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Thyssen Steel Company v. M/V Kavo Yerakas, CA5, 50 F.3d 1349, 4/27/95

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fees were available under a claim for maintenance and cure; and whether the Supreme Court's *Miles* decision and ninth circuit precedent precluded punitive damages on a general maritime action.

The ninth circuit noted that in order for Glynn to recover under the Jones Act he had to show a defendant was his employer. *Cosmopolitan Shopping Co. v. McAllister*, 337 U.S. 783, 787 n.6 (1949). The district court had found as a matter of law that an employer/employee relationship existed between Glynn and Roy Al. The ninth circuit rejected Roy Al's argument that the jury could have found Glynn to be a joint venturer or independent contractor on the basis of the compensation arrangement, which was based on a receipt of a percentage of profits. The appellate court concluded that no reasonable jury could have found factually that Glynn was anything other than an employee, considering several factors such as payment, direction, supervision and source of power to hire and fire. *Matute v. Lloyd Bermuda Lines, Ltd.*, 931 F.2d 231, 236 (3d Cir.), *cert. denied*, 502 U.S. 919 (1991).

The appeals court also concluded that the district court had erred in submitting defendant Shawhan's employer status as a jury question. The court stated that, since there could only be one employer for the purposes of the Jones Act and that it had already been determined that Roy Al was Glynn's employer, the jury should not have been permitted to consider the question of whether or not Shawhan was also Glynn's employer.

With respect to the issue of whether Glynn was entitled to attorney's fees, the ninth circuit noted that it was well established, since *Vaughan v. Atkinson*, 369 U.S. 527 (1962), that an injured seaman could recover attorney's fees where defendant had acted willfully and persistently in failing to pay maintenance and cure. The court treated the issue as abandoned by defendant Roy Al, since it did not seriously contest the issue of its "willful and persistent" failure to either investigate Glynn's claim or pay maintenance.

The appeals court, instead, focussed on Glynn's assertion that the lower court had not properly set the level of fees on his claim. The court determined that the lower court did not abuse its discretion in fixing the amount of fees awarded and

that the amount awarded was reasonable, affirming the result. The ninth circuit observed with approval that the district court, in fixing the fees, had used factors set forth in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 69-70 (9th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976), such as time and labor required, novelty and difficulty of the question involved, skill necessary to pursue the claim, preclusion of other employment, etc.

The ninth circuit focussed in the critical part of its opinion on the issue of whether the district court had erred in finding that Glynn was not entitled to punitive damages on the maintenance and cure claim. The court, in its analysis, relied on *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), concluding that punitive damages are not recoverable for defendant's willful, arbitrary and persistent failure to pay maintenance and cure. *Glynn v. Roy Al Boat Management Corp.*, 57 F.3d 1495, 1505. The court extended the *Miles* rationale limiting nonpecuniary recovery to general maritime causes of action on the theory that such recovery was not provided for in the "uniform plan of maritime tort law Congress created."

The appeals court rejected Glynn's argument that it should not abandon the ninth circuit's recognition of punitive damages for failure to pay maintenance and cure under the pre-*Miles* precedent of *Evich v. Morris*, 819 F.2d 256 (9th Cir.), *cert. denied*, 484 U.S. 914 (1987). The court pointed out that the language in *Evich* supporting plaintiff's position was dictum. The ninth circuit expressly refused to follow the fifth circuit's opinion in *Guevara v. Maritime Overseas Corp.*, 34 F.3d 1279 (5th Cir. 1994), where the court upheld a punitive damage award for failure to pay maintenance and cure. The ninth circuit noted that decisions upholding punitive damages relied "directly or indirectly" on the *Vaughan* case. The Supreme Court in that case had acknowledged for the first time that damages for failure to give maintenance and cure may include "necessary expenses, including attorney's fees, when the failure to pay maintenance is willful and persistent." *Glynn*, 57 F.3d at 1504. The ninth circuit concluded that there is no reason why the plaintiff

should be awarded punitive damages in addition to attorney's fees since attorney's fees alone were a powerful incentive deterring employers from willfully and arbitrarily refusing to pay maintenance and cure.

As to other issues raised, the court ruled that Glynn's failure to submit the question of prejudgment interest to the jury served as a waiver on his prejudgment entitlement and that the district court had not erred in finding that a magistrate could not order payment of maintenance and cure as a condition for lifting a default against defendants. The lower court had found that there was a disputed issue of fact as to whether any injury had befallen Glynn aboard the *No Problem*, which required a determination before he could prevail and, therefore, such an action by the magistrate would have been premature.

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COGSA Carriers

CHARTERER CAN BIND VESSEL OWNER DESPITE CHARTER-PARTY INDEMNITY CLAUSE BY SIGNING "FOR THE MASTER"

Charter party authorizing charterer to sign for master could bind vessel owner as COGSA carrier even though charter party expressly included indemnification provision; shippers failed to meet fifth circuit privity standard or make *prima facie* bailment claim against owner.

(Thyssen Steel Company v. M/V Kavos Yerakas, CA5, 50 F.3d 1349, 4/27/95)

Thyssen Steel Company (Thyssen) entered into a contract with Europe-Overseas Steamship Lines (Eurolines) to carry steel from Europe to Texas aboard the ship *M/V Kavos Yerakas*, which had been time chartered to Eurolines by its owner, Dodekaton Corporation (Dodekaton). Pursuant to loading the cargo of steel pipe, bills of lading were issued and signed by the Eurolines agent "for the master."



Upon arrival in Texas, some of the cargo was damaged. Thyssen and other plaintiffs brought an action against the M/V *Kavo Yerakas*, Dodekaton and Eurolines for cargo damage occurring during transit. The district court entered judgment in favor of vessel owner Dodekaton. The other defendants settled and plaintiffs appealed the judgment in favor of Dodekaton.

Under COGSA, a cargo owner may only recover from the carrier of the goods. *Pacific Employers Ins. Co. v. M/V Gloria*, 767 F.2d 229, 234 (5th Cir. 1985). A "carrier" is "the owner or the charterer who enters into a contract of carriage with a shipper." 46 U.S.C. app. § 1301(a). A "contract of carriage" takes the form of a bill of lading or other similar document of title. 46 U.S.C. app. § 1301(b). A contract of carriage with a vessel owner may be directly between the parties or through the charterer's authority to sign bills of lading "for the master." *Pacific Employers*, 767 F.2d at 236. If, however, the charterer signs without the authority of the vessel owner, then the owner will not be a party to the contract of carriage and will not be a "carrier" under COGSA. *Pacific Employers*, 767 F.2d at 237; *J. Gerber & Co. v. M/V Inagua Tania*, 828 F.Supp. 458, 460 (S.D. Tex. 1992). To establish liability for the vessel owner, the cargo owner must show that the shipowner was a party to the contract; failure to do so will show that the cargo owner did not rely on the owner to perform the contract.

The district court did not confront the contention that Eurolines, the charterer, had power to sign bills of lading on behalf of Dodekaton based on charter party provisions nearly indistinguishable from those contained in the *Pacific Employers* case. In *Pacific Employers*, the fifth circuit found that charter party provisions largely identical to Clause 8 and 45 of the *Thyssen* charter party entitled the charterer to sign bills of lading on behalf of the vessel owner. *Pacific Employers*, 767

F.2d at 237-38. However, the major departure from the *Pacific Employers*' charter versus that of *Thyssen* is that the latter charter contained an indemnification provision, making the case more factually similar to a case in the fourth circuit, *Yeramex International v. S.S. Tendo*, 595 F.2d 943 (4th Cir. 1979). The fifth circuit considered the *Yeramex* case in its analysis when examining the effect of the indemnity clause.

A provision in a contract of carriage that purports to relieve a party of liability is expressly void under the Carriage of Goods by Sea Act. See 46 U.S.C. app. § 1303(8). In the *Yeramex* case the fourth circuit did not allow a much more elaborate indemnity provision by itself alone to exonerate the vessel owner from traditional responsibilities for vessel seaworthiness, etc. The fifth circuit agreed with this concept, deciding that the indemnity provision did not have a bearing on the owner's liability as a COGSA carrier.

In sum, the fact that the parties had a charter party and bill of lading nearly identical to those found in *Pacific Employers* was controlling. Clause 45 of the *Thyssen* charter party entitled the master to allow Eurolines' agent to sign the bills of lading, binding the owner. If, the court stated, on remand, the shippers proved that the master had actually authorized Eurolines to sign on his behalf, then the *Pacific Employers* framework would be fulfilled, providing necessary privity with the vessel owner thereby meeting the definition of COGSA carrier.

In the absence of this proof, the court held that the fifth circuit's standard for COGSA liability required privity, rejecting arguments by the plaintiffs holding up second circuit cases where claims were directly asserted against vessel owners in privity's absence. A better argument by *Thyssen*, which was entertained by the court, was the assertion that the district court had erred in finding no common law bailment claim against the vessel owner for cargo damage. In the absence of COGSA "carriage of goods," which is defined as covering "the period from the time when the goods are loaded on to the time when they are discharged from the ship," 46 U.S.C. app. § 1301(e), the

plaintiffs argued that Dodekaton was liable under common law as a bailee of cargo for damage caused by its own negligence.

The fifth circuit, however, found that plaintiff-appellants had not established a *prima facie* bailment claim against the owner. First, plaintiffs did not show that an express or implied bailment contract existed. Second, the plaintiffs failed to establish that the cargo was within Dodekaton's exclusive possession during transit. (The cargo was also within Eurolines'— the charterer's— possession.) The appeals court affirmed the district court, finding that, even if a general maritime bailment claim were permissible as a matter of law, Dodekaton was not liable as a bailee for cargo damage.

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Supplemental Rules

SECOND CIRCUIT RULES COURTS CAN'T DENY COUNTERSECURITY ON ARBITRABLE ACTIONS

While trial courts have broad discretion when ordering countersecurity in proceedings brought under Section 8 of the Arbitration Act, arbitrability is not permissible basis for denying countersecurity since the result would conflict with clear purposes of the Arbitration Act and Supplemental Fed. R. Civ. P. E(7).

(*Result Shipping Co., Ltd. v. Ferruzzi Trading USA, Inc.*, CA2, 56 F.3d 394, 5/25/95)

Grain was shipped from the United States to Jordan pursuant to a contract between defendant Ferruzzi Trading USA, Inc. (Ferruzzi) and the Jordanian Ministry of Supply. Ferruzzi chartered the M/V *Bulk Topaz* from Result Shipping Co., Ltd. (Result) in order to ship the grain. The charter party between Ferruzzi and Result provided that all disputes arising out of the charter would be subject to arbitration in London.