IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION
IN ADMIRALTY

STERLING EQUIPMENT, INC.	)	
	)	C.A. NO.: 2:06-CV-01753-PMD
Plaintiff/Defendant-in-Counterclaim,	)	
	)	
v.	)	
	)	**FINDINGS OF FACT AND**
NORTHSTAR MARINE CORP.,	)	**CONCLUSIONS OF LAW**
	)	
Defendant/Plaintiff-in-Counterclaim	)	
	)	

This matter was tried without a jury on December 4, 2007. The court--having heard the arguments, read the briefs of counsel, and considered the evidence including courtroom testimony of witnesses, deposition testimony, and exhibits--makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Plaintiff/Defendant-in-Counterclaim Sterling Equipment, Inc. ("Sterling") is engaged in the business of leasing barges for various projects. It owns and leases the two barges at issue in this litigation, the SEI 180-6 and the SEI 180-7.

2. Defendant/Plaintiff-in-Counterclaim Northstar Marine Corporation ("Northstar") is engaged in the business of towing sea vessels, and operates the tug WARRIOR for this purpose.

3. On February 3, 2005, Sterling entered into a contract with Potomac Constructors, LLC ("Potomac") to lease the SEI 180-6 and the SEI 180-7 to Potomac for use on the Woodrow Wilson Bridge Project, in Alexandria, Virginia.

4. On or about February 14, 2005, Sterling entered into a contract with Northstar that

provided that Northstar would, for the sum of $52,014.00, tow the SEI 180-6 and the SEI 180-7 from Green Cove Springs, Florida, to Alexandria. Half of this fee was paid to Northstar up front, and the other half was to be paid when the barges were delivered to Potomac.

5. Captain William F. Hughes ("Hughes"), the principal officer of Northstar and Master of the tug WARRIOR, estimated that the journey would take from February 21 until March 2, a total of 10 days.

6. Sterling and Northstar agreed to delay the date of departure, and settled on a new date of March 5.

7. Potomac retained a marine surveyor, Robert A. Richards ("Richards") to inspect the barges to make sure that they could do the work Potomac required of them. He was inspecting only for this purpose, and not for general seaworthiness.

8. Richards inspected the barges on February 18. In his report, issued February 22, he reported that he had found "most internals in good condition with the exception of most outer vertical truss channels wasted, broken, or holed, side longs wasted in way of vertical channels, outboard 3 ft. of bulkheads wasted and holed in way of manholes." He recommended that the interior bulkheads and exterior plating should be repaired before the barges were delivered to Potomac, and wrote that Sterling had agreed to perform these repairs. Richards concluded that "We are of the opinion that the vessels are in fair condition if repairs in progress are completed and vessels are made watertight. . ."

9. Sterling retained Southern Drydock Corporation ("Southern Drydock") to make the necessary repairs to the barges, for which they paid a sum of $90,000.

10. On March 4, after these repairs had been made, Richards made a follow-up inspection

upon the barges, and in his report issued on March 14, reported that there were still significant wastage holes and splits inside the ship's hold. No effort was made to remedy these problems.

11. On March 5, the WARRIOR arrived in Florida with its crew, ready to tow the SEI 180-6 and the SEI 180-7 to Virginia.

12. However, Sterling had not yet obtained the required load line certificates, which required the Coast Guard to inspect the ships and issue guidelines for the voyage. These certificates were not obtained until March 11. The certificates contained the following restriction: "This vessel is to be towed with no passengers, equipment or crew on board. All hull openings shall remain closed and securely fastened. Transit of the vessel is to be accomplished during fair weather only."

13. When Hughes attempted to perform his own inspection of the barges, the Coast Guard had already inspected them and ordered all hatches sealed for the journey, so Hughes was not able to inspect the interior of the barges despite requesting permission to do so. Based upon the exterior of the barges, Hughes estimated that they were serviceable to be towed to Virginia.

14. During the Coast Guard's inspection, they had discovered waist-deep water in many of the barges' holds, which they had ordered pumped out before continuing with the inspection.

15. Upon receiving the load line certificates, the WARRIOR was still not able to leave due to inclement weather conditions, during which the load certificate explicitly said the WARRIOR was not to travel. As a result, the WARRIOR was not able to leave for Virginia until March 20.

16. The WARRIOR's crew on the trip was only four men–Hughes, a mate, and two deckhands, instead of the WARRIOR's normal crew of six people.

17. During the period of March 5, when the crew of the WARRIOR expected to leave, and March 20, when the WARRIOR actually left, a period of fifteen days, the crew of the

WARRIOR remained in Florida, unable to take on another job and waiting for the arrival of the load line certificates and then clear weather.

18. During the voyage, the WARRIOR sailed in the lead, with a hawser connecting it with the SEI 180-6, which followed the WARRIOR, and the SEI 180-7, which followed the SEI 180-6. This arrangement remained unchanged throughout the journey.

19. Initially, the seas were calm, the weather was clear, and winds were 5-10 knots. The WARRIOR and the barges moved northward from Jacksonville at 5-6 knots.

20. During the journey, Hughes monitored weather conditions through reports from the National Weather Service over radio at least twice a day.

21. On March 22, the WARRIOR and the barges were off the coast of Charleston, South Carolina. The National Weather Service's forecast for that morning was a small craft advisory, with winds between 15-20 knots, seas between 4-6 feet, and thunderstorms. There was no entry in the tug's log for weather conditions on this morning. The forecast predicted that this type of weather would remain in the area through the day, and slightly worsen as the day went on.

22. Despite these weather reports, the WARRIOR continued its voyage north to the area known as Frying Pan Shoals, just off the coast of both North Carolina and South Carolina. Here, in the early morning hours of March 23, the weather became even more severe, with seas reaching 8-10 feet.

23. Because of these conditions, the tug WARRIOR reduced speed and moved closer to Frying Pan Shoals for shelter until the weather changed.

24. Due to the holes in both barges, SEI 180-6 and SEI 180-7 both began to take on significant amounts of water, which increased their weight, thus also increasing the strain on the

WARRIOR and all other equipment.

25. At about 3:15 a.m., the hawser connecting the two barges broke, which caused the SEI 180-6, no longer connected to the flotilla, to break away and drift out to sea. Sterling was notified that this had occurred.

26. Approximately one hour after learning that the SEI 180-6 had broken free, Sterling submitted a total loss claim on the barge to Northstar's Marine Insurance Broker.

27. Very shortly after this, the SEI 180-7 began to heavily list towards its port side, with its port lead rail underneath the waterline. Hughes notified the Coast Guard that the barge was listing, and was instructed to tow the barge back to Charleston.

28. The WARRIOR then moved away from the severe weather and headed back south, where the Coast Guard instructed Hughes to ground SEI 180-7 near Georgetown, South Carolina, to prevent any further damage. Hughes notified Sterling that SEI 180-7 had listed and he had been forced to ground it.

29. Once SEI 180-7 was grounded, Hughes noticed numerous substantial holes in the ship below the water line.

30. Hughes and the WARRIOR remained with the grounded SEI 180-7 from March 25 until March 29, pursuant to an order from the Captain of the Port.

31. On March 26, Sterling hired Mr. Richard B. Harden ("Harden"), a marine surveyor with Marine Safety Consultants, Inc., to survey the damage to the SEI 180-7. Harden noted that there were several points at which it appeared that scale and barnacle growth had recently broken off, and there were several fractures in the ship's hull that he attributed to a possible collision with the tug.

32. Harden was also retained to do a survey of the SEI 180-6, and observed that certain of the ship's compartments had flooded severely during the recent journey. Harden could not specifically identify the cause of the flooding, but noted that the damage did not appear to be new.

33. Although Sterling attempted to retain Northstar to complete the job of towing the barges up to Virginia, Northstar refused to do so.

34. Sterling then contracted with another tug to tow the SEI 180-6 from North Carolina, where it had been brought after being found adrift, to Virginia to be delivered to Potomac.

35. The SEI 180-7 was declared a total loss, and was sunk off the coast of South Carolina and converted into an artificial reef.

36. Photographs taken of the interiors of the barges after the incident revealed that both ships had severe waste and rust damage, including numerous holes in the hulls of the barges, many of which had been haphazardly plugged with common cloth rags.

37. In June 2005, Hughes entered into discussions with Jay Cashman, Incorporated/Testa Corporation ("Cashman/Testa"), a joint venture which had been put in charge of removing the remnants of the Old Cooper River Bridge in Charleston, South Carolina.

38. On July 1, Hughes submitted a proposal to Cashman/Testa, proposing that he could provide towing for the project on a working schedule of six days per week. This schedule was incompatible with what Cashman/Testa needed from its towage provider.

39. Throughout the summer of 2005, Hughes continued to be in contact with Joseph M. Duffy ("Duffy"), Cashman/Testa's Project Manager, about Northstar's desire to perform towing services for the debris removal project.

40. Hughes was informed that the towing job had been set aside for a minority owned

business entity ("MBE"). Northstar was not an MBE, but began discussions with Broadband Construction, LLC ("Broadband"), which was a MBE, to form a partnership to provide towage services to the Cooper River Bridge Project. Broadband agreed, and the partnership submitted a bid to provide towage services for the project.

41. The Northstar/Broadband partnership continued to negotiate with Duffy throughout the summer in an attempt to secure the towage rights to the project.

42. Duffy was supposed to meet with Hughes and Fred Anthony ("Anthony") from Broadband on the afternoon of October 5, 2005, to continue negotiations.

43. Sterling was, in fact, owned by the same interests that owned Cashman, part of the joint venture put in charge of the Cooper River Bridge demolition project. At some point Sterling notified Cashman that there was pending litigation between Sterling and Northstar.

44. The scheduled meeting between Hughes, Anthony, and Duffy never occurred, as Duffy called Hughes and notified him that the meeting was cancelled, and that there would be no further discussions between Cashman/Testa and Northstar as to the towage services for the project because of the pending litigation between Sterling and Northstar. Duffy reported that he had been notified by his superiors to cease negotiations with Northstar for this reason.

45. The contract for the towage services was not awarded to Northstar, and was instead awarded to another business.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the admiralty and maritime claims presented in this litigation under 28 U.S.C. § 1333, and supplemental jurisdiction over all other claims presented

under 28 U.S.C. § 1367.

2. Venue is proper in the District of South Carolina under 28 U.S.C. § 1391(b).

The Contract Between Sterling and Northstar

3. A tug operator must exercise reasonable care and maritime skill as prudent navigators employed in the performance of similar services. *Stevens v. THE WHITE CITY*, 258 U.S. 195 (1932). A tug has an obligation to utilize available weather reports in order to operate in a manner consistent with foreseeable risks. *Aiple Towing Co. v. M/V LYNNE E. QUINN*, 534 F. Supp. 409 (D. La. 1982). The court finds that Hughes and the crew of the WARRIOR were not negligent. The evidence shows that Hughes was monitoring the weather reports on a regular basis. When the hawser broke and the SEI 180-6 drifted away while the SEI 180-7 began to list severely, Hughes sensibly determined that the best course of action would be to stay with the SEI 180-7 to ensure its safety. After Hughes managed to stabilize the SEI 180-7, he was in touch with the Coast Guard about how to safely guide it back to a safe harbor, and followed Coast Guard instructions until he was finally able to safely ground the vessel off the coast of South Carolina. Hughes exercised reasonable care throughout the events in question, and his actions did not proximately cause the damage done to the two barges.

4. The owner of a tow has an absolute duty to provide a seaworthy vessel. *Schuylkill Transp. Co. v. Banks*, 1945 A.M.C. 1500, 1504 (3d Cir. 1945); *Deytens Shipyards, Inc. v. Marine Industries, Inc.*, 234 F. Supp. 411, 413 (E.D.S.C. 1964) (aff'd 349 F.2d 357 (4th Cir. 1965)). The burden of proof for establishing that a vessel was unseaworthy rests upon the party making such an

assertion. *Shebby Dredging Co., Inc. v. Smith Brothers, Inc.*, 469 F. Supp. 1279, 1284 (D. Md. 1979). The court finds that the SEI 180-6 and the SEI 180-7 were unseaworthy at the time they left Florida. While Richards did inspect the barges prior to the tug's departure, he was not inspecting them for seaworthiness, only that they were sufficient to perform the tasks Potomac required of them. A vessel suitable for inland service may be unfit for travel on the ocean, and therefore unseaworthy. *Valentine Waterways Corp. v. Tug Choptank*, 380 F.2d 381 (4th Cir. 1967). Furthermore, there were still problems noted on his second follow-up report which were never repaired by Sterling. The photographs taken of the interiors of both barges after the events in question clearly show widespread, massive rusting and decay throughout the interiors of both barges, and substantial holes which had been "repaired" by simply stuffing rags inside the holes. The court finds that the sole proximate cause of the barges taking on water, which caused the breaking of the hawser and the events that followed, was that the barges were simply not seaworthy and should not have been towed in the first place.

5. The loss of a tow raises no presumption of negligence or fault on the part of the owner and/or operator of the tug. *Stevens*, 258 U.S. at 202.

6. A tug operator has no duty to perform a detailed inspection of the tow prior to or during the journey. *Kenny Maine Towing, Inc. v. M/V John R. Rice*, 583 F. Supp. 1196 (E.D. La. 1984). A reasonable visible inspection of the tow or tows is sufficient. *Cargill, Inc. v. C.P. Towing Co.*, 1992 A.M.C. 392 (4th Cir. 1991). The court finds that Hughes' inspection of the exterior of the SEI 180-6 and the SEI 180-7 before the WARRIOR left Florida was reasonable, especially in light of the fact that he was prevented from inspecting the barges further by the Coast Guard.

7. The owner and operator of a tug has no cause of action against the owner of a tow

for unseaworthiness if the tug operator knew of that condition and failed to use reasonable care under the circumstances. *King Fisher Marine Services Inc. v. The NP SUNBONNET*, 724 F.2d 1181 (5th Cir. 1984). The court finds that Hughes had no knowledge that the SEI 180-6 and the SEI 180-7 were unseaworthy until after the events in question had taken place.

8. Where the tow is terminated through no fault of the tug or its crew, the owner or operator of the tug may recover damages incidental to the towage contract. *Shebby Dredging*, 469 F. Supp. at 1286.

9. In the absence of an agreement specifying appropriate compensation for any delay by either party, a court should award reasonable compensation for services rendered. *The J.P. Donaldson*, 167 U.S. 999 (1987).

10. Sterling paid Northstar $26,000 initially for its towage services, and was to pay Northstar a further $26,000 for this service when it delivered the SEI 180-6 and the SEI 180-7 to Potomac. It expected the trip to take 10 days. However, due to Sterling's failure to obtain the necessary load line certificate in a timely fashion, the WARRIOR and her crew were unable to begin the journey for 15 days. Given that this delay from March 5 until March 20 was due to Sterling's failure to obtain the certificates and was no fault of Northstar's, Northstar is entitled to reasonable compensation for these days. Northstar is entitled to be compensated for these 15 days at its demurrage rate of $3,450.00 per day, for a total of **$51,750.00**.

11. Northstar is further entitled to be compensated for the lost profits on the transaction, since Northstar never received the second half of the agreed upon sum for its towage services. Of the $26,000.00 which was to be paid to Northstar upon its delivery of the barges to Potomac, Northstar has conceded that only half this amount was profit–the rest was to cover costs on the

journey. Therefore, Northstar is entitled to be compensated for **$13,000.00** in lost profits.

12. When a disaster such as the one in the present case occurs, a tug has a duty to stand by and take such reasonable precautions as the circumstances may require. When the disaster happens through no fault of the tug's, the tug operator is entitled to reasonable compensation for its services while taking such precautions. *Caribbean Towing Co. v. S.S. John W. Culen*, 1968 A.M.C. 2225 (E.D. La. 1968). In the present case, the WARRIOR took reasonable precautions by grounding the SEI 180-7 and standing by in accordance with Coast Guard instructions for the next four days, from March 25 until March 29. Accordingly, Northstar is entitled to be compensated for its services during these four days at its demurrage rate of $3,450.00 per day, for a total of **$13,800.00**.

13. Northstar is also entitled to be compensated for damage and loss to its equipment. During the incident, Northstar lost the hawser, bridles, lights, batteries, shackles and other equipment it needs for its towing operation. Accordingly, Northstar is entitled to be compensated for loss of and damage to its equipment, which was valued at **$5,000.00**.

14. Accordingly, based on the foregoing, the court finds that Plaintiff/Defendant-in-Counterclaim Sterling is liable on counts one, two, four, and eight of Defendant/Plaintiff-in-Counterclaim's Counterclaim (Breach of Warranty of Seaworthiness, Negligent Failure to Repair or Inform, Delay, and Negligent Misrepresentation) relating to Sterling's delay in failure to provide seaworthy vessels for Northstar to tow to Virginia and its representations as to the seaworthiness of the barges in question. Sterling is liable to Northstar for the actual damages suffered by Northstar, which total **$83,550.00**, together with prejudgment interest at the appropriate rate.[1]

---

[1] "Under maritime law, the awarding of prejudgment interest is the rule rather than the exception, and, in practice, is well-nigh automatic." *U.S. Fire Ins. Co. v. Allied Towing Corp.*, 966 F.2d 820, 828 (4th Cir. 1992)(quoting *Reeled Tubing, Inc. v. M/V Chad G*, 794 F.2d 1026,

15. Northstar has failed to establish the requisite intent on the part of Sterling to support counts three, six, and seven of its Counterclaim (Breach of Contract Accompanied by a Fraudulent Act, Fraud, and Constructive Fraud), and those causes of action consequently fail as a matter of law. Northstar's fifth cause of action (Quantum Meruit) asserted in the counterclaim fails as a matter of law because it only applies to situations where a contract must be implied from the surrounding facts and circumstances, whereas here there was an express contract between the two parties.

The Alleged Contract Between Northstar and Cashman/Testa

16. In order to prevail on a claim for tortious interference with a contractual relationship, a plaintiff must first establish the existence of a contract. *Drs. Steuer and Latham, P.A. v. National Medical Enterprises, Inc.*, 672 F. Supp. 1489, 1527 (D.S.C. 1987). In order to establish a contract, a plaintiff must show that there was an offer, acceptance, and consideration. *Id.* In the present case, Northstar has shown none of these things, as there is simply no evidence that there was a contract between Northstar and Cashman/Testa. Accordingly, Sterling cannot be held to be liable for interference with a contractual relationship.

17. Northstar's next Counterclaim is for interference with a prospective contract. In order to recover on this cause of action, a plaintiff must show: (1) the intentional interference with the plaintiff's potential contractual relations; (2) for an improper purpose or by an improper method; and (3) causing injury to the plaintiff. *Crandall Corp. v. Navistar Int'l Transport Co.*, 302 S.C. 265, 395 S.E.2d 179 (1990). A plaintiff must specifically show that it lost an "identifiable contract or

---

1028 (5th Cir. 1986)).

expectation." *United Educational Distributors, LLC v. Educational Testing Service*, 350 S.C. 7, 564 S.E.2d 324, 328 (2002) (citations omitted). The agreement must be "a close certainty." *Id.* "[M]ere hope of a contract is insufficient." *Id.* The contract cannot be "speculative." *Id.*

18. Northstar's evidence on this cause of action shows that Northstar was extremely interested in obtaining the towage contract for the Cooper River Bridge demolition project. Northstar had spoken extensively with Cashman/Testa about obtaining the bid, and had struck up a partnership with Broadband in order to qualify as a minority-owned business, which Cashman/Testa desired. By all appearances, Northstar had the equipment, time, and inclination to perform the towage on this project, and Cashman/Testa was also very serious about awarding the project to Northstar. However, Northstar's evidence falls short of establishing that an agreement was "a close certainty" as required by law. Northstar only submitted one actual proposal to Cashman/Testa. That proposal stipulated that Northstar would provide towage services six days a week, and was rejected by Cashman/Testa as "too rigid" because "[t]hat didn't work with the schedule of demolition." While Northstar definitely became more flexible after this proposal was rejected in terms of when it would work, Duffy stated in deposition testimony that at the time that negotiations were cut off with Northstar, he "wasn't sure, ever that [he] could get to a point that [Cashman/Testa] could satisfy the things needed" by Northstar. The evidence provided by Northstar has only shown that they were a serious contender to get the bid, but it was in fact far from certain that Northstar would receive the contract to perform towage services for the Cooper River Bridge demolition project. Accordingly, Northstar has failed to satisfy the required elements of a valid claim for interference with a prospective contract, and Sterling cannot be held liable on that cause of action.

19. Northstar's final counterclaim against Sterling is for defamation. Defamation is an injury to reputation due to a communication to others of a false statement about another. *Fleming v. Caulder*, 338 S.C. 524, 526 S.E.2d 732 (S.C. Ct. App. 2000), *rev'd on other grounds*, 567 S.E.2d 857 (2002). Under South Carolina law, in order to recover for defamation, a plaintiff must establish: (1) a false or defamatory statement concerning another; (2) an unprivileged communication to a third party; (3) fault on the part of the publisher; and (4) either actionability on the statement irrespective of special harm or the existence of special harm caused by the publication. *Holtzscheiter v. Thompson Newspapers, Inc.*, 332 S.C. 502, 506 S.E.2d 497, 506 (1998).

20. A corporate entity may sue for defamation. *Hospital Care Corp. v. Commercial Cas. Ins. Co.*, 194 S.C. 370, 9 S.E.2d 796 (1940). However, in order to recover damages for defamation, a corporate plaintiff must show that the defamation caused a pecuniary loss to the business. *Id.* at 797 (citations omitted).

21. Sterling's statement to Cashman that there was pending litigation between Sterling and Northstar does not give rise to a cause of action for slander. At the time the statement was made, no action had been filed. However, it is clear that litigation between Sterling and Northstar was on the horizon–both parties had exchanged demands for monetary damages and filed notices of claims of lien with the Coast Guard's National Vessel Documentation Center to secure their claims. As an initial matter, the court notes that the statement that there was "pending litigation" is neither untrue nor defamatory. The fact that both sides had taken official steps, even if they had not yet filed a claim in court, to litigate the issue of which party was at fault for the barges' taking on water means that litigation was, in fact, pending. Northstar has not produced any evidence that this statement was accompanied by a statement that Northstar was at fault, so this statement was

merely a neutral statement of fact, and a reasonable listener would not interpret this as defamatory.

22. Northstar has also failed to carry its burden of showing that an unprivileged communication was published to a third party. "A qualified privilege may exist where the parties have a common business interest. However, the qualified privilege exists only when the publication has occurred in a proper manner and to proper parties only." *Abofreka v. Alston Tobacco Co.*, 288 S.C. 122, 341 S.E.2d 622, 624-25 (1986). Here, Sterling was a subsidiary of Cashman, so the two parties involved had a clear common business interest. Sterling simply noted to its parent company that there was pending litigation between it and Northstar, which is communication in the proper manner to the proper party. Accordingly, Sterling's statement to Cashman that there was pending litigation between it and Northstar enjoyed a qualified privilege, and cannot give rise to a claim for slander.

23. The court holds that Northstar has failed to establish liability on behalf of Sterling on the Ninth (Interference with a Contractual Relationship), Tenth (Interference with a Prospective Contract), and Eleventh (Defamation) Counterclaims. Accordingly, Sterling is not liable for any actions relating to Northstar's attempt to contract with Cashman/Testa for the towage contract for towing debris away from the Cooper River Bridge demolition project.

CONCLUSION

It is therefore **ORDERED**, for the foregoing reasons, that judgment be entered for Northstar Marine Corporation against Sterling Equipment, Incorporated in the sum of **$83,550.00** (eighty-three thousand, five hundred fifty dollars and no cents), plus prejudgment interest from March 23, 2005 to the date of this Order[2] and postjudgment interest at the legal rate from the date of this Order.[3]

AND IT IS SO ORDERED.

PATRICK MICHAEL DUFFY
United States District Judge

Charleston, South Carolina
March 4, 2008.

---

[2]As noted by the court in *Schumacher*, "District courts are not bound by state statutory rates in setting prejudgment interest in admiralty cases and indeed have been urged to follow the interest rate prevailing commercially." *Schumacher*, 850 F. Supp. at 455 n.5 (citing *Ameejee Valleejee & Sons v. M/V Victoria U.*, 661 F.2d 310, 313-14 (4th Cir. 1981)).

The court awards Plaintiff prejudgment interest from March 23, 2005 on the basis of the weekly average one-year Treasury constant maturities rate in effect on March 23 of each year, compounded annually. The rates are: March 23, 2005: 3.31%; March 23, 2006: 4.7%; and March 23, 2007: 5.05%.

[3]Pursuant to 28 U.S.C. § 1961, this rate is 2.08%.