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Dresdner Bank AG v. M/V Olympia Voyager United States Court of Appeals for the Eleventh Circuit 463 F.3d 1233 (Decided September 8, 2006)

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on the proper procedure for the task. This was deemed ample evidence to support the district court's decision to apportion Jauch with 50% of the fault. Additionally, the court stated that the district court was in a better position to assess the relative degree of fault between the parties. The court, due to the evidence presented and its position to weigh the facts, found that there had not been clear error. The district court's reduction in Jauch's damages because of his contributory negligence was correct.

The defendant claims that allowing Jauch to recover past medical expenses under the pretense of special damages rather than cure would allow him to get through the back door where what he could not get through the front door. However, the court finds that the plaintiff's entitlement to recover under the Jones Act for past medical expenses is not barred when he cannot recover under cure. The calculation used by the district court to award Jauch only a portion of the damages he was entitled to under the Jones Act is unexplainable. Likewise, prejudgment interest can be held for Jones Act cases tried in admiralty but is not automatic. *City of Milwaukee v. Cement Div., Nat. Gypsum Co.*, 515 U.S. 189, 196 115 S.Ct. 2091, 132 L.Ed.2d 148 (1995). The court did not give a reason for denying prejudgment interest. The judgment for the amount of past medical benefits paid by Jauch and the denial of prejudgment interest are vacated and remanded.

For the foregoing reasons, the district court's decision was affirmed insofar as Jauch's claim for maintenance and cure and apportioning fault equally and vacated and remanded with regard to past medical expenses and the denial of prejudgment interest.

Kristopher R. Olin
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UNDER THE CIRCUMSTANCES HEREIN, UNDER CIMLA, A PREFERRED SHIP MORTGAGE IS SUPERIOR TO BUNKER SUPPLY NONLIENS

The Court of Appeals for the Eleventh Circuit affirmed in part, and reversed in part, and remanded when it found that any possible lien bunker supplier, in relation to its claims against the vessel, were subordinate to the banks' preferred ship mortgage but also that the district court erred and abused its discretion when it dismissed with prejudice, the supplier's in personam claim.

Dresdner Bank AG v. M/V Olympia Voyager
United States Court of Appeals for the Eleventh Circuit
463 F.3d 1233
(Decided September 8, 2006)

Plaintiff, Eko-Elda Anonymi Viomichaniki, Emporiki Eteria Petrelajoeidon Viomichaniki (Eko-Elda), supplied bunkers to the M/V OLYMPIA VOYAGER ("the Vessel"). Plaintiffs, Dresdner Bank AG in Hamburg, Kreditanstalt Fur Wiederaufbau, and Norddeutsche Landesbank-Girozentrale ("the banks") brought an action to foreclose on a lien on the Vessel

when it defaulted on its preferred ship mortgage payments. Eko-Elda intervenes in an attempt to enforce a lien on the vessel which was in debt to Eko-Elda in the amount of \$5.5 million dollars for bunkers sold to it.

The Banks brought suit *in rem* against the vessel and *in personam* against Olympic World Cruises ("OWC"). While the banks were entitled to foreclose on the defaulted preferred ship mortgage, Eko-Elda intervened. Eko-Elda had contracted with OWC to provide bunkers to the Vessel, a Greek flagged ship. When the Vessel defaulted in payments to Eko-Elda, Eko-Elda warned that they would cease supplies of the bunkers. Royal Olympic Lines, Inc and/or Royal Olympia Cruises ("ROC") promised to repay the debt as long as the supply continued.

OWC filed for bankruptcy and then the Banks began the foreclosure proceedings and were awarded final judgment. Eko-Elda then filed a motion to intervene in the district court, and that motion was granted. Eko-Elda brought a claim for breach of contract *in personam* against OWC and fraud *in rem* against the vessel claiming that ROC never actually intended to repay the debt owed to Eko-Elda.

The district court found, and both parties agreed that Greek law applied to Eko-Elda's claims. However, because Greek law applied, Eko-Elda was unable to establish any maritime lien against the Vessel. Thus, the district court found that the judgment that Eko-Elda would get would be subservient to the lien on the preferred mortgage which the Banks had and the district court dismissed the claim.

Eko-Elda claims that the Banks lack ability to defend the Vessel because they didn't file a verified statement in accordance with Supplemental Rule C (6) (b). The Banks defend that even if Eko-Elda had a valid *in rem* claim it would be subordinate to their lien. Eko-Elda requested from the court that if their argument in regards to Rule C didn't work, that the court then switch the claim to Supplemental Rule B.

The court recognizes that in the spirit of Rule C (6) (b), the Banks need not file a verified statement because they have already filed suit and what Eko-Elda is requesting would just be tedious extra work which would provide no more information to any party involved. By their initial complaint, the Banks fulfilled the requirement of a verified statement.

Eko-Elda claims that Greek law would allow a lien which would give it priority over the Banks' preferred ship mortgage lien. However, this argument fails because any non-maritime lien will always be subordinate to a preferred ship mortgage lien. Greek law says that the laws where the Vessel was arrested will govern the ranking of liens, and because the Vessel was arrested in the United States, then United States law determines the priority. Furthermore, the Commercial Instruments and Maritime Liens Act ("CIMLA"), 46 U.S.C. § 31301 *et seq.*, states a "preferred mortgage lien ... has priority over all claims against the vessel (except for expenses and fees allowed by the court, costs imposed by the court, and preferred maritime liens)." 46 U.S.C. § 31326(b)(1).

Greek law cannot determine that any lien that Eko-Elda has is a maritime lien and thus United States law gives priority to the Banks' lien and it is determined that the district court was correct in dismissing the claims. Eko-Elda's attempt to switch its claim from Supplemental Rule C to Supplemental Rule B does not help its case at all. In order for Eko-Elda's lien to rank higher than the Banks' lien, it must be a maritime lien, and Supplemental Rule B does not provide a maritime lien, rather an *in personam* lien claim. Further, evidence that the Banks allowed a postponement in mortgage payments did not constitute a fraud or provide equitable subordination of the Banks' preferred ship mortgage.

However, on Eko-Elda's final *in personam* claim against OWC for breach of contract, it was found that the district court erred in dismissing the claim. OWC should not have been considered a party subject to the district court's jurisdiction and thus the district court abused its discretion.

It is thus established that Eko-Elda has no possible claim for recovery in either Supplemental Rule B or C because it cannot establish a maritime lien. However, Eko-Elda's claim for breach of contract *in personam* against OWC is valid and should be reversed.

Lee D. Soffer
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RECOVERY OF OVERHEAD COSTS UNDER 33 U.S.C. § 576 PERMITTED

The United States Court of Appeals for the Eighth Circuit upheld the decision of the District Court for the Eastern District of Missouri, holding that that overhead costs claimed by the Army Corp of Engineers, related to repairs made to a lock and gate damaged in allision, were "sufficiently related" to the work, justifying the awarding of overhead costs. The Court of Appeals also held that the District Court was correct in finding that the amount of overhead awarded was reasonable.

United States v. Capital Sand Co., Inc.
United States Court of Appeals for the 8th Circuit
466 F.3d 655
(Decided October 25, 2006)

The M/V JAMIE LEIGH, owned by defendant, struck miter gate number two of Lock 25 on the Mississippi River, while towing a barge, damaging the gate. Lock 25 is maintained and operated by the Army Corps of Engineers ("Corps").

In order to repair a miter gate, the damaged gate must be pulled from a lock and replaced temporarily until the permanent gate can be repaired and reinstalled. The Corps made the repairs itself and simultaneously repaired miter gate one, which had previously been damaged in an allision in 1999, although repair to this gate was not an urgent issue. After repairs were completed on February 9, 2002, the Corps apportioned repairs costs: the Corps estimated the damage done to gate two by the defendants to be between \$350,000 and \$600,000. It was decided by the Government that the defendant owed \$303,511.53. When the defendant did not make any payments after receiving a bill, the Government filed suit in the Southern District of Illinois. The case was then transferred to the Eastern District of Missouri at defendant's request. The Government then recalculated the damages in accordance with the rule of *United States v. Am. Commercial Barge & Line Co.*, No. 88-1793-C-7, slip op. at 19 (E.D.Mo. Sept. 30, 1991), *aff'd in part on other grounds*, 988 F.2d 860 (8th Cir. 1993), which requires that damages be apportioned in accordance with the repairs that were actually needed and which were caused by the specific allision (not including damages resulting from other sources or everyday wear).