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Afram Lines Intern., Inc. v. M/V Capetan Yiannis United States Court of Appeals, Eleventh Circuit, 19 June 1990 905 F.2d 347

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standard provision in a charter party. *Spence v. Mariehamns RIS*, 766 F.2d 1504 (11th Cir. 1985). But, the court stated, the amended part of clause 8 included in the charter party between BSC and Roscoe Shipping did not place the responsibility of proper discharge of cargo on BSC. *Irby v. Tokai Lines*, 1990 WL 18880, 1990 U.S. Dist. Lexis 2116 (E.D.PA. Feb 23, 1990).

The court concluded that the plain language of clause 8 contained no suggestion that BSC had a duty to supervise, and that the appellant failed to present any extrinsic proof that BSC and Roscoe Shipping meant to impose such a duty. Therefore, the court rejected Mrs. Hines' contention that clause 8 was an agreement between the parties placing the responsibility for the safety of the longshoremen during cargo operations on BSC.

Appellant's final argument was that BSC had such control over the stevedoring operations as to raise a duty on BSC's behalf to ensure the safety of Ceres employees. She called attention to the right of BSC's cargo representative to be present during the discharging of cargo, his

right to make suggestions, and to the ten pages of instructions on proper handling of BSC cargo given to Ceres. The court concluded that Folan merely regulated the proper handling of BSC cargo so as to avoid any damage to it, and that the ten pages of instructions were simply a "laundry list" of suggestions on how to handle the various products BSC ships. BSC in fact retained no actual control over the stevedoring operations. Therefore, no duty could be imposed on BSC to ensure the safety of the longshoremen.

As the depositions of Sorenson and Folan support the finding that BSC was not in any way involved in the operative control of the stevedoring operations, and as Sorenson testified that the responsibility to ensure the safety of his workers was his own, the Court of Appeals found no general duty, under *Scindia*, for BSC to supervise stevedoring operations, and no contractual agreements imposing such a duty. Therefore, the court affirmed the judgment of the district court granting summary judgment in favor of BSC.

Katherine Vasilopoulos '92

AFRAM LINES INTERN., INC. V. M/V CAPETAN YIANNIS

United States Court of Appeals, Eleventh Circuit, 19 June 1990

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Absent extraordinary circumstances, plaintiff need not post countersecurity in amounts exceeding the security of the original claim when the plaintiff does not seek to release its property from the counterplaintiff's custody and when the counterplaintiff cannot proceed *in rem* or *quasi in rem*.

FACTS: In December, 1987 Brotherhood Shipping Company, Ltd. (Brotherhood), owner of the M/V Capetan Yiannis (the vessel) entered an agreement with a nonparty, Grant Shipping Company, and Afram Lines International, Inc. (Afram), a Florida corporation. Under the agreements the vessel was to be subchartered to Afram and was to carry cargo for Afram from Milwaukee, Wis., to West Africa. The vessel would be commanded by a Brotherhood employee.

On December 12, 1987 the parties took the vessel to the port of Milwaukee and began to load cargo. On December 14, the harbor master issued a notice to all affected vessels of an impending storm. After allegedly receiving ambiguous advice from Afram's Milwaukee representative, the vessel master decided to keep the vessel tied to the dock. During the storm the vessel's mooring lines split and the vessel was pushed repeatedly against the dock causing both vessel and dock substantial structural damage.

Afram promptly filed an action in the Eastern District of Wisconsin seeking recovery *in rem* against the vessel and *in personam* from Brotherhood for \$1.7 million in damages for Brotherhood's alleged negligence, conversion, and breach of the subcharter agreement. In response to Afram's demand of security Brotherhood agreed with Afram to post a \$440,000.00 bank guarantee, thereby avoiding arrest of the vessel.

Afram then instituted an action in the United States District Court for the Middle District of Florida. Brotherhood filed an answer and a counterclaim. The counterclaim alleged that Brotherhood had sustained damages in the amount of \$4,724,475.74 which was attributable to Afram's own conduct. After filing the answer and counterclaim Brotherhood filed a motion pursuant to Rule E(7) of the Supplemental Rules for Certain Admiralty and Maritime Claims (Rule E(7)), to compel Afram to post countersecurity. The district court granted the motion and ordered Afram to post security to the full stated amount of Brotherhood's claim. Afram filed a motion for reconsideration, which was denied. Afram appealed the decision to the United States Court of Appeals for the Eleventh Circuit.

ISSUE: Did the district court err in ordering the plaintiff to post countersecurity in amounts exceeding the security of the original claim when the plaintiff did not, by posting countersecurity, seek to release its property from the counterplaintiff's custody and when the counterplaintiff could not bring an action *in rem* or *quasi in rem*?

ANALYSIS: The Court of Appeals for the Eleventh Circuit vacated the order of the district court, finding that the district court had abused

its discretion in requiring Afram to post the sum.

In its decision the court looked first at Rule E(7). The court found that the rule stands for the proposition that in the event of a counterclaim, where the defendant had given security to respond in damages, the plaintiff shall give security in the usual amount and form to respond in damages to the claims found in the counterclaim, unless the court, for cause shown, otherwise directs. The purpose of the rule, the court noted, is to "place the parties on an equality as regards to security."

Washington-Southern Navigation Co. v. Baltimore & Philadelphia Steamboat Co., 263 U.S. 629, 638-39 (1924). The court further found that to effectuate Rule E(7) the district court has broad discretion to determine whether, and to what amounts, countersecurity shall be posted.

Despite this broad discretion, the court stated that the district court should consider several factors. For example, it should be reluctant to order countersecurity if the plaintiff does not, by the posting of countersecurity, seek to release its property from the counterplaintiff's custody. *Expert Diesel, Inc. v. The Yacht "Fishin' Fool"*, 627 F. Supp. 432 (S.D.Fla.1986). The court also held that it should be determined whether the counterplaintiff could have brought an action *in rem* or *quasi in rem* for in the event that the counterplaintiff could not have proceeded in this manner, there would be little reason to require a larger bond on the counterclaim than on the original claim. In addition, the court held that the district court should look at the plaintiff's financial ability to post the countersecurity. Finally, the court held, it should be considered to what extent the counterclaim may be frivolous.

Applying the facts, the court of appeals concluded that Afram did not seek to release any of its property from Brotherhood's custody by posting countersecurity. It also found that Brotherhood could not proceed *in rem* or *quasi in rem* and that Brotherhood sought its recovery from Afram *in personam*. With these two factors present, the court ruled that district courts should not, absent extraordinary circumstances, require claimants, like Afram, to post countersecurity in an amount which exceeds the security posted on the original claim. Thus the court held that the district court had abused its discretion when it ordered Afram to post full countersecurity.

John Froitzheim '92