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E.A.S.T., Inc. of Stamford, Conn. v. M/V Alaia United States Court of Appeals, Fifth Circuit, 26 June 1989 876 F.2d 1168

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Kuehne & Nagel v. Geosource (Cont.)

Executive Jet Aviation, Inc. v. City of Cleveland, Ohio, 409 U.S. 249 (1972). *Executive Jet* provided the test to be satisfied when invoking admiralty jurisdiction for maritime torts and requires that: (1) the alleged wrong occurs on navigable waters (situs) and (2) the wrong bears a significant relationship to traditional maritime activities (nexus).

The district court found that the "impact" of the fraudulent contract "took effect" on navigable waters because the delays in unloading the cargo allowed the remaining cargo to be "at sea" waiting to be discharged. The requirement of *Executive Jet* for situs was provided with the linkage by the delay at sea. In effect, the misrepresentations were manifested at sea. *Carroll v. Protection Maritime Insurance Co., Ltd.*, 512 F.2d 41 (1st Cir. 1975).

The district court found that the intentional tort was so "... interwoven with a maritime contractual relationship (at least in part) as to fall within admiralty jurisdiction." *Kuehne & Nagel (AG & CO) v. Geosource, Inc.*, 625 F. Supp. 794, 799 n.6 (S.D. Tex. 1986). The Fifth Circuit reversed the district court and found no basis for admiralty jurisdiction. In the instant case, the fraudulent inducement took place at the forwarders' meeting in Hamburg, FRG. The tortious acts occurred before the contract was signed. An "impact" on navigable waters with maritime

consequences never happened and therefore the situs requirement of *Executive Jet* was not met, thereby invalidating any claim for admiralty jurisdiction. The court of appeals held that the parties to a contract with strong maritime ties must satisfy the *Executive Jet* situs requirement.

As to the claim for breach of a maritime contract, the district court found that Kuehne & Nagel could not invoke admiralty jurisdiction based on breach of contract. The first and foremost criterion to be fulfilled is the existence of a maritime contract. *Rea v. The Eclipse*, 135 U.S. 599 (1980). A traditional maritime contract does not include land transportation. Elements which establish a maritime contract are activities that are traditionally marine in nature with only incidental non-maritime activity being permissible. If there is a mix of elements, the admiralty court must separate the activities and enforce the maritime obligations. The bills of lading had a fixed single rate for the sea and land transportation.

The Fifth Circuit agreed and affirmed the district courts finding that there was no admiralty jurisdiction based on breach of a maritime contract. In this contract, neither of the requirements are met. Although the situation did involve transportation of goods by sea, the route included a 1000 mile overland road trip which is not an incidental portion of the contract or something easily separable.

Mark A. Taylor '92

E.A.S.T., INC. OF STAMFORD, CONN. v. M/V ALAIA United States Court of Appeals, Fifth Circuit, 26 June 1989 876 F.2d 1168

Breach of a time charter creates a maritime lien distinct from liens based on contracts of affreightment and requires delivery of the vessel rather than the union of ship and cargo to become effective.

FACTS: E.A.S.T., Inc. ("EAST") entered into an agreement with Advance Co. ("Advance") the owners of the M/V Alaia, to time charter the vessel. The charter party acknowledged EAST's intention to carry milk carton stock and bulk soda ash from New Orleans to Venezuela. Also, the charter agreement contained an arbitration clause that specified that this contract would be arbitrated in London and governed by English law. EAST subsequently entered into two voyage subcharters, one to carry milk carton stock and another to carry soda ash. EAST paid \$26,700 in advance charter hire. EAST procured ship's agents, longshoremen, bunkers, and encountered other expenses in preparation for the charter. The vessel went "on hire" on October 20, 1987. EAST and the two subcharters engaged marine surveyors to inspect the vessel. The marine surveyors concluded that the vessel was unseaworthy, was not suitable to carry the cargo and did not meet the standards of the charter party. The surveyors cited excessive dirt, rust and debris along with unseaworthy hatches as the basis for their finding.

EAST rejected the vessel and filed an *in rem* action in Federal District Court for the Eastern District of Louisiana, where it sought to invoke the charter's arbitration clause and obtain security for a possible arbitration award. Advance filed a notice of appearance *in personam*, an answer and a counter-claim. Advance sought to vacate the vessel's arrest order, claiming that the maritime lien was insufficiently based, and alleging that a valid charter party had come into existence. Alternatively, Advance stated a maritime lien is improper for breach of a charter party, where cargo had not been loaded on the ship. Advance also contested EAST's claim that the arbitration clause was not enforceable.

The district court first rejected the argument that a valid time charter did not exist. This court, relying on the reasoning of *International Marine Towing v. Southern Leasing Partners, Ltd.*, 722 F.2d 126 (5th Cir. 1983), *cert. denied*, 469 U.S. 821 (1984), noted that a maritime lien was valid even though no cargo was loaded pursuant to the charter. The court also held that the enforcement of the arbitration clause based on *in rem* jurisdiction was sufficient and that any defect in jurisdiction was cured by Advance's appearance *in personam* to defend against EAST's action and to support its counterclaim.

ISSUES: (1) Did the trial court err in concluding that a maritime lien was proper for breach of a time charter even though cargo had never been loaded or placed in the possession of the vessel?
(2) Did the trial court err in finding *in rem* jurisdiction

as a sufficient basis for referring parties to arbitration?

ANALYSIS: The Fifth Circuit affirmed the ruling of the district court, and concluded that the time charter between the parties was not executory because the vessel had been delivered to EAST. The court cited, G. Gilmore and C. Black, *The Law of Admiralty* 636 (2d ed. 1975), which states, "[t]he point at which the vessel itself is deemed to have commenced 'performance' sufficient to remove the contract from executory status varies with the type of contract involved." The court of appeals further cited G. Gilmore and C. Black, *supra* at 636, "[u]nder charter parties, the point of 'execution' would be the delivery of the vessel under the charter: mere refusal to deliver would only give rise to liability *in personam*...."

The court of appeals rejected the assertion by Advance, that the time charter was a contract of affreightment and therefore remained executory until there was a union of the ship and its cargo. The court distinguished *Belvedere v. Compania Plomari de Vapores, S.A.*, 189 F.2d 128 (5th Cir. 1951), which Advance claimed controlled the issue, on the grounds that the plaintiff was both a cargo owner and a charterer. The EAST court stated "[w]hen, however, the charterer has, as in this case, entered into subcharters with the cargo owners, the charterer asserts a breach only of the time charter *qua* time charter and not of a contract of affreightment. ..." E.A.S.T., at 1177. The court of appeals affirmed the district court's decision granting a maritime lien upon the breach of time charter.

The Fifth Circuit also agreed with the district court that *in rem* jurisdiction is an adequate basis for referring parties to arbitration. The court of appeals found the Federal Arbitration Act §8 to be persuasive:

If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then . . . the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

9 U.S.C. §8

Even in the absence of this provision, 9 U.S.C. §206 authorizes the district court to refer the parties to arbitration in London as provided for in the charter party. The court further agreed that Advance's appearance *in personam* was a separate and sufficient basis on which to refer parties to arbitration.

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