

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

Charles M. Huff and Branch Banking)	C.A. 2:08-1364-PMD-BM
and Trust Company of South Carolina,)	
)	
Plaintiffs,)	
)	
vs.)	
)	
P/Y MONKEY BIDNESS,)	ORDER
(O.N. 1076432), her engines, boilers,)	
tackle, furniture, equipment, freights)	
and apparel, <i>in rem</i> , and Delmarva)	
Marine Assets, LLC, <i>in personam</i> ,)	
J. Mark Caldwell, Michael S. Aiello)	
and Francis M. Harvey, Jr., <i>in personam</i> ,)	
)	
Defendants.)	
_____)	

This matter comes before the court upon motion of the Defendant Delmarva Marine Assets, LLC (hereinafter “Delmarva”), the owner of MONKEY BIDNESS (hereinafter the “Vessel”), a fifty-five foot Sea Ray, O.N. 1076432, for an emergency hearing to vacate the arrest of the Vessel.¹ The motion was referred to the Honorable George C. Kosko, United States Magistrate Judge, who held an initial hearing on May 8, 2008, and thereafter conducted an evidentiary hearing on May 13, 2008, at which testimony was received from the parties. Subsequent to that hearing, Branch Bank and Trust Company of South Carolina (hereinafter

¹An arrest warrant was issued by the Honorable Patrick Michael Duffy, United States District Judge, on April 8, 2008, pursuant to Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure. On April 10, 2008, the United States Marshal arrested the Vessel and turned it over to the Substitute Custodian, John R. Gamble (“Substitute Custodian”). See Transcript, p. 117. Later on April 10, 2008, the Substitute Custodian had the Vessel towed to Ross Marine on John’s Island, South Carolina, where it was removed from the water and stored on land. See Transcript, pp. 117-118.

“BB&T”) intervened as a Plaintiff asserting a maritime lien claim for foreclosure of a Preferred Ship Mortgage against the Vessel. BB&T added Caldwell, Aiello, and Harvey as Defendants *in personam*.²

This case was referred to the undersigned for all pretrial management and motions on September 15, 2008, following which a status conference was held on September 24, 2008. At this hearing the parties agreed to pursue settlement discussions, and a deadline of October 7, 2008, to resolve this matter was set. After advising the Court that the settlement negotiations were unsuccessful, counsel for Plaintiff Charles M. Huff (hereinafter “Huff”) requested additional time to submit proposed findings for the Court’s consideration. The Court granted this request and gave all parties until Thursday, October 17, 2008, to submit any additional proposed findings to the Court. Delmarva’s motion to vacate the arrest of the Vessel is now ready for disposition.

BACKGROUND AND PROCEDURAL HISTORY

The record reflects that during February 2008, the Vessel docked at various slips at the Sunset Cay Marina on Folly Beach, South Carolina (hereinafter “Marina”), although it is unclear whether it had permission to do so. See Transcript, pp. 14, 28, 83. Defendants contend that Joe Vaughn, who knew someone who had a slip at the Marina, informed Delmarva that the Vessel had permission to berth at the Marina, although Delmarva presented no independent evidence to support this assertion. See Aiello Affidavit, ¶ 3 (Defendants’ Exhibit One); See also Transcript, pp. 14-15, 41. Frances “Butch” Clark (hereinafter “Clark”), the President of the Marina’s Co-Owners’ Association, testified that he attempted to confirm this assertion, and that although he

²A proof of service for Aiello was filed on October 10, 2008 and for Harvey on October 31, 2008. The record does not reflect that proof of service has been filed for Caldwell.

found “a little bit of credibility” for this assertion, he “never really got it squared away.” See Transcript, pp. 8, 14-15, 17. Clark testified that, in the meantime (prior to February 17, 2008), the Vessel “just came and went” as it pleased using different docks, even though the Marina required insurance and registration information for vessels to dock at the Marina, which had not been provided. See Transcript, pp. 14, 28, 43-44, 46-48. Delmarva claims, and Clark confirmed, that it had provided the Marina with its *insurance* documentation prior to February 17, 2008, but there is no evidence, nor any allegations even asserting, that *registration* information was ever provided to the Marina for the Vessel. See Aiello Affidavit, ¶ 3 (Defendants’ Exhibit One); see also Transcript, pp. 14, 17. Rather, and to the contrary, the evidence from the hearing shows that in fact the Vessel had no valid registration. See Transcript, pp. 123, 143.

The parties agree that on February 17, 2008, the Vessel ran aground and became inoperable, and that on February 18 or 19, 2008, TowBoat U.S. towed the Vessel, which was without power, back to the Marina. See Plaintiff’s Exhibits 3-4; see also Transcript, p. 43. The only place a ship could be berthed under such an emergency was at a vacant T dock, Numbers D-1 and D-15, at the end of Pier “D,” both of which were owned by Huff. See Transcript, pp. 15-16. Both of these forty-foot slips were used due to the fifty-five foot length of the Vessel. It is undisputed that Delmarva did not obtain Huff’s permission to dock the Vessel in his slips. See Transcript, pp. 49-50, 58, 142, 152. Further, while Section 14.8 (Emergency Access) of the Covenants/By-Laws of the Marina provides that the designee of the Counsel of Co-Owners, Clark, had authority to use any slips in the event of an emergency, it is not clear at what point (if

ever) Clark granted such permission.³ See Master Deed for Sunset Cay Marina Horizontal Property Regime (Plaintiff's Exhibit One); see also Transcript, pp. 12, 25-27, 37, 164-165.

Huff testified that, after discovering the Vessel docked in his slips, he was concerned that the Vessel was in his slips without his permission, and was also concerned about liability as the owner of the slips because of the danger that the Vessel might sink and discharge oil and other pollutants. See Transcript, pp. 158-159, 167. Huff obtained the abstract of the title for the Vessel and discovered that Delmarva was its owner, but when he tried to contact Delmarva, the mail sent to Delmarva at its registered address in Delaware was returned to sender. See Transcript, pp. 143-144. Huff further testified that before he discovered that the Vessel was moored in his slips, he had intended to lease D-1 or D-15 to Bo Burnett (hereinafter "Burnett), who had apparently provided his registration and insurance information to the Marina. See Transcript, pp. 120-122, 161, 169-170. Although Defendants argue that Burnett never entered into a written lease agreement, as required by the By-Laws/Covenants of the Marina, for either of these slips, it is unclear from the record as to whether this lack of a written agreement was the result of the slips being unavailable. See Transcript, p. 134.

Clark testified that, after a period of time, he became concerned about the Vessel's security because no one was taking care of the Vessel and there had been a number of storms. See Transcript, pp. 14, 17, 50. Unbeknownst to Huff, he attempted, apparently on or about March 23, 2008, to contact one of Delmarva's principals, Michael Aiello ("Aiello"). See

³When the boat was initially towed into the Marina, it was apparently the dock attendant on duty who told TowBoat to park the Vessel in Huff's slips. See Aiello Affidavit, ¶ 4 (Defendants' Exhibit One); see also Transcript, p. 84. Clark did not find out about the presence of the Vessel until later, while Huff testified that he did not find out that the Vessel was in his slips until the end of March, when he went out to the Marina and saw the Vessel berthed in his slips. See Transcript, pp. 43, 169-170.

Transcript, pp. 14, 18-19, 63; see also, p. 144. The Marina obtained written permission by fax from Aiello to inspect the Vessel, and in early April 2008, Robert Lance Howard, the Marina's Dock Master (hereinafter "Howard"), inspected the Vessel. See Defendants' Exhibit Three; see also Transcript, pp. 8-9, 18-19, 27, 84-85. Howard found water in the engine room and discovered that the Vessel's main engines were inoperable. See Transcript, pp. 85-86. In addition, there was almost a foot of water in the bilges, the water was at least four inches above the bilge pumps, the bilge pumps were inoperable, the Vessel's AC and DC batteries were completely discharged, and the Vessel's electrical system was inoperable. See Transcript, pp. 85-86, 96-97, 127. Howard performed a complete inspection of the Vessel and determined that there were no breaches of the hull and that no further water was seeping in, and concluded that the water he found probably was surface or rain water. See Transcript, pp. 86-87. Howard then used the ship store's batteries to activate the Vessel's DC batteries and pump all the water out of the Vessel. See Transcript, p. 85. These services took approximately three days. See Transcript, pp. 94, 100.

Howard testified that he believed he was going to be paid by Aiello⁴, but before he could send a bill, representatives of Huff requested that Huff be allowed to pay for the services that Howard had rendered. See Transcript, pp. 88-91. The value of the work was One Thousand and One Hundred and Sixty-five Dollars (\$1,165.00), and on April 4, 2008, Burnett, acting on behalf of the Huff, paid Howard \$1,165.00. See Transcript, pp. 89-90, 132, 156. Burnett also asked Howard to continue to check the bilges to make sure that they stayed pumped out. See

⁴There was conflicting testimony regarding whether Aiello intended to pay for Howard's work. Burnett testified that, based on his conversations with Howard, Aiello did not intend to pay for the work. See Transcript, p. 135.

Transcript, pp. 128-133, 137. Also on April 4, 2008, Clark telephoned Huff and, later that day, Huff's counsel, John Hughes Cooper ("Cooper"). See Transcript, pp. 28, 59, 95, 112. Clark knew that Huff had not given permission for the Vessel to dock at his slips, that Huff was asserting liens against the Vessel, and that Huff was initiating litigation against Delmarva and the Vessel. See Transcript, pp. 49-50, 53, 58-59, 90, 95, 146-147, 149.

At the evidentiary hearing on May 13, 2008, there was conflicting testimony regarding whether the Vessel used the electricity and water at Huff's slips or whether those utilities were disabled at his slips and the Vessel obtained electricity and water from another slip. See Transcript, pp. 97, 162. Howard testified he was required to use another power pedestal to provide power to the Vessel because, at the time the Vessel was moored at Slips D-1 and D-15, the power pedestal at that dock was not working. See Transcript, p. 97. However, Huff testified that even if a different pedestal was used that he was charged by virtue of the Vessel being in his slips, but conceded that the charges would not have exceeded \$100.00 per month. See Transcript, pp. 163-164. In any event, regardless of the source of electricity, it remains undisputed that the Vessel remained docked at Huff's slips, and it is undisputed that Huff paid an invoice in the amount of \$1,165.00 for the pumping and repair of the Vessel. See Transcript, pp. 15-16, 89-90, 132, 156.

Some time prior to April 4, 2008, Clark started to negotiate a lease with Aiello for an undetermined slip, and although the exact date is disputed, Clark did instruct his wife to e-mail a blank computer-generated lease form to Aiello, with blanks to be filled in by Aiello. See Transcript, pp. 22, 28, 66; see also Defendants' Exhibit One (Attachment to Aiello's Affidavit). This faxed lease was not signed by an agent or anyone representing the Marina, and it did not

identify any specific slip or slips to be leased. See Transcript, pp. 51-52; see also Defendants' Exhibit One (Attachment to Aiello's Affidavit). Further, although the lease was dated April 4, 2008, the lease period was backdated to start on March 1, 2008. See Defendants' Exhibit One (Attachment to Aiello's Affidavit). Clark told his wife to use the March 1, 2008 date because he intended to give the March rental payment to Huff. See Transcript, pp. 28, 52-53, 67. Clark also did not want to have to attempt to distribute rent among the various slips for the month of February.⁵ See Transcript, p. 28. Clark further testified that he thought the Vessel may have been towed to D-1 and D-15 around the first of March; however, the evidence shows that the Vessel was towed to these slips on February 18 or 19, 2008. See Plaintiff's Exhibits Three & Four; see also Transcript, pp. 43, 54.

By April 5, 2008, the Marina posted a sign in its office directing any inquiries about the Vessel to Huff's counsel. See Transcript, p. 130. On April 6, 2008, two friends of Aiello boarded the Vessel, and the Marina asked them to leave because Huff was in the process of arresting the Vessel. See Transcript, pp. 129-130. After Clark spoke with Huff and Huff's counsel, Clark informed Aiello that "they're going to seize the boat", and that he should "hold his check up". See Transcript, pp. 28-29, 56, 58-59, 112.

Defendants' counsel argued at the hearing that "as far as [Delmarva] knew, he was legally in the slip." See Transcript, p. 103. Defendants' counsel also argued that "they [Delmarva and Clark] started talking about getting into a lease and working it out and having the boat stay someplace at the marina, and it was okay to stay at the marina." See Transcript, p. 107.

⁵As previously noted, the Vessel had moored in various different docks at the marina prior to running aground on February 17, 2008, without ever paying any rental fees. See Transcript, pp. 14, 28.

However, there is no evidence that Delmarva attempted to enter into a lease prior to being tracked down by Clark. There is also no evidence that Delmarva ever provided the Marina with the registration required to enter into a lease, or that the Vessel was in fact even validly registered as required by law. It is also undisputed that no funds were ever paid by Delmarva for the rental of any slips at the Marina for the Vessel. See Transcript, pp. 58, 156, 165.

Huff's counsel, Cooper, represented to the Court that Aiello called him on the morning of April 7, 2008. See Transcript, p. 112. Huff contends that even though Aiello was aware that Huff had not given permission for the Vessel to dock at his slips, that Huff was asserting liens, and that he was initiating litigation against the Vessel, Aiello nevertheless faxed the lease form to the Marina on the afternoon of April 7, 2008. See Transcript, p. 112; see also Defendants' Exhibit One (Attachment to Aiello's Affidavit).⁶ Aiello had written other information by hand in the blanks on the form. See Defendants' Exhibit One (Attachment to Aiello's Affidavit); see also Transcript, p. 69. In any event, although the parties dispute when this lease form was returned to Clark, it is undisputed that it was never signed by Clark or by any representative of the Marina. See Defendants' Exhibit One (Attachment to Aiello's Affidavit). It is also undisputed that the Defendants have never paid any money for dockage, the pump-out and repair services, for water, or for electricity. See Transcript, pp. 58, 156, 165.

DISCUSSION

"The post-arrest hearing is not intended to resolve definitively the dispute between the parties, but only to make a preliminary determination whether there were reasonable grounds for issuing the arrest warrant, and if so, to fix an appropriate bond." Salazar v. Atlantic Sun, 881

⁶The Defendants contend that it was sent a few days earlier. See Transcript, p. 24, 68.

F.2d 73, 79-80 (3d Cir. 1989); Mujahid v. M/V Hector, No. 91-1406, 1991 WL 254121 at * 1 (4th Cir. Dec. 4, 1991)(citing Salazar, 881 F.2d at 79-80). To establish a sufficient interest in the Vessel to justify an arrest, Huff must only establish prima facie entitlement to a maritime lien. Amstar Corp. v. S/S Alexandros T., 664 F.2d 904, 912 (4th Cir. 1981). Huff need not prove the merits of his claim. Wajilam Exports (Singapore) Pte. Ltd. v. ATL Shipping, Ltd., 475 F.Supp.2d 275, 278-279 (S.D.N.Y. 2006).

When assessing whether a plaintiff has a valid admiralty or maritime claim, courts apply the “reasonable grounds” test. Courts have compared the showing required under a reasonable grounds analysis to the more familiar standard of probable cause. Id.; see also Amstar Corp., 664 F.2d at 912. Probable cause requires less than a preponderance of the evidence. It requires only a “fair probability” that the asserted facts are true and establish a valid claim. See Wajilam Exports (Singapore) Pte. Ltd., 475 F.Supp.2d 279-280.

The Liens Asserted by Huff

Huff asserts three types of maritime liens against the Vessel: (1) a lien for necessities; (2) a lien for trespass; and (3) a lien for salvage.

“Necessaries” are defined in the Federal Maritime Lien Act as including repairs, supplies, towage, and the use of a dry dock or marine railway. 46 U.S.C. § 31301(4). Courts have expanded the meaning of necessities to include most goods or services that are useful to a vessel, to keep her out of danger, and to enable her to perform her particular function; Loginter S.A. v. M/V Nobility, 177 F.Supp.2d 411, 414 (D. Md. 2001) (internal quotations and citations omitted); and a presumption arises that one furnishing necessities to a vessel acquires a

maritime lien. Newport News Shipbuilding & Dry Dock Co. v. S.S. INDEPENDENCE, 872 F.Supp. 262, 267 (E.D. Va. 1994).

In the present case, Huff provided dockage and paid the invoice for pumping out and repairing the Vessel. *C.f.* South Carolina State Ports Authority v. Lykes, 837 F.Supp. 1357, 1365 (D.S.C. 1993) [“Wharfage and dockage have consistently been recognized by the Courts as being ‘necessary’ to the operation of a vessel and therefore maritime in nature and capable of lien status”]. While disputed by the Defendants, Huff also claims to have provided electricity and water to the Vessel. Defendants offer several arguments as why they have not paid Huff for any of these goods or services, but it is nevertheless undisputed that they have not done so. Therefore, the Court finds that Huff has established reasonable grounds for arrest of the Vessel based on a lien for necessities.

Second, Huff claims a lien for trespass. The power of the admiralty courts to adjudicate claims encompasses every variety of maritime tort which may be the foundation of a legal claim for compensation, and the legal concept of trespass arising out of the unauthorized entry upon or use of property of another is one of the concepts recognized in admiralty. Petition of New York Trap Rock Corporation, 172 F.Supp. 638, 646 (D.C.N.Y. 1959) (citation omitted). Here, it is undisputed that the Vessel was docked at Huff’s slips from February 19, 2008 until it was arrested and towed to Ross Marine on April 10, 2008. While it is disputed whether the Marina gave Delmarva permission to dock in Huff’s slips and, if so, whether the Marina had actual or apparent authority to do so, it is undisputed that Huff himself did not give either the Defendants or the Marina permission to dock the Vessel in his slips. In any event, even if placed in Huff’s slips initially due to an emergency, the Vessel then remained in these slips without notice to



Huff, and the Defendants have paid nothing for dockage to Huff or anyone else. Therefore, the Court finds that Huff has established reasonable grounds for arrest of the Vessel based on a lien for trespass. Hedgepath v. Am. Tel. Tel. Co., 559 S.E.2d 327, 337 (S.C.Ct. App. 2001) [“[T]respas is any intentional invasion of the Plaintiff’s interest in the exclusive possession of his property”].

Third, Huff claims a lien for salvage. “Any service or assistance applied for or received by a vessel in peril or distress which in any measure conduces to its safety is in the nature of a salvage service, and is to be compensated upon principles more liberal than ordinary work.” THE APACHE, 124 F. 905, 907 (D.C.S.C. 1903). In the present case, Huff paid the entire invoice for pumping out the Vessel, installing a temporary bilge pump, and repairing her electrical system. The undisputed testimony is that, at the time these repairs and services were effected, the water in the Vessel’s bilge was over a foot high and was at least four inches above its bilge pumps, which were not working. Huff contends that he is entitled to a lien for salvage because the repairs for which he paid were necessary to ensure the Vessel did not sink at the dock, and the Court agrees that the facts presented are sufficient to establish a “fair probability” that Huff has a salvage lien. Wajilam Exports (Singapore) Pte. Ltd., 475 F.Supp.2d at 278-280; Amstar Corp., 664 F.2d at 912.

Defendants’ Actual Authority Argument

Defendants offer several arguments for why an arrest of the Vessel was/is not appropriate, none of which the Court finds has any merit.

Defendants first contend that the Marina had actual authority to lease Slips D-1 and D-15, arguing that ownership of the Marina is through a horizontal property regime and that Huff’s



slips were general common elements, not limited common elements. However, while there was conflicting testimony regarding ownership of various elements of the Marina, the testimony nevertheless established that Huff owned Slips D-1 and D-15 and that he had the right to exclude vessels from those slips. Likewise, the Master Deed for the Co-Owners' Association, Plaintiff's Exhibit 1, provides that owners have the exclusive right to lease their slips. Clark also testified that the Marina could not lease slips without the permission of their owners, and that the Marina never obtained Huff's permission. Finally, even if the Marina did have actual authority to lease slips, no lease was ever signed, nor have the Defendants ever paid for dockage or for any other services. Thus, Defendants' argument based on actual authority is without merit.

Defendants' Apparent Authority Argument

Next, Defendants argue that the Marina had apparent authority to lease Huff's slips. However, apparent authority for which a principal is liable must be traceable to the principal and cannot be established solely by the acts and conduct of the agent. Further, apparent authority also must be based upon conduct of the principal. No conduct of the agent is by itself sufficient for that purpose, and such conduct must also be of a character which the principal should reasonably contemplate as likely to mislead those dealing with the agent and should stem from some affirmative act or negligence of the principal. 2A CJS Agency § 143. Additionally, apparent authority does not arise in circumstances where third parties are actually aware of limitations on the agent's authority. Metco Products, Inc. Div. of Case Mfg. Co. v. N.L.R.B., 884 F.2d 156, 160 (4th Cir. 1989).

Here, the Court finds from the testimony and evidence presented at the hearing that, by the date Aiello faxed the slip lease form to the Marina, he knew that Huff was asserting liens



against the Vessel for trespass, necessities, and salvage. Additionally, the lease form admitted into evidence was not signed by either the Marina or Aiello, nor did it identify any specific slips to be leased. Finally, prior to the arrest, Aiello knew that the Marina did not have Huff's permission to lease the slips and Aiello could not reasonably have relied on the authority of the Marina to lease them. Defendants have also made no payments for dockage under any lease. This argument is without merit.

Defendants' Emergency Argument

Defendants also argue that the Marina had the power in an emergency to dock the Vessel in any slip. While the Court agrees that the Covenants and By-Laws grant the Marina such power for a reasonable period of time, perhaps one or more days, the emergency provision of the Covenants/By-Laws could not reasonably be construed to provide such authority for weeks. The Vessel remained in Huff's slips from February 19, 2008 until it was arrested on April 10, 2008, a total of fifty-one days. Hence, even if proper authorization had been obtained for the Vessel's initial docking (which is disputed), that would not have justified the continual docking of the Vessel in Huff's slips for the extended period of time shown in the record.

Defendants' Gratuitous Payment Argument

Defendants argue that Huff's payment for the pumping and repair of the Vessel's electrical system was gratuitous. Although there is an unsigned affidavit from Aiello which stated that he believed that there would be no charge for the work, as this affidavit is unsigned it has not been considered. In any event, it is patently unreasonable for Aiello to have expected to pay nothing for approximately three days' worth of work with a value in excess of One Thousand Dollars (\$1,000.00). Howard testified that he was not working for free and insists that



he was charging his normal rates. Hence, if Huff's payment is viewed as one merely for necessities, he has a lien at least in the amount of the payment, and if it is viewed as one for salvage, he has a lien for more than that amount. Radcliffe Americas Ltd. v. M/V Tyson Lykes, 996 F.2d 47, 49 (4th Cir. 1993) [[T]he primary impetus for recognition of [maritime liens] was concern for the ship and its needs, not the needs of suppliers or even the ship's owners"]. Defendants' argument is without merit.

Defendants' "Only at Sea" Argument

Finally, Defendants argue that with respect to Plaintiff's claim for a salvage lien, salvage can occur only at sea, and in support of this argument, they refer the court to the case of Reiss v. One Schat-Harding Lifeboat No. 120776 #1, 444 F.Supp.2d 553 (2006). The court does not read Reiss so narrowly. Because of the broad scope of admiralty jurisdiction in the United States, the perils out of which a salvage service may arise are all such perils as may encompass a vessel when upon waters which are within the admiralty jurisdiction of the United States. It necessarily follows that the right to recover for salvage services is not limited to services concerning a peril occurring on the high seas or within the ebb and flow of the tide. Simmons v The Steamship JEFFERSON, 215 U.S. 130, 140 (1909). Rather, any "service or assistance applied for or received by a vessel in peril or distress which in any measure conduces to its safety is in the nature of a salvage service, and is to be compensated upon principals more liberal than ordinary work." THE APACHE, 124 F. at 907; R.M.S. Titanic, Inc., v. Wrecked and Abandoned Vessel, 286 F.3d 194, 202 (4th Cir. 2002) ["By saving property at sea, salvors do not become the property's owner; rather, they save it for the owners and become entitled to a reward from the owner or from his property."](internal citation omitted); The Jefferson, 215 U.S. at 140

[Applying salvage law to a ship that was in dry dock, and holding that “(u)seful services of any kind rendered to a vessel . . . exposed to any impending danger and imminent peril of loss or damage, may entitle those who render such services to salvage reward”] The Court finds, at least in so far as Defendants’ motion to vacate the arrest, that Plaintiff has presented sufficient facts to establish a lien for salvage. Wajilam Exports (Singapore) Pte. Ltd., 475 F.Supp.2d at 278-280.

Other Liens on the Vessel

There was testimony at the hearing that there are or may be additional liens against the Vessel asserted by other entities, although to date the only intervening party is BB&T. BB&T represents to the Court in its verified Complaint that payments on its Promissory Note and Preferred Ship Mortgage are in arrears, and that as of August 21, 2008 the balance owed is Three Hundred and Thirty-Five Thousand and Sixty-Four Dollars and 19 cents (\$335,064.19), which represents principal, accrued interest, and late charges. At the status conference held on September 24, 2008, Defendants did not dispute the propriety of this lien.

The Amount of the Bond

Based on the evidence and other filings, the Court finds that BB&T has a lien amount of \$335,064.19 as of August 21, 2008. Additionally, Huff has submitted bills for \$21,338.05 for in *custodia legis* expenses through September 2008⁷, which include \$9,361.91 for storage, \$1,700.00 for towing, \$4,441.14 in U.S. Marshal’s fees, and \$5,835.00 in substitute custodian

⁷These figures are as of the date of the September 24, 2008 hearing. Different fees on the itemization for storage were paid through different dates in September, and it appears that additional storage fees will be due for certain expenses in September. See Plaintiff’s Supplement Memorandum and Attached Exhibits.

fees. Huff also has claims for necessities and trespass of \$1,165.00, as well as for reasonable dockage fees, to include power and other incidentals if paid by him. For purposes of setting a bond, the Court finds these additional costs and fees to be no more than \$10,000.00 at this time.

Huff also asserts a lien for salvage, and although in the Court's opinion this lien may be Huff's weakest claim, it is also potentially Plaintiff's largest claim. The United States Court of Appeals for the Fourth Circuit has held that salvors may be entitled to liberal salvage awards, often exceeding the value of the services rendered. Reiss, 444 F.Supp.2d at 557. Courts generally rely on the six factors set forth by the United States Supreme Court in THE BLACKWALL, 10 Wall. 1, 19 L. Ed. 870 (1869) to determine the amount of a salvage award. These factors are (1) the labor expended by the salvors in rendering the salvage service; (2) the promptitude, skill, and energy displayed in rendering the service and saving the property; (3) the value of the property employed by the salvors in rendering the service and the danger to which such property was exposed ; (4) the risk incurred by the salvors in securing the property from the impending peril; (5) the value of the property saved; and (6) the degree of danger from which the property was rescued. Fair market value usually forms the basis for a salvage award. See Reiss v. One Schat-Harding Lifeboat No. 120776 #1, 444 F.Supp.2d at 557 (citing R.M.S. Titanic, Inc., 286 F.3d at 203-204); Columbus-America Discovery Group v. Atlantic Mut. Ins. Co., 56 F.3d 556, 569 n. 17 (4th Cir. 1995).

In Reiss, forty-five percent of the value of a lifeboat was found to be a reasonable salvage award. However, Reiss involved a derelict vessel at sea with a high degree of danger to the salvors. In contrast, in the present case, even assuming a claim for salvage, only three days' labor was expended in salvaging the vessel. The alleged salvage here was rendered promptly

upon discovery of the Vessel's condition, and the repairs had already been made prior to the Plaintiff even discovering the problem. Further, it did not require a high degree of skill or expensive equipment, nor was there any danger to the salvor in effecting the repairs. Nevertheless, the water level was approximately a foot high in the bilges with the water at least four inches above the bilge pumps, which were inoperable, placing the Vessel in danger of sinking.

The Vessel's hull and machinery were insured for \$435,000.00, although the record shows that the Vessel's insurance was apparently cancelled on August 17, 2008. See Plaintiff's Supplement Memorandum, Exhibit D. The record also contains the relevant portion of a condition and valuation survey of the Vessel performed on or about September 4, 2008 by Capt. Neil Haynes of Blue Water Surveys, Inc., indicating a fair market value of \$500,000. See Plaintiff's Supplement Memorandum, Exhibit A.

Applying the six BLACKWALL factors to the facts of the present case, assuming that Plaintiff can establish a lien for salvage, the Court finds that, under the facts presented (at least for purposes of setting a bond), the salvage lien should not increase the bond amount by more than Ten Thousand Dollars (\$10,000.00).

Conclusion

For the foregoing reasons, Defendants' request to vacate the arrest of the Vessel is **DENIED**. Bond is set at \$425,000.00.⁸ Salazar, 881 F.2d at 79-80 ["The post-arrest hearing is

⁸Nothing herein should be construed as a determination as to whether Plaintiffs will ultimately prevail on the merits of their claims. Further, by setting the bond amount as stated, the Court is mindful that costs and fees may continue to accrue. The Court therefore finds it prudent to err on the high side of any possible recovery. See 20th Century Fox Film Corporation v M.V. Ship Agencies, Inc., 992 F.Supp. 1429, 1434 (M.D.FL. 1997).

not intended to resolve definitively the dispute between the parties, but only to make a preliminary determination whether there were reasonable grounds for issuing the arrest warrant, and if so, to fix an appropriate bond”].

IT IS SO ORDERED.⁹



Bristow Marchant
United States Magistrate Judge

November 3, 2008
Charleston, South Carolina

⁹The Court finds that issuance of an order is appropriate. *C.f. IsBrandtsen Marine Servs, Inc. v. M/V Inagua*, 93 F.3d 728, 730 (11th Cir. 1996)[References Magistrate Judge setting bond in the amount of \$300,000]; *Heidmar, Inc. v. Anomina Ravennate Di Armanento Sp*, 132 F.3d 264 (5th Cir. 1998)[Referencing Magistrate Judge issued warrant for arrest of the vessel and set bond]; *Chaves v. M/V Medina Star*, 47 F.3d 153 (5th Cir. 1995)[Magistrate Judge issued warrant for arrest and set bond]; *20th Century Fox Film Corp. v. M.V. Ship Agencies*, 992 F.Supp. 1429 (M.D.Fla. 1997)[Magistrate Judge issuing an order on a motion to set bond and for the release of the vessel]; *Jose v. M/V Fir Grove*, 801 F.Supp. 358, 368 (D.Or. 1992)[Referencing Magistrate Judge setting bond]. Nevertheless, the parties are advised that upon any appeal of this Order, the District Judge may, in his sole discretion, review this matter under the clearly erroneous standard of Rule 72(a), Fed. R. Civ. P., or he may review this matter under the *de novo* standard of a Report and Recommendation. *see* Rule 72(b), Fed. R. Civ. P.; *see also Bargecarib Inc. v. Offshore Supply Ships Inc.*, 168 F.3d 227, 229 (5th Cir. 1999) [Recounting Case History].

