Admiralty Practicum

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Article 10

Central Hudson Gas & Electric Corp. v. Empresa Naviera Santa S.A., CA2, 56 F.3d 359, 5/17/95

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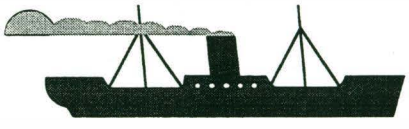
When the vessel arrived in Jordan, the Jordanian Ministry rejected the grain in two of the vessel's holds as damaged and seized the M/V *Bulk Topaz*. Result was forced to post bond in order to secure the vessel's release and commenced suit against Ferruzzi by attaching Ferruzzi's property in the District of Connecticut to secure an *in personam* admiralty claim for breach of the charter party. The property consisted primarily of a $66,000 mortgage on residential property owned by two Ferruzzi employees. Result claimed total damages of $1,082,139.30.

Ferruzzi answered by filing a counterclaim, alleging that the crew of the M/V *Bulk Topaz* was responsible for damaging the grain after it had been loaded onto the vessel, and that Result was therefore liable to Ferruzzi for damages totalling $375,000. Ferruzzi moved for security for its costs in connection with Result's attachment of its property, and for countersecurity on its counterclaim. The district court denied both motions and granted Result's motion to stay the proceedings pending arbitration on the merits in London.

Ferruzzi appealed the order denying its motion for security and countersecurity, arguing, *inter alia*, that the district court denied its motion for security and countersecurity solely because the underlying dispute was to be resolved in arbitration. Because this case presented "issues concerning the interplay of the Arbitration Act, * * * and the Supplemental Rules governing availability of security and countersecurity," *Result Shipping Co., Ltd.* v. *Ferruzzi Trading USA, Inc.*, 56 F.3d 394, 399 (2d Cir. 1995), which had not been previously addressed in the second circuit, the appeals court exercised its jurisdiction to hear the appeal under the collateral order doctrine. *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 547-47, 69 S.Ct. 1221, 1225, 93 L.Ed. 1528 (1949).

The issue in the case was whether or not the court, in the exercise of its discretionary power to order countersecurity, could deny such security to a defendant because the action giving rise to the counterclaim was subject to contractually stipulated arbitration.



While acknowledging that the trial court has broad discretionary powers with respect to ordering countersecurity in proceedings brought pursuant to § 8 of the Arbitration Act, 9 U.S.C. § 8 (1988), the court of appeals held that denying countersecurity solely because the underlying dispute was to be resolved in arbitration would conflict with the clear purposes of the Act and Supplemental Rule E(7) of Fed. R. Civ. P.

> Section 8 allows an "aggrieved party" to enjoy the advantages of *both* arbitration *and* traditional maritime security devices, and a counterclaiming defendant is an "aggrieved party" within the meaning of the statute who is as entitled to both these remedies as is the plaintiff. * * * [T]he purpose of Rule E(7) is to equalize, where not otherwise inequitable, the positions of the plaintiff and the defendant with respect to security. A plaintiff may not be denied an order of attachment merely because the parties' dispute is to be resolved in arbitration.* * * [S]uch arbitration is not a permissible basis on which to deny the defendant the benefit of traditional maritime security devices, such as countersecurity under Rule E(7).

56 F.3d at 400. (Emphases in original.)

Because the record of the proceedings in the district court was unclear as to the judge's basis for denying Ferruzzi's motion for countersecurity, the court of appeals remanded "in order to allow the District Judge to exercise his discretion without reference to the impermissible consideration of arbitration." *Id.* at 401.

As to Ferruzzi's motion for security for its costs in connection with Result's attachment of its property, including legal fees, the court of appeals upheld the district court's denial of the motion and noted that Ferruzzi had "pointed to no federal statute authorizing awards of attorney's fees to a prevailing defendant in a maritime case merely because the litigation was initiated by attachment." *Id.* In a footnote, the court, relying on *Incas & Monterey Printing & Packaging, Ltd.* v. *M/V Sang Jin*, 747 F.2d 958, 965, 965 n.19 (5th Cir. 1984), *cert. denied*, 471 U.S. 1117, 105 S.Ct. 2361, 86 L.Ed.2d 261 (1985), stated further that even had Ferruzzi based its counterclaim on wrongful attachment, countersecurity would not be mandatory under Rule E(7) because the act of the wrongful attachment would not have arisen "out of the same transaction or occurrence with respect to which the action was originally filed." 56 F.3d at 402.

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Admiralty Procedure

BAREBOAT CHARTERER HELD LIABLE IN SEPARATE *IN PERSONAM* ACTION ON FACTS OF PRIOR *IN REM* SUIT

Admiralty courts presiding over *in rem* actions may award damages in excess of the value of the *res*; bareboat charterer collaterally estopped from relitigating damages and liability questions in subsequent suit, although prior *in rem* action held not *res judicata* on separate *in personam* claim against charterer.

(*Central Hudson Gas & Electric Corp. v. Empresa Naviera Santa S.A., CA2, 56 F.3d 359, 5/17/95*)

On January 16, 1988, the M/V *Lunamar II* (the Vessel) dragged an anchor in the Hudson River, damaging an electrical cable pipeline owned by Central Hudson Gas & Electric Corporation (Central Hudson). The Vessel was operated by Empresa Naviera Santa S.A. (Empresa) pursuant to a bareboat charter party. Central Hudson thereafter commenced an action in the Southern District of New York against the Vessel *in rem* and *in personam* against the registered owner, Seiriki One (Panama) S.A. (Seiriki). A $3 million letter of undertaking which did not expressly include any charterparties was delivered to Central Hudson by the Vessel's underwriters on behalf of Seiriki. Seiriki

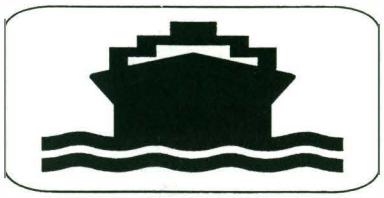
and Empresa filed restricted appearances as owner and owner *pro hac vice*, respectively.

Central Hudson then brought an action *in personam* against Empresa in the Southern District of New York and an additional *quasi in rem* action in Louisiana against another ship operated by Empresa— both actions being consolidated in the New York court. The district court decided in favor of Central Hudson in the *in rem* proceeding, awarding damages totalling $4,477,584.15, greater than the amount provided for in the letter of undertaking, but dismissed the *in personam* suit against Seiriki for lack of jurisdiction. The district court also held in favor of Central Hudson in the suit against Empresa, awarding the amount of the deficiency from the *in rem* judgment plus prejudgment interest— $1,850,895.83 in total. Empresa appealed the district court's rulings.

On appeal, the second circuit decided whether a district court sitting in admiralty could enter an *in rem* judgment in excess of the value of the subject *res* or the substituted bond and whether the *in rem* judgment of an admiralty court bars a subsequent *in personam* action against the bareboat charterer of the subject vessel for a deficiency in the prior *in rem* judgment.

The court of appeals began its analysis with an affirmation of the general rule that *in rem* judgments may not be rendered in excess of the value of the *res* or the substituted bond because *in rem* proceedings are brought against the *res* itself. 7A JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ E.16[2], at E-779 (2d ed. 1995). The court then asserted that district courts sitting in admiralty are not bound by the general rule by virtue of their equitable powers. *The Minnetonka*, 146 F. 509, 515 (2d Cir.), *cert. denied*, 203 U.S. 589 (1906)). The court stated that admiralty courts may award damages in excess of a letter of undertaking which was delivered to avoid the arrest of a vessel, adding the caveat that this does not allow execution of judgment for the deficiency against parties not found liable *in personam*.

The court of appeals then proceeded to discuss the *in rem* judgment creditor's ability to secure an *in personam* judgment for the deficiency. Stating that Supplemental Rule C(1)(b) of the Federal Rules



of Civil Procedure specifically allows both *in rem* and *in personam* actions against possibly liable parties, the court found that the doctrine of *res judicata*, if applicable, was the only bar to the *in personam* action by Central Hudson. The court determined that *res judicata* was not applicable unless Empresa was in privity with Seiriki, the owner of the subject *res*. Empresa was found not to be in privity and therefore *res judicata* did not bar the *in personam* suit. The court explained that Empresa's interest in the *in rem* action was strictly representative and separate from its interest in an action to impose *in personam* liability. The court thus concluded that Empresa's liability had not been previously adjudicated. However, the court also held that Empresa was collaterally estopped from contesting liability or damages as these issues had been adjudicated in the *in rem* proceedings and that Empresa was bound by virtue of the principle of *respondeat superior*.

Confirming the findings of the district court, the second circuit affirmed the lower court's judgment in all respects.

In a dissent, Judge Jacobs questioned the majority's holding that the facts relied upon to establish collateral estoppel did not also establish *res judicata* as to Empresa. Judge Jacobs opined that Empresa, as bareboat charterer, was in privity with the ship and that further actions against Empresa were therefore barred by *res judicata*.

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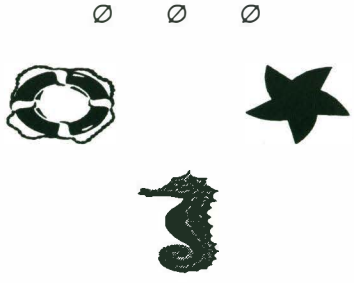

Maritime Liens

SALVAGE CLAIM DOES NOT SUPERSEDE PREFERRED SHIP MORTGAGE IN ABSENCE OF REASONABLE APPREHENSION OF MARINE PERIL

Salvage lien asserted for vessel services not rendered as a result of "reasonabl[y] apprehen[ded]" marine peril does not supersede preferred mortgage in accordance with purposes of 1920 Ship Mortgage Act.

(Faneuil Advisors, Inc. v. O/S Sea Hawk, CA1, 50 F.3d 88, 3/29/95)

In the early morning hours of July 15, 1992, David Kinchla (Kinchla) and his son tried to retake possession of the *Sea Hawk*, a fishing boat they had abandoned to state custody after having filed for Chapter 11 bankruptcy. Kinchla intended to tow the boat out to sea from the harbor of Hampton-Seabrook, New Hampshire, but did not make the necessary request for the opening of the Hampton River Bridge. The bridge blocked the Kinchlas' exit from the harbor and, while maneuvering under it, they lost control in the current, slamming the hull into a bridge support. The current then shifted the boat and it slid backwards stern first under the bridge, damaging its bridge-superstructure and outrigger tuna poles. Although the Kinchlas were able to abscond, the Coast Guard caught up with them and brought the duo and the *Sea Hawk* to the state pier, where the Kinchlas were arrested.

The saga began in January 1988, when Kinchla purchased the 45-foot *Sea Hawk*, by taking out a $148,000 note with Atlantic Financial Federal Savings and Loan Association (Atlantic); thereafter, Kinchla granted Atlantic a first preferred ship mortgage. Subsequently, Atlantic went into receivership and was taken over by Resolution Trust Company (RTC), which sold the mortgage to Faneuil Advisors, Inc. (Faneuil) on April 23, 1993.