services, Inc.'s **Motion for Partial Summary Judgment (Rec. Doc. 133).** This motion is opposed. Upon review of the record, the memoranda of counsel, and the applicable law, this Court now finds, for the reasons set forth below, that the motion should be denied.

**749 Background Facts*

This case stems from an accident during a salvage operation in the Gulf of Mexico on or about August 29, 2006. The goal of the salvage operation was to recover several platforms owned by the Rowan Companies, Inc. ("Rowan") that had been toppled during Hurricanes Katrina and Rita. During the operation, diver Chandon McGrath sustained fatal injuries. Divers Brian Bradford and Jason Pope were injured while attempting to rescue McGrath. McGrath's parents filed suit in this Court on December 29, 2006. Pope filed suit in this Court on January 16, 2007. Bradford filed suit in this Court on April 1, 2008 and in the District of South Carolina on September 22, 2006. The South Carolina case was transferred to this district and all of the Pope and Bradford cases were consolidated with the McGrath case. The McGrath and Pope cases have subsequently settled.

In undertaking the salvage operation, Rowan contracted with several other entities. The main salvage contractor was Bisso Marine, LLC ("Bisso") who entered into a contract with Rowan. Global Mem., Rec. D. 133. Bisso provided some of its own divers for the operation and contracted with Chesapeake Bay Diving, Inc. ("Chesapeake") and 2-W Diving, Inc. ("2-W") to provide additional divers. *Id.* Bradford was employed by 2-W. Rowan also entered into a Master Service Agreement ("MSA") with International Subsea, Inc. ("Subsea"). *Id.* Global and Subsea dispute the purpose and requirements of this MSA. Subsea in turn chartered a vessel from Global, the M/V **GLOBAL EXPLORER**, pursuant to a Master Time Charter (the "Charter"). *Id.* The Charter provided that Maritime Management Services, Inc. ("Maritime Management") would be the Operator of the vessel. *Id.*

All of the entities discussed above who were involved in the salvage operation are defendants in this consolidated action. By Order

of this Court on July 1, 2008 it was deemed that each defendant in the Bradford litigation had filed a cross claim against every other defendant for contribution and/or indemnity and that each defendant had answered denying these claims. Rec. D. 108. Global has filed the present Motion for Partial Summary Judgment on its cross claims against Subsea to force Subsea to defend and indemnify Global against all claims asserted by Bradford.

The Parties' Arguments

Global has filed this motion arguing that under the Charter, Subsea is contractually obligated to defend and indemnify Global against the Bradford claims. Global argues that the BIMCO Uniform Time Charter Party for Offshore Vessels, named "SUPPLYTIME 89" was incorporated in the Charter. Clause 17(a) of that agreement authorizes Subsea to sublet, assign, or loan the M/V **GLOBAL EXPLORER** to another entity with Global's approval. If such a sublease, assignment, or loan occurs then Clause 17(a) provides that contractors of the entity subletting the vessel are deemed contractors of Subsea for all purposes of the Charter. Global further argues that Clause 12(b) of the SUPPLYTIME 89 provides that Global is not responsible for personal injury damage claims made against it by Subsea's employees, contractors, or subcontractors and that Subsea is required to defend and indemnify Global against such claims even if the injury was caused by Global or the unseaworthiness of the M/V **GLOBAL EXPLORER. Global** contends that Subsea chartered the vessel to provide it to Rowan pursuant to the MSA between Subsea and Rowan. As a result, Global asserts that Clause 17 (a) is activated and Rowan's contractors and subcontractors (i.e. Bisso, Chesapeake, and 2-W) are ***750** deemed contractors and subcontractors of Subsea. Bradford was the employees of one of these subcontractors. Thus, pursuant to Clause 12(b) Subsea must defend and indemnify Global from these claims. Additionally, Global argues that Clause 12(e)(ii) of the SUPPLYTIME 89 provides that the requirement to defend and indemnify extends to Maritime Management as the Operator of the vessel.

Subsea has opposed the motion. Subsea objects to several conclusory statements in the Global motion that they contend are an inaccurate recitation of the facts or a mischaracterization of the Charter and MSA. Subsea argues that they did not in fact subcontract with Chesapeake or 2-W and thus Clause 12(b) of the SUPPLYTIME 89 does not require them to defend and indemnify. Furthermore, Subsea argues that they never sublet, assigned, or loaned the vessel to Rowan and that the MSA between Subsea and Rowan did not call for such a transfer in rights to the vessel, so as a matter of law the MSA cannot be interpreted to be a sublease, assignment, or loan of the vessel. As a result, Subsea contends that Clause 17(a) of the SUPPLYTIME 89 does not operate to deem Bisso, Chesapeake, or 2-W a contractor or subcontractor of Subsea. Additionally, the language of Clause 17(a) only references contractors of the assignee being deemed contractors of Subsea. Chesapeake and 2-W were subcontractors and thus Subsea argues that even if it sublet, assigned, or loaned the vessel to Rowan they would not have to defend and indemnify for injuries to employees of Rowan's subcontractor because those subcontractors would not be deemed subcontractors of Subsea. Lastly, Subsea argues that at the very least there are genuine issues of material fact regarding whether the MSA constitutes a sublease, assignment, or loan of the vessel. While a letter attached to the MSA discusses the terms for use of two specific vessels, there is no discussion of terms for the use of the M/V **GLOBAL EXPLORER**. Subsea suggests that there is an addendum to the MSA discussing these terms, but that those terms are not known at this time which prevents summary judgment. Subsea also argues that while Clause 17(a) of the SUPPLYTIME 89 requires that Global approve any sublease, assignment, or loan of the vessel, there is no evidence that such approval was ever given, further calling into doubt whether there ever was a sublease, assignment, or loan.

Global submitted a reply memorandum arguing that Subsea did in fact sublease, assign, or loan the vessel. Global contends that based on the MSA Subsea subleased the vessel to Rowan for the purposes of diving and salvage support. Global also contends that based on the MSA Subsea assigned the vessel and loaned the vessel to Rowan. Global's arguments focus on the Special Provisions contained in a letter addendum dated January 25, 2006 which modified the MSA. Global asserts that the Special Provisions create an obligation for Subsea to provide Rowan with a vessel and that this obligation is the reason that Subsea chartered the M/V **GLOBAL EXPLORER**. Although the Special Provisions that Global references do not pertain to the M/V **GLOBAL EXPLORER** and instead discuss the use of two different vessels and state that if a different vessel is to be used the terms of the Special Provisions are to be renegotiated, Global maintains that the fact that the renegotiated terms for the M/V GLOBAL EXPRESS have not been identified by any party is not material. Global also argues in its reply memorandum that the Charter between Global and Subsea provides explicit approval for the sublease, assignment, or loan of the vessel to Rowan because the Charter identifies the same purpose for the use of the vessel as does the MSA. Additionally, the burden ***751** was on Subsea to notify Global of any sublease, assignment, or loan, and if this did not happen then Subsea cannot base their argument on a lack of approval from Global. Global further argues that although Clause 17(a) only references contractors, it was within the contemplation of the parties that Subsea would be responsible for all diving activities in which the vessel was used, including those of contractors and subcontractors.

Subsea provided a surreply memorandum to further press its arguments. Subsea contends that the MSA clearly states that Subsea is to provide services, not a vessel, to Rowan. The MSA explicitly states as much in the "Use of Vessels" section. The MSA provides that Subsea is to utilize a vessel to provide services and that Subsea is an independent contractor that has control of its work. There is no language in the MSA that suggests a sublease, assignment, or loan of the vessel. Furthermore, Global cannot cite to any contractual terms of the MSA that pertain to the M/V **GLOBAL EXPLORER**. The M/V **GLOBAL EXPLORER** was a substitute vessel and the MSA did no more than contemplate the use of a substitute vessel. The terms for the use of a substitute vessel were specifically to be renegotiated, however Global has not identified the renegotiated terms that applied to the M/V **GLOBAL EXPLORER**. Additionally, Subsea argues that the Charter could not have explicitly approved of a sublease, assignment, or loan simply by including the same work description as the MSA because there is no evidence that the MSA identified by Global even applies to the M/V **GLOBAL EXPLORER** because it was a substitute vessel with the terms to be renegotiated. Any lack of evidence regarding notice of a sublease, assignment, or loan begs the question as to whether such a sublease, assignment, or loan ever happened. Subsea asserts that the evidence that is necessary here is evidence of Global's approval of such a sublease, assignment, or loan, not simply evidence that Global was given notice of such an action. Subsea reasserts its argument that since there was no sublease, assignment, or loan, none of Rowan's contractors may be deemed contractors of Subsea. Additionally, even if there was a sublease, assignment, or loan the plain language of Clause 17(a) does not include subcontractors and prevents deeming certain parties to be subcontractors.

Subsequently, Global submitted an amended memorandum in support of the motion that clarified certain factual issues. Subsea also submitted an amended opposition memorandum. The substantive arguments made by the parties in the amended memoranda are the same as those made in the original memoranda discussed above.

Discussion

Summary judgment is appropriate if "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). If that burden has been met, the nonmoving party must then come forward and establish the specific material facts in dispute to survive summary judgment. *Matsushita*

Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

The requirement that Subsea defend and indemnify Global, if such a requirement exists, would be a contractual requirement of the Charter. As a preliminary step, it must be determined whether the Charter is a maritime contract governed by federal law. The Supreme Court has noted that the key determination is "the nature of the contract, as to whether ***752** it has reference to maritime service or transactions." Kossick v. United Fruit Co., 365 U.S. 731, 735, 81 S.Ct. 886, 6 L.Ed.2d 56 (1961). The Fifth Circuit has further clarified that "[a] principal determinant is the relation the contract 'bears to the ship.... A contract relating to a ship in its use as such, or to commerce ... is subject to maritime law.' " Theriot v. Bay Drilling Corp., 783 F.2d 527, 538 (5th Cir.1986) (quoting 1 BENEDICT ON ADMIRALTY § 183 (7th ed. 1985)). The parties to this motion do not dispute, and there can be little doubt, that the Charter is a maritime contract and thus is governed by federal law.

[1] [2] [3] [4] [5] Under federal maritime law, indemnity clauses in maritime contracts are generally enforceable, even for a party's own negligence, as long as the indemnity provision is clear, express, and unambiguous. *See* Corbitt v. Diamond M. Drilling Co., 654 F.2d 329, 333 (5th Cir.1981); Foreman v. Exxon Corp., 770 F.2d 490, 498 (5th Cir.1985). "A maritime contract containing an indemnity agreement ... should be read as a whole and its words given their plain meaning unless the provision is ambiguous." Weathersby v. Conoco Oil Co., 752 F.2d 953, 955 (5th Cir.1984). Courts "should construe [an] indemnity clause to cover all losses 'which reasonably appear to have been within [the parties'] contemplation.' " Kemp v. Gulf Oil Corp., 745 F.2d 921, 924 (5th Cir.1984)(quoting Corbitt, 654 F.2d at 333). An indemnity provision "should not be read to impose liability for those losses or liabilities which are neither expressly within its terms nor of such a character that it can be reasonably inferred that the parties intended to include them within the indemnity coverage." Corbitt, 654 F.2d at 333. "Interpretation of the terms of a contract is a matter of law." Weathersby, 752 F.2d at 956.

[6] The indemnity provision at issue in these motions is Clause 12(b) of the SUPPLYTIME 89 contained in the Charter. It provides:

> Notwithstanding anything else contained in this Charter Party excepting Clause 21, the Owners shall not be responsible for ... any liability arising out of ... personal injury or death of the employees of the Charterers or of their contractors and subcontractors (other than the Owners and their contractors and subcontractors) ... arising out of or in any way connected with the performance of this Charter Party, even if such ... injury or death is caused wholly or partially by the act, neglect or default of the Owners, their employees, contractors or subcontractors, and even if such ... injury or death is caused wholly or partially by the unseaworthiness of any vessel, and the Charterers shall indemnify, protect, defend and hold harmless the Owners from any and against all claims, costs, expenses, actions, proceedings, sits, demands and liabilities whatsoever arising out of or in connection with such loss, damage, liability, personal injury or death.

The plain language of this clause indicates that if Bradford was the employee of a contractor or subcontractor of Subsea, then Subsea would be contractually required to defend and indemnify Global for the claims. However, Bradford was not in fact an employee of Subsea's contractors or subcontractors. Subsea had no contractual relationship with Bisso, Chesapeake, or 2-W. Instead, Bisso was a contractor of Rowan and Chesapeake and 2-W were subcontractors of Rowan. As a result, Subsea would only have to defend and indemnify Global against the Bradford claims if 2-W was deemed to be a contractor or subcontractor of Subsea pursuant to Clause 17(a) of the SUPPLYTIME 89.

***753** Clause 17(a) of the SUPPLYTIME 89 provides:

> The Charterers shall have the option of subletting, assigning or loaning the Vessel to any person or company not competing with the Owners, subject to the Owner's prior approval which shall not be unreasonably withheld, upon giving notice in writing to the Owners, but the original Charterers shall always remain responsible to the Owners for due performance of the Charter Party and contractors of the person or company taking such subletting, assigning or loan shall be deemed contractors of the Charterers for all purposes of the Charter Party.

This provision read together with Clause 12(b) provides that if Subsea, as the Charterer, subleases, assigns, or loans the vessel to another company, then the contractors of that other company are deemed to be contractors of Subsea, and pursuant to Clause 12(b) Subsea would have to defend and indemnify Global for claims by that contractor's employees.

[7] Global argues that the MSA between Subsea and Rowan required Subsea to provide a vessel to Rowan and that as a result of the MSA Subsea sublet, assigned, or loaned the M/V **GLOBAL EXPLORER** to Rowan, thus activating Clause 17(a). However, Global does not point to any evidence that the MSA required Subsea to sublease, assign, or loan a vessel. Instead, Global continuously asserts that because Subsea "provided" a vessel for the salvage operation Clause 17(a) is activated.

It is not at all clear that the MSA provides for the subleasing, assignment, or loan of a vessel from Subsea to Rowan. Instead, the MSA preamble states that it is a contract for "goods and/or services." Ex. A to Global's Mem., Rec. D. 133. The MSA does contain a section that discusses the use of vessels by Subsea. Paragraph 12 of the MSA is entitled "Use of Vessels." The paragraph provides:

> Contractor may, with prior approval of Rowan perform services hereunder using vessel(s) owned and/or operated by others; provided, however, that Contractor will remain liable to fulfill all duties, obligations and responsibilities under this Agreement as if Contractor were the owner and operator of such vessel(s). Nothing contained herein shall be construed as making the actual owners and/or operators of such vessels third party beneficiaries of this Agreement, and nothing contained herein shall be construed as affecting such actual owner's and/or operator's liability to Rowan.

Paragraph 12 further states in subsection (c) that:

> In the event any vessel(s) owned, operated or chartered by Contractor should be constructively or actually lost and Contractor files exoneration or limitation of liability proceedings in connection with such loss, it is expressly understood and agreed that this Agreement is a personal contract and none of the terms and conditions of this Agreement shall be affected by such proceedings and that the contractual rights and obligations of the parties hereto shall be and remain the same as though such proceedings had never been filed.

These provisions of the MSA make clear that it is a personal contract for Subsea's services and that Rowan took no interest in or control of any vessel chartered by Subsea. Additionally, the MSA includes a letter addendum containing the Special Provisions in which Rowan discusses the potential use of two vessels by Subsea, neither of which are the M/V **GLOBAL EXPLORER**. *Id.* The letter also states that terms of a substitute vessel would have to be renegotiated. *Id.* Thus, even if ***754** the MSA could serve as an agreement to sublease, assign, or loan the M/V **GLOBAL EXPLORER**, which it does not seem to do, there would be an issue of material fact as to whether a sublease, assignment, or loan was negotiated specifically with regard to the M/V **GLOBAL EXPLORER**.

Additionally, Clause 17(a) of the SUPPLYTIME 89 requires that Global approve any sublease, assignment, or loan of the vessel. There is no evidence before the Court that any such approval was given. Global argues that their approval is explicit in the Charter because the M/V **GLOBAL EXPLORER** was chartered for the purpose of Subsea fulfilling its obligations under the MSA. However, as discussed above, the MSA does not provide for a vessel to be sublet, assigned, or loaned to Rowan. Further, the letter addendum to the MSA discusses two vessels neither of which is the M/V **GLOBAL EXPLORER**, and explicitly states that terms would have to be renegotiated if a different vessel was used by Subsea. Thus, even if the Charter could serve as an explicit approval based on the MSA, the MSA's provisions specifically with regard to the M/V **GLOBAL EXPLORER** are still not clear. Since the provisions of Clause 17(a) are not triggered unless this approval is provided by Global, the lack of any evidence of such approval creates an issue of material fact that would prevent summary judgment.

Finally, Subsea has also argued that the plain language of Clause 17(a) prevents indemnity where the claims at issue have been brought by an employee of Rowan's subcontractor. Clause 17(a) provides that when the vessel is sublet, assigned, or loaned the "contractors of the person or company taking such subletting, assigning or loan shall be deemed contractors of the Charterers for all purposes of the Charter Party." As a result of this clause deeming the contractors of Rowan, the company taking the sublease, assignment, or loan, as the contractors of Subsea, Subsea would have to indemnify Global, pursuant to Clause 12(b), for the claims of any of Rowan's contractors or their employees. However, the claims at issue in this case were brought by Bradford, an employee of Rowan's subcontractor 2-W. Clause 17(a) does not explicitly provide for deeming a subcontractor of Rowan to be a subcontractor of Subsea. Global contends that despite the language referencing only contractors, the Court should conclude that it was within the reasonable contemplation of the parties that the claims of both contractors and subcontractors would be indemnified if there was a sublease, assignment, or loan. *See* Corbitt, 654 F.2d at 333. However, Subsea maintains that Clause 17(a) is unambiguous and includes only contractors, and because there is no ambiguity the plain language should be followed. *See* Weathersby, 752 F.2d at 955. Furthermore, Subsea argues that the Court can only conclude that the inclusion of the term subcontractors in Clause 12(b) and the lack of inclusion of subcontractors in the "deeming" provision of Clause 17(a) was purposeful. Although there are issues of material fact that preclude summary judgment, the language of Clause 17(a) also appears to prevent Subsea from having to indemnify Global. Accordingly,

IT IS ORDERED that defendants Global Enterprises, LLC, formerly **Global Explorer**, LLC and Maritime Management Services, Inc.'s **Motion for Partial Summary Judgment (Rec. Doc. 133)** is hereby **DENIED.**

E.D.La.,2009.
McGrath v. Chesapeake Bay Diving
620 F.Supp.2d 747

Motions, Pleadings and Filings (Back to top)

- 2:08cv01475 (Docket) (Apr. 1, 2008)
- 2007 WL 3023745 (Trial Pleading) Answer to First Supplemental and Amending Complaint of Jason Pope. (Oct. 9, 2007) Original Image of this Document (PDF)
- 2007 WL 3028863 (Trial Pleading) Answer (Sep. 20, 2007) Original Image of this Document (PDF)
- 2007 WL 3028862 (Trial Pleading) Answer of International Subsea, Inc. to Plaintiff Jason Pope's First Supplemental and Amending Complaint (Sep. 4, 2007) Original Image of this Document (PDF)
- 2007 WL 2708530 (Trial Pleading) First Supplemental and Amending Complaint (Aug. 24, 2007) Original Image of this Document (PDF)
- 2007 WL 4545265 (Trial Pleading) Answer (May 11, 2007) Original Image of this Document (PDF)
- 2007 WL 4545264 (Trial Filing) International Subsea, Inc.'s Corporate Disclosure Statement (May 8, 2007) Original Image of this Document (PDF)
- 2007 WL 4599464 (Trial Pleading) Answer (Mar. 30, 2007) Original Image of this Document (PDF)
- 2007 WL 1132174 (Trial Pleading) Answer of International Subsea, Inc. to Plaintiffs' Complaint (Mar. 7, 2007) Original Image of this Document (PDF)
- 2007 WL 1132175 (Trial Pleading) Answer to Complaint (Mar. 2, 2007) Original Image of this Document (PDF)
- 2007 WL 4545266 (Trial Pleading) Answer (Mar. 2, 2007) Original Image of this Document (PDF)
- 2006 WL 3907387 (Trial Pleading) Complaint (Dec. 29, 2006) Original Image of this Document (PDF)
- 2:06cv11413 (Docket) (Dec. 29, 2006)

Judges and Attorneys (Back to top)

Judges | Attorneys

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New Orleans, Louisiana 70130

Litigation History Report | Judicial Motion Report | Judicial Reversal Report | Judicial Expert Challenge Report | Profiler

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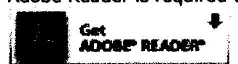

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