

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
KEY WEST DIVISION

IN ADMIRALTY

CASE NO. 4:17-CV-10050-JLK

IN THE MATTER OF:
THE COMPLAINT OF HORIZON
DIVE ADVENTURES, INC., AS OWNER
OF THE M/V PISCES (Hull Id# FVL31002F707)
ITS ENGINES, TACKLE, APPURTENANCES,
EQUIPMENT, ETC., IN A CAUSE FOR
EXONERATION FROM OR LIMITATION OF
LIABILITY,

Petitioner,

vs.

SANDRA STEWART, AS PERSONAL
REPRESENTATIVE OF THE ESTATE OF
ROBERT STEWART, and PETER SOTIS,

Respondents/Claimants.

CLAIMANT'S RENEWED MOTION TO STAY LIMITATION ACTION

The Claimant, SANDRA STEWART, as Personal Representative of the Estate of ROBERT STEWART, hereby renews her request that this Court stay Petitioner's Limitation Action and stay entry of the injunction against the prosecution of her claims in state court due to two crucial developments in this matter, which have confirmed that this limitation action is a single claimant proceeding.

First, on November 28, 2018 Magistrate Judge Simonton issued a Report and Recommendation on Claimant Sandra Stewart's Motion to Strike or Dismiss Claimant Peter Sotis' Claims for Intentional Infliction of Emotional Distress and Negligent Infliction of

Emotional Distress (“Report and Recommendation”) [DE 125]. Magistrate Judge Simonton recommended dismissal of Claimant Peter Sotis’ claims for intentional infliction of emotional distress and negligent infliction of emotional distress with prejudice [*Id.* at p. 11]. Second, on December 3, 2018, Magistrate Judge Simonton entered her Omnibus Order on Discovery Motions [DE 126] acknowledging Claimant Stewart’s stipulation that she will not seek any funds from this limitation proceeding if this Court ultimately finds that Petitioner Horizon Dive Adventures, Inc. is entitled to limitation of or exoneration from liability in this case. As a result, this is a single claimant proceeding and Claimant is entitled to stay this action and pursue her remedies in state court.

I. Procedural History and Background

Petitioner, HORIZON DIVE, filed its Complaint for Exoneration From or Limitation of Liability on May 23, 2017, following the tragic death of Robert Stewart on January 31, 2017, during the course of a dive boat excursion from Petitioner’s vessel offshore of Key Largo, Florida [DE 1]¹. On June 1, 2017, this Court entered an Order requiring all Claimants to appear and make proof of their claims on or before August 18, 2017 [DE 10]. Claimant STEWART filed her Claim, Answer and Affirmative Defenses on August 17, 2017 [DE 12]. On August 18, 2017, PETER SOTIS, who (like Petitioner, HORIZON DIVE) is a defendant in Claimant STEWART’s state court action, also filed a Claim, Answer and Affirmative Defenses [DE 14]. However, the only “claim” presented by SOTIS at that point was a reference to the attached copy

¹ Prior to the filing of this action by Petitioner, Claimant STEWART had already commenced a wrongful death action in the 17th Judicial Circuit in and for Broward County, Florida styled *Sandra Stewart, as Personal Representative of the Estate of Robert Stewart v. Horizon Dive Adventures, Inc., ADD Helium, LLC, Peter Sotis, individually, and Claudia Sotis, individually*, Case No. CACE-17-005915. As the court can see, SOTIS is a defendant in that case, along with HORIZON DIVE and others. SOTIS is *not* aligned with STEWART’s interests.

of the state court action filed by Claimant STEWART against, SOTIS, and Petitioner, HORIZON, among others [*Id.*, at 1].

On April 24, 2018, Claimant STEWART filed a Motion to Stay Limitation Action and Stay Entry of Injunction Against State Court Action [DE 35]. Claimant STEWART sought to stay this limitation action and stay the entry of the injunction against the state court action pursuant to the U.S. Constitution² and binding case law from the Eleventh Circuit Court of Appeals,³ holding that in a single-claimant limitation action (such as this) the sole claimant must be permitted to pursue her remedy in the forum of her choice upon the filing of proper stipulations [*See id.*]. On May 11, 2018, SOTIS, without first seeking leave and in an effort to defeat Claimant STEWART's well-taken motion to stay, filed an Amended Answer, Affirmative Defenses and Claim, asserting for the first time any semblance of a claim against Petitioner, HORIZON [DE 46]. Specifically, SOTIS attempted to assert potential claims for contribution or indemnity and for intentional infliction of emotional distress [*Id.*, at 6 - 7]. SOTIS' purported intentional infliction of emotional distress arose "from the post death suspension of [SOTIS'] personal and his company, Add Helium's teaching credential due to the innuendo surrounding Mr. Stewart's death which has been intentionally and wrongfully been directed against SOTIS." [*Id.*, at 7].

This Court conducted a hearing on Claimant STEWART's Motion to Stay Limitation Action and Stay Entry of Injunction Against State Court Action on June 12, 2018. As a result of SOTIS late filed claim in this action which (if viable) could render this action a multi-claimant

² See Article III, Section 2 of the U.S. Constitution (commonly referred to as the "Savings to Suitors Clause").

³ See, e.g., *Beiswenger Enterprises Corp. v. Carletta*, 86 F. 3d 1032, 1037 (11th Cir. 1996).

limitation case, the Court denied Claimant STEWART's motion.⁴ [See DE 67]. However, recognizing the deficiencies of his pleading during the hearing, SOTIS made an *ore tenus* motion for leave to amend his Amended Claim, which the Court granted [See *id.*]. In doing so, the Court required SOTIS to file a Second Amended Answer, Affirmative Defenses and Counterclaim by June 22, 2018, and set a briefing schedule so that the second Amended Counterclaim could then be challenged by the parties [*Id.*, at 49:14-50-15].

On June 22, 2018, SOTIS, filed a Second Amended Answer, Affirmative Defenses and Counterclaim again attempting to assert claims for contribution and indemnity and intentional infliction for emotional distress against Petitioner, HORIZON DIVE [DE 68]. Subsequently and pursuant to the Court's briefing scheduling, Claimant STEWART moved to dismiss SOTIS' claim for failure to state a valid claim [DE 78]. Petitioner, HORIZON DIVE, did not challenge SOTIS' claim against it in a separate 12(b) motion but did deny that SOTIS' allegations were sufficient to state a claim during the hearing on Claimant STEWART's motion in its Answer [DE 69]. After this Court referred the Motion to Dismiss to Magistrate Judge Simonton, she conducted a hearing on that motion on November 8, 2018 [DE 121].

On November 28, 2018, Magistrate Judge Simonton issued her Report and Recommendation on Claimant Sandra Stewart's Motion to Strike or Dismiss Claimant Peter Sotis' Claims for Intentional Infliction of Emotional Distress and Negligent Infliction of Emotional Distress [DE 125], and concluded:

Claimant Sotis' allegations as to Horizon Dive's conduct fall far short of what the Florida Supreme Court has said is required to establish such a claim. As noted by Claimant Stewart, Claimant Sotis nowhere alleges from where the Petitioner's duty to protect Claimant Sotis from "vilification" in the diving industry derives,

⁴ The denial was announced in open court. Thereafter, Petitioner HORIZON DIVE and Claimant STEWART submitted separate orders to the Court. No written order has been signed.

and the undersigned is aware of no such duty that would apply herein. Furthermore, Claimant Sotis has alleged no specific words or actions directly attributable to Petitioner Horizon Dive. The most that Sotis alleges is that Horizon Dive stood silent as others placed blame on Sotis. This conduct simply does not rise to the level of outrageous conduct necessary to support his claim. Thus, Claimant Sotis has failed to state a claim for intentional infliction of emotional distress against Petitioner Horizon Dive and his claim is subject to dismissal.

[DE 125, p. 11].

In light of the Magistrate's Report and Recommendation and her Omnibus Order, Claimant STEWART hereby renews her Motion to Stay Limitation Action and Stay Entry of Injunction Against State Court Action on the basis that this action is (and always has been) a single-claimant limitation action. As Magistrate Judge Simonton noted in her Report and Recommendation, "the [now dismissed] late-filed claim against Petitioner Horizon Dive for Intentional Infliction of Emotional Distress **could have a significant impact on whether it is appropriate to stay the Limitation Action and allow Claimant Stewart to proceed with her damages action in state court**, or whether the state-court case must remain stayed pending determination of the Limitation Action." [DE 125, p. 3, n. 1]. (Emphasis added). Indeed, upon the striking of SOTIS' claim and as a result of Claimant STEWART's accepted stipulation to not pursue any part of the limitation fund of limitation or exoneration is ultimately granted to Petitioner HORIZON DIVE, there will be no further basis upon which this Court can maintain the injunction over Claimant STEWART's state court action or otherwise prohibit her from pursuing her remedies and proceeding in that action at this time.⁵

⁵ The Eleventh Circuit has held that the limitation act is not an independent source of jurisdiction. *Lewis Charters, Inc. v. Huckins Yacht Corp.*, 871 F.2d 1046 (11th Cir. 1989) ("In light of the evolution of the limitation act of the principles of admiralty jurisdiction, we conclude that appellant may not base admiralty jurisdiction solely upon the limitation act, in the absence of a significant relationship between its claim and traditional notions of maritime activity."). Thus, as Magistrate Judge Simonton noted, the limitation act, "cannot be used to extend federal jurisdiction to a claim not otherwise subject to such jurisdiction." [DE 125, p. 6, n. 6]. Magistrate Judge Simonton also noted that if SOTIS' Counterclaim is compulsory, the Court can exercise supplemental federal jurisdiction over the claim whereas if it were merely permissive the Court would lack subject matter jurisdiction over it. Clearly, the

Notwithstanding the foregoing, even if SOTIS' claims were still intact, it is clearly a "Claim arising on distinct occasion" pursuant to 46 USC 30506(2) which provides that "separate limits of liability apply to claims for personal injury or death arising on distinct occasions." SOTIS does not specifically allege the time or place where HORIZON allegedly intentionally inflicted emotional distress on SOTIS, but it clearly did not occur on the M/V Pisces on January 31, 2017. It is therefore "distinct occasion" from the negligence which occasioned Mr. Stewart's death on January 31, 2017, requiring a separate limitation fund and again rendering this action a single claimant case.

II. Applicable Law

Petitioner, HORIZON DIVE, is trying to limit its liability to Claimant STEWART to the value of the M/V Pisces, the dive boat which was involved in the incident in which Mr. Stewart was killed on January 31, 2017. Petitioner, HORIZON DIVE, asserts entitlement to limit its liability under the provisions of the Limitation Act, 46 U.S.C. §30501 *et. seq.*⁶ "The act allows the vessel owner to limit liability for damage or injury occasioned without the owner's privity or knowledge, to the value of the vessel or the owner's interest in the vessel." *Lewis v. Lewis and Clark Marine, Inc.*, 531 U.S. 438, 446 (2001).

Article III, §2, of the United States Constitution vests federal courts with jurisdiction over all cases of admiralty and maritime jurisdiction. Section 9 of the Judiciary Act of 1789 codified

Counterclaim is merely permissive. Although Magistrate Judge Simonton did not reach this issue, because it had not been raised by the parties, and even though Judge Simonton has now ruled that Claimant SOTIS' amended claim does not properly state a claim – and cannot properly state a claim – for intentional infliction of emotional distress, the Claimant STEWART would note that in addition to that holding, this Court lacks jurisdiction over Claimant SOTIS' alleged claim for intentional infliction of emotional distress because that alleged claim does not have a significant relationship with traditional notions of maritime activity. It is undisputed that the actions which SOTIS claims constitute intentional infliction of emotional distress occurred after the vessel returned to port, not during the maritime activity involved in this case.

⁶ Prior to 2006, the Limitation of Liability was codified at 46 U.S.C. App. §181, *et seq.*

this grant of exclusive original jurisdiction, but “sav[ed] to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it.” *Lewis*, 531 U.S., at 443. Given that a ship owner’s remedy to limit its liability falls within the admiralty and maritime jurisdiction of the federal court, some tension exists between the saving to suitors clause and the Limitation Act: “One statute gives suitors the right to a choice of remedies, and the other statute gives vessel owners the right to seek limitation of liability in federal court.” *Id.*, at 448.

The United States Supreme Court and the Courts of Appeals have generally resolved the “tension” between the saving to suitors clause and the Limitation Act by permitting claimants to proceed with their claims in state court under certain circumstances -- *i.e.*, where there is only a single claimant (as is now the case here) or where the total claims do not exceed the value of the limitation fund. *Lewis*, 531 U.S., at 451. *See also, Langnes v. Green*, 282 U.S. 531, 539-44 (1931); *Suzuki of Orange Park, Inc. v. Shubert*, 86 F. 3d 1060, 1063 n.2 (11th Cir. 1996); *Beiswenger Enterprises Corp. v. Carletta*, 86 F. 3d 1032, 1037 (11th Cir. 1996); *In re: Parker Towing Co., Inc.*, 2018 WL 1220708 (S.D. Ala. 2018). In a single-claimant situation, the Court must lift the injunction and allow the claimant to proceed in her chosen forum (*e.g.*, state court) after the claimant “waive[s] any claims to res judicata relevant to the issue of limited liability based on any judgment obtained in the state court, and concede the shipowner’s right to litigate all issues relating to limitation in the federal limitation proceeding.” *Beiswenger*, 86 F. 3d at 451. (quoting *Gorman v. Cerasia*, 2 F. 3d 519, 524 (3d Cir. 1993)). The Courts have considered the following factors when deciding whether a single claimant has adequately conceded to the federal court’s exclusive jurisdiction over limitation of liability issues. The Claimant must:

- a) File her claim in the limitation proceeding;

- b) Consent to waive any claim of res judicata relevant to the issue of limited liability based on any judgment obtained in the state court; and
- c) Concede petitioner shipowner's right to litigate all issues relating to limitation in the limitation proceeding.

See Jefferson Barracks Marine Serv., Inc. v. Casey, 763 F.2d 1007, 1010 (8th Cir. 1985). As set forth below, Claimant STEWART has complied with these requirements.

In *Beiswenger*, the Eleventh Circuit observed the “tension between the exclusive jurisdiction vested in admiralty courts to determine the vessel owner’s right to limited liability and the saving to suitors clause [of 28 U.S.C. §1333(1)],” which “embodies a presumption in favor of jury trials and common law remedies in the forum of the claimant’s choice.” 86 F.3d, at 1037. The primary objective in resolving the tension is to protect the vessel owner’s right to claim the Limitation of Liability Act’s cap, and to reserve the adjudication of that right in federal court. *Id.* “Courts have attempted to give effect to both the Limitation Act and the savings to suitors clause whenever possible.” *Id.* Courts have identified two sets of circumstances under which vessel owners may limit their liability and damage claimants are allowed to try liability and damages in their preferred fora: (1) where the limitation fund exceeds the aggregate amount of all the possible claims against the vessel owner; or (2) where there is only one claimant. *Id.* at 1037-38 (citing cases).

Here, given SOTIS’ inability to assert a viable claim in this action against, Petitioner HORIZON DIVE, this is a single-claimant case. Moreover, even if SOTIS’ claim were viable, this would still be a single-claimant case because Claimant STEWART has stipulated, and the Court has acknowledged [DE 126], that she will not pursue any part of the limitation fund if

limitation or exoneration is ultimately granted.⁷ In light of the foregoing, this Court must stay this action and lift the injunction staying the state court action. *See generally Lewis*, 531 U.S. 438.

III. STIPULATIONS

Claimant STEWART's stipulations are as follows:

(1) That she will not seek to enforce any judgment or make any claim for damages against the Limitation Fund regardless of the outcome of this limitation proceeding and regardless of any judgment obtained in state court.

(2) That she was the sole damage Claimant in the limitation proceedings entitled "IN THE MATTER OF THE COMPLAINT OF HORIZON DIVE ADVENTURES, INC., AS OWNER OF THE M/V PISCES (HULL ID# FVL31002F707) ITS ENGINES, TACKLE, APPURTENANCES, EQUIPMENT, ETC., IN A CAUSE FOR EXONERATION FROM OR LIMITATION OF LIABILITY" bearing Civil Action No. 4:17-cv-10050 on this Court's docket and that Peter Sotis is an alleged contribution and/or indemnity Claimant in the above-referenced limitation proceedings;

⁷ Claimant STEWART's most recent stipulation not to seek **any** damages from the limited fund in this case transform this into a single-claimant situation.. In fact, the Eleventh Circuit in *Beiswenger* held that the claimants converted the multiple claims situation into a functional equivalent of a single claims case by stipulations far less extensive than Claimant STEWART's in this case. In *Beiswenger*, the personal injury claimants stipulated, in pertinent part:

4. That the Respondent/Claimants will not seek to enforce any judgment rendered in any state court, whether against the Petitioner or another person or entity that would be entitled to seek indemnity or contribution from the Petitioner, by way of cross-claim or otherwise, that would expose the Petition [sic] to liability in excess of \$40,090.00, until such time as this Court has adjudicated the Petitioner's right to limit that liability.

Beiswenger, 86 F.3d, at 1043. Here, Claimant STEWART has now stipulated that she will not seek any damages whatsoever from the limitation fund if limitation or exoneration is ultimately granted.

(3) That counsel, Pedro Echarte, caused to be filed in the Circuit Court of Broward County, Florida, a suit entitled *SANDRA STEWART, as Personal Representative of the Estate of ROBERT STEWART vs. HORIZON DIVE ADVENTURES, INC., a Florida Corporation, ADD HELIUM, LLC, a Foreign Limited Liability Company, PETER SOTIS, individually, and CLAUDIA SOTIS, individually*, bearing Broward County Case Number CACE-17-005915;

(4) The state court litigation arose out of the occurrence which is the subject of the above referenced limitation proceedings;

(5) That she is desirous of pursuing her remedies in the State Court suit;

(6) That she concedes the right of the parties to have all limitation issues tried in this Court;

(7) The United States District Court for the Southern District of Florida, Civil Action No. 17-cv-10050 has the exclusive jurisdiction and authority to determine all issues relating to the entitlement of Petitioner, HORIZON DIVE ADVENTURES, INC., to limit its liability to the Claimant in the above-captioned civil action pursuant to the Petition of Limitation previously filed by HORIZON DIVE ADVENTURES, INC., including the determination of the value of any limitation fund that may be necessary for the satisfaction of claims against HORIZON DIVE ADVENTURES, INC., as owner of the M/V Pisces, and whether or not HORIZON DIVE ADVENTURES, INC. has the right to limit its liability to all claimants making claims arising from its ownership and operation of this vessel;

(8) Claimant herein will not raise in any forum other than federal court in admiralty proceedings any question with respect to the right of Petitioner, HORIZON DIVE ADVENTURES, INC. to seek limitation of its liability;

(9) Claimant stipulates that it is her desire to also protect Petitioner, HORIZON DIVE ADVENTURES, INC., from potential excess liability in this federal court and Claimant seeks to

protect Petitioner, HORIZON DIVE ADVENTURES, INC., from potential liability in excess of limitation fund should the federal court find in its favor.;

(10) Claimant hereby stipulates that in the event there is any judgment or recovery in the state court action, or any other fora, whether against Petitioner, HORIZON DIVE ADVENTURES, INC., or any other liable party or parties who have made or may make cross claim or claims over against Petitioner, HORIZON DIVE ADVENTURES, INC., in no event will Claimant seek to enforce any part of that judgment or recovery against the limited fund in this proceeding;

(11) Claimant will not seek in this federal district court, or any other court, to enter any judgment against Petitioner, HORIZON DIVE ADVENTURES, INC., in excess of whatever amount this court determines to be Petitioner, HORIZON DIVE ADVENTURES, INC.'s limited liability, if any;

(12) Claimant will not seek in any state court any judgment related to or arising out of Petitioner, HORIZON DIVE ADVENTURES, INC.'s right to seek limitation of its liability;

(13) In order to afford sufficient protection from excess liability arising out of third-party claims wherein indemnification or contribution is or may be sought by other parties or defendants pending the resolution of all claims in the limitation proceeding, in the event there is any judgment or recovery by Claimant in any state court actions or proceedings of any type, in no event will Claimant seek to enforce any part of such judgment or recover against Petitioner, HORIZON DIVE ADVENTURES, INC. until this Court has the opportunity to rule upon limitation.

(14) Claimant waives any claim of *res judicata* or issue preclusion that might arise on the basis of any judgment obtained in any state court relevant to the issue or the right of Petitioner, HORIZON DIVE ADVENTURES, INC. to limit or exonerate itself of liability; and

(15) Claimant stipulates that if Petitioner, HORIZON DIVE ADVENTURES, INC. is held responsible for attorneys' fees and costs which may be assessed against it by a co-liable defendant

party seeking indemnification from Petitioner, HORIZON DIVE ADVENTURES, INC. for attorneys' fees and costs, then such claim shall have priority because Claimant has stipulated that she will not seek any damages from, and will not seek to enforce any judgment against the limited fund.

IV. Conclusion and Request for Relief

By reason of the foregoing, Claimant STEWART respectfully requests that this Honorable Court accept the protective stipulations offered and recognize her right, conferred by the "saving to suitors clause" of Article III, §2, of the United States Constitution, to pursue her personal injury claim in a forum of her own choosing. Claimant STEWART requests that this Court grant her Renewed Motion to Stay Limitation Action and Stay Injunction Against State Court Action with protective stipulations and stay this action to allow Claimant STEWART to proceed against Petitioner, HORIZON DIVE, in her state court action for wrongful death. Claimant STEWART desires that her case be decided by a jury of her peers. Claimant STEWART further states that the Petitioner's interest in having this Court determine issues relative to limitation are adequately protected by the stipulations contained herein and there remains no justification for the further prosecution of this action in this Court at this time.

DATED: December 11, 2018

Respectfully submitted,

/s/ Philip D. Parrish
Philip D. Parrish (541877)
phil@parrishappeals.com
PHILIP D. PARRISH, P.A.
Co-Counsel for Claimant STEWART
7301 SW 57th Court, Ste 430
Miami, FL 33143
Tel: (305) 670-5550
Fax: (305) 670-5552

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that on December 11, 2018 I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ Philip D. Parrish
Philip D. Parrish (541877)

SERVICE LIST

Donna E. Albert, Esq.
Law Offices of Donna E. Albert, P.A.
Counsel for Petitioner
7999 North Federal Highway, Suite 320
Boca Raton, FL 33487
Tel. 561-994-9904
Fax 561-994-9774
Emails: DEA@donnaalbert.com and
office@donnaalbert.com

Neil Bayer, Esq.
Kennedys Americas LLP
Counsel for Respondent, Sotis
1395 Brickell Avenue, Suite 610
Miami, FL 33131
Tel. 305-371-1111
Email: neil.bayer@kennedyslaw.com

Pedro P. Echarte, III, Esq.
Michael Haggard, Esq.
Douglas J. McCarron, Esq.
The Haggard Law Firm, P.A.
Counsel for Respondent, Stewart
330 Alhambra Circle, First Floor
Coral Gables, FL 33134
Tel. 305-446-5700
Fax 305-446-1154
Email: ppe@haggardlawfirm.com
mah@haggardlawfirm.com
djm@haggardlawfirm.com

Christopher R. Fertig, Esq.
Darlene M. Lidondici, Esq.
Fertig & Gramling
Co-Counsel for Petitioner
200 SE 13th Street
Fort Lauderdale Florida
Tel. 954-763-5020
Fax 954-763-5412
chris.fertig@fertig.com
dml@fertig.com