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Floyd v. Lykes Bros. Steamship Co., Inc., United States Court of Appeals, Third Circuit, 9 March 1988, 844 F.2d 1044

COUTHINO, CARO AND COMPANY, INC. AND FIREMAN'S FUND INSURANCE CO. v. M/V SAVA ET. AL.

United States Court of Appeals, Fifth Circuit, 28 June 1988
849 F.2d 166

A provision in the bill of lading referring to COGSA does not provide constructive notice of the $500 per package limitation of liability to a shipper.

FACTS: In December of 1983, Couthino, Caro and Company, Inc. (Couthino), a steel importer, purchased 420 coils of steel from a manufacturer in Spain for shipment to New Orleans, Louisiana. The steel was loaded aboard the M/V Sava in Spain and stowed in holds four and six. Two marine surveyors observed and recorded the loading.

During the voyage, inclement weather conditions necessitated ventilation of the cargo by opening the holds as the M/V Sava lacked a forced ventilation system to control the dewpoint in the holds.

When the cargo was discharged in New Orleans in February, the coils evidenced varying degrees of rusting. A clearly defined waterline on the coils from hold four and standing water in hold six, indicated the presence of seawater in both holds. After two of Couthino's buyers received their portion of the shipment and complained of heavy rust damage, Couthino collected the coils at a warehouse in Chicago. Examination of the coils suggested flooding of the holds during the voyage and carriage of the cargo in a moisture saturated environment. Subsequently, the damaged coils were either sold at salvage or subject to depreciation allowances.

Couthino and its insurer, Fireman's Fund, brought suit against M/V Sava for the damaged cargo in the United States District Court for the Eastern District of Louisiana. The district court ruled in favor of the shipper, Couthino, but limited the vessel's liability to $500 per coil. Couthino appealed the order regarding the limitation of liability. The owner of the M/V Sava cross-appeals, challenging the lower court's finding concerning the condition of the cargo.

ISSUE: Did M/V Sava afford the cargo shipper a fair opportunity to avoid the $500/package limitation of liability by merely adducing a provision in the bill of lading that referred to COGSA?

ANALYSIS: The Court of Appeals of the Fifth Circuit determined that the clause in the bill of lading did not provide constructive notice to Couthino of the content of COGSA's limitation of liability provision.

The court noted that the case hinged on the carrier's and shipper's respective burden of prooof under Title 46 USC §1304 (5) (COGSA). This section limits the liability of a carrier to $500 per package for loss or damages in connection with the transportation of goods unless the shipper specifies a desire to increase the cargo's valuation in excess of that amount.

In order to benefit from this limitation provision, the courts have held that the carrier bears the initial burden of showing that it offered the shipper a fair opportunity to avoid the limitation, *General Electric Co. v. M/V Nedlloyd*, 817 F.2d 1022 (2d Cir. 1987), *cert denied*, —— U.S. ——, 108 S. Ct. 710, 98 L.Ed.2d 661 (1988). Yet, the circuits differ as to what evidence establishes a carrier's prima facie case of fair opportunity, *Wuerttembergische v. M/V Stuttgart Express*, 711 F.2d 621 (5th Cir. 1983). The district court cited prior court rulings which stated that mere incorporation of COGSA by reference is insufficient evidence of fair notice. However, the district court relied upon the erroneous premise that the Fifth Circuit had rejected the rationale of these cases. In so doing, the district court concluded that the bill of lading, which only mentioned COGSA, provided the shipper with adequate notice of §1304 (5), thereby constituting sufficient evidence of fair opportunity actually existed. The Court of Appeals for the Fifth Circuit pointed out that, in those cases cited, inclusion of COGSA was not the determinative factor. Instead, this court relied on evidence that the carrier clearly afforded the shipper the option to declare a valuation of its cargo after reviewing the various shipping rates.

In the case at bar, the bill of lading contained no such alternative. Therefore, since the carrier did not make its threshold showing, the shipper has no burden of proof and the M/V Sava is not entitled to limited liability.

The owner of the M/V Sava contended that the coils were not delivered to the ship in good condition. Couthino conversely argued that it sought damages due to the extensive rusting of the steel while aboard the M/V Sava and not for minor manufacturing defects. In *Camemint Food Inc. v. Brasileiro*, 647 F.2d 347, 355 (2d Cir. 1981) the court stated that "Plaintiff must show that the goods were delivered to the carrier free of the damages for which recovery is sought."

In this instance, expert testimony indicated that the steel was free of corrosive rust when delivered to the M/V Sava. The district court correctly reasoned that the coils were in good condition when the carrier received them and rejected the owner of the M/V Sava's claim.

The Court of Appeals affirmed the judgment of the district court as to finding the M/V Sava liable, reversed the judgment as to the limitation of liability and remanded the case for a determination of damages. This decision thus brings the Second and Fifth Circuit into agreement on this issue.

Susan Lysaght '91

FLOYD v. LYKES BROS. STEAMSHIP CO., INC.

United States Court of Appeals, Third Circuit, 9 March 1988
844 F.2d 1044

Absent embalming and mortuary facilities, the burial at sea of a deceased seaman rests in the discretion of the ship's captain.

FACTS: James H. Floyd (Floyd) was a seaman aboard the S.S. Shirley Lykes, owned and operated by Lykes Steamship Company of New Orleans, Louisiana (hereinafter "Lykes"). On August 19, 1983, while the vessel was passing through the Straits of Gibraltar enroute to Canada and the United States, Floyd met his demise by heart attack. At sea and eight days from port, the captain ordered and the crew made ready a burial at sea. On the following morning, August 20th, a message was sent to Lykes in New Orleans informing management of the death and pending burial of the deceased. That afternoon the crew positioned the flag draped remains at the ships stern and, after a brief service and eulogy by the captain, Floyd slid to his watery grave. The captain informed Lykes that the burial had been completed. Prior to the burial, neither the ship nor Lykes had notified Floyd's next-of-kin of the death.

Suit was initiated by Maria Floyd (Maria), daughter of the deceased, in the District Court for the Eastern District of Pennsylvania, alleging wrongful death and improper disposition of the remains, against Lykes. The district court granted defendant's summary judgment motion and dismissed the wrongful death count for lack of evidence. As to Count two, improper disposition of the body, the district court dismissed the claim as to Maria's brothers, sisters and mother, also plaintiffs, on the grounds that only the next-of-kin may properly bring such action. Thereafter, the district court granted Lykes summary motion and dismissed the complaint. Maria appeals the dismissal of Count two as to herself only.

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Floyd v. Lykes *(Cont.)*

ISSUE: Is it proper for a ships captain to perform a burial at sea, without prior notification of the next-of-kin, when the vessel is eight days from port?

ANALYSIS: Plaintiff argued on appeal that state tort law established a quasi-property right to the body of the deceased in the next-of-kin and that state law was or should be incorporated into the general maritime law. Agreeing that maritime law applied and citing *Igneri v. Cie de Transports Oceaniques*, 323 F.2d 257, 259 (2d Cir. 1963), *cert denied* 376 U.S. 949 (1964), the court held that it could "look to the law prevailing on the land" only when the maritime law was silent. Absent a maritime statute, the case should be governed by general maritime case law, *United States v. Reliable Transfer Co.*, 421 U.S. 397, 409 (1975); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 160-61 (1920), and state law may not be applied where it would conflict with maritime law, *Coastal Iron Works, Inc. v. Petty Ray Geophysical*, 783 F.2d 577, 582 (5th Cir. 1986).

The court looked to *Brambir v. Cunard White Star, Ltd.*, 37 F. Supp. 906, 907 (S.D.N.Y. 1940), *aff'd mem.*, 119 F2.d 419 (2d Cir. 1941), as the leading case on point. In that case a passenger died eight days from port and the court held that the ship's master had absolute discretion over the fate of the corpse. Further, burial at sea is recognized as a viable option by master, vessel and medical guidebooks.

Defendant cited *Finley v. Atlantic Transport Co.*, 220 N.Y. 249, 115 N.E. 715 (1917) to support its case. There, defendant provided an embalmer and morgue and additionally, was only twenty hours from port when the burial was effected. Other than this easily distinguishable case, the only authority to support defendant's claim was a publication by the United States Public Health Service entitled *The Ships Medicine Chest and Medical Aid at Sea*. That handbook contained the statement "[t]oday burial at sea is the exception". But no expansion of this statement was offered, leaving the reader inconclusive as to whether the meaning was that death at sea was the exception today due to advances in medicine and technology, or that lack of embalming and mortuary facilities was the exception, etc. Thus the plaintiff's case failed for lack of any evidence in support of her cause of action.

In affirming the lower court's decision the court of appeals noted that plaintiff offered no statutes, cases or authorities to contradict *Brambir's* holding, that nothing in the Death on the High Seas Act, 46 U.S.C. §§761-68, or the Jones Act, 46 U.S.C. §688, prohibited burial at sea, and that no abuse of discretion on the part of the captain had been demonstrated. the court insinuated that certain proof not present in the instant case might have allowed the action to go forward. Examples of such facts were if the ship had embalming and mortuary facilities (vessels refrigerated food locker not appropriate), or if the plaintiff had demonstrated both a willingness to reimburse Lykes for its expenses for an unplanned docking at a closer port plus the willingness of the port country to accept an unembalmed cadaver, or if the captain's decision could be classified as "arbitrary, fanciful or unreasonable".

Harold Levy '90

SCAC TRANSPORT (USA) INC. v. S.S. DANAOS
United States Court of Appeals, Second Circuit, 25 April 1988
845 F.2d 1157

A stevedore whose negligence has been determined to be the proximate cause of the litigation can be vouched into arbitration proceedings without its consent and be bound by the findings of the arbitrator.

FACTS: The S.S. Danaos was loading cargo on a vessel when an accident occurred wherein the vessel's Stulken Boom collapsed when a pin in a winch block failed during the loading of a water tank truck. The truck, boom and parts of the vessel suffered damage. The vessel, owned by Danais Shipping Company (Danais), was under a time charter to Big Lift USA, Inc. and Big Lift Shipping Company (N.A.) Inc. (Big Lift), collectively which had contracted with Universal Maritime Service Corp. (Universal) for the stevedoring services.

The truck's owner SCAC Transport (SCAC) commenced this action against Danais, Big Lift and the S.S. Danaos in rem. Danais cross claimed against Big Lift for indemnity. Universal was brought into the action by a third party claim and was cross claimed for indemnification by Big Lift. SCAC settled with Danais. Pursuant to the charter-party between Danais and Big Lift any dispute was to be arbitrated in London. Universal was not a party to this agreement.

Big Lift tendered the defense to Universal with regard to the London arbitration and required Universal to appear in defense of the action and to indemnify Big Lift. Universal was advised that refusal or neglect of the notice would bar it from objecting to the outcome of the arbitration.

The arbitration ruling was in favor of Danais, and the stevedore's negligence was found to be the proximate cause. Damages included vessel repairs, loss of charter hire, interest and attorney's fees. Universal again declined to assume the defense, when Big Lift informed it that an appeal before the Commercial Court in London was to be heard. After Universal declined to assume defense of the claim and prosecution of the special cases, Big Lift instructed its London solicitors to terminate appeal. Big Lift then commenced an action in the District Court.

The District Court, affirming the finding of the London arbitration as to negligence, found that Big Lift was entitled to indemnity. The damages awarded, however, did not include attorney's fees becuase the court determined they were beyond what Universal could reasonably contemplate when hired as a stevedore.

ISSUE: Whether a stevedore without its consent may be vouched into an arbitration where the stevedore is the charterer's indemnitor?

ANALYSIS: The Court of Appeals for the Second Circuit reversed the district court and held that absent a particularized showing of prejudice, a stevedore may be vouched into arbitration under a charter party by a charterer where the stevedore is the charterer's indemnitor. The district court's decision as to attorney's fees was reversed.

Under the common-law practice of voucher, a defendant or indemnitee who seeks indemnification from a third party or indemnitor must serve a notice to defend on the third party. This notice informs the indemnitor of the action against the defendant and offers the opportunity to defend the action.

If the defense is not assumed, the defendant may bring a separate action later to recover its indemnity. The indemnitor can dispute the existence and extent of the indemnity. See *Humble Oil & Ref. Co. v. Philadelphia Ship Maintenance Co.*, 444 F.2d 727 (3rd Cir. 1971). The third party will be collaterally estopped from relitigating issues decided in the first action in all of the elements of the adjudicatory procedure are met.

Arbitration is cited as an important, efficient and equitable means of dispute resolution when arbitrators are experienced in maritime matters and the evidence is extensive. The Second Circuit noted the procedural aspects of arbitration and court adjudication and concluded contrary to the district court's ruling that the notice received by Universal had no preclusive effect; that absent a particularized showing of harm, procedural differences between arbitration and the judicial process are not grounds for denying a preclusive effect to vouching in notice. Universal did not demonstrate any prejudice suffered as a result of the London arbitration.

For reasons of efficiency vouching is permitted. Stevedores are well aware that charter parties contain arbitration clauses to which they as potential indemnitees are bound. Absent a

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