

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 REPLY IN SUPPORT OF RENEWED
MOTION TO STAY LIMITATION ACTION**

The Claimant, SANDRA STEWART, as Personal Representative of the Estate of Robert Stewart, by and through undersigned counsel, hereby files her Reply in support of her renewed request to stay Petitioner Horizon Dive Adventures, Inc.'s limitation action and stay entry of the injunction against the prosecution of her claims in state court [DE 127], and states as follows:

Petitioner HORIZON DIVE's response to Claimant STEWART's Renewed Motion to Stay Limitation Action is long on rhetoric and short on reason. In her Renewed Motion, Claimant STEWART asserted two new and crucial developments in this case, which confirm that this is the functional equivalent of a single claimant proceeding that now falls squarely

within *Beiswenger Enterprises Corp. v. Carletta*, 86 F.3d 1060 (11th Cir. 1996), requiring the granting of Claimant STEWART's renewed motion.

First, 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 [DE 125].¹ Both HORIZON and STEWART recognized the soundness of that ruling, and neither filed objections to the Report and Recommendation. On December 13, 2018, this Court adopted and affirmed the Magistrate Judge in its "Final Order Granting Claimant's Sandra Stewart's Motion to Dismiss Claimant, Peter Sotis' Claims for Intentional Infliction of Emotional Distress and Negligent Infliction of Emotional Distress." [DE 128]. SOTIS' only remaining "claim" in this matter is for indemnity and contribution, which alone is not sufficient to create a "multi-claimant" situation upon the filing of proper stipulations (which Claimant STEWART has done here). *See Beiswenger*, 86 F.3d at 1041 – 1044 (holding that stipulation by a claimant that they will not enforce any state court judgment against any party until the vessel owner's right to limitation or exoneration is adjudicated is sufficient to cure any "multiple claims" situation that arises solely from a third parties' prospective claim for indemnification or contribution).

The second crucial development was Magistrate Judge Simonton's Omnibus Order on Discovery Motions [DE 126] acknowledging Claimant STEWART's stipulation that *she will not seek any money from the limitation fund* if this Court ultimately finds that Petitioner HORIZON DIVE is entitled to limitation of or exoneration from liability. Claimant STEWART is still very much a "claimant" with standing in this action, because, *inter alia*, this Court's injunction

¹ It should be noted that SOTIS' purported claim for emotional distress was only asserted after Claimant STEWART filed her original Motion to Stay Limitation Action and Stay Entry of Injunction Against State Court Action, dated April 24, 2018 [DE 35]. SOTIS filed his claim without leave of Court or agreement of any party in what can only be described as an effort to defeat Claimant STEWART's motion.

(motion) precludes her from pursuing her state court action against Petitioner HORIZON DIVE and other individuals and entities that are not involved in this proceeding.

The Striking of SOTIS' Claim for Emotional Infliction of Distress, When Combined With Claimant STEWART's *Beiswenger* Stipulations, Renders This The Functional Equivalent of a Single Claimant Limitation Action Pursuant to *Beiswenger Enterprises Corp. v. Carletta*, 86 F.3d 1032 (11th Cir. 1996).

In her Report and Recommendation Magistrate Simonton noted:

In balancing a petitioner's right to a limitation proceeding against the "Saving to Suitors" clause of 28 USC §1333, Federal courts have identified two sets of circumstances under which the damages claimants will be allowed to proceed in the forum of their choosing: (1) when the value of the limitation fund exceeds the combined total potential claims; and (2) when there is only one claimant, or when adequate stipulations have been entered into by the parties to protect the petitioner's right to a limitation proceeding while effectively transforming a multiple-claims-inadequate-fund case into the functional equivalent of a single claim case. The Eleventh Circuit has held that, under certain circumstances, the parties can stipulate around contribution claims such that a multiple claimant action can effectively be treated as a single claimant action. *Beiswenger Enterprises Corp. v. Carletta*, 86 F.3d 1032, 1038-39 (11th Cir. 1996). Thus, the 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)].

In *Beiswenger* the Eleventh Circuit observed that:

[C]ourts have allowed claimants to transform a multiple-claims-inadequate-fund case into the functional equivalent of a single claim case through appropriate stipulations, including stipulations that set the priority in which the multiple claims will be paid from the limitation fund. By entering such stipulations, the damage claimants effectively guarantee that the vessel owner will not be exposed to competing judgments in excess of the limitation fund. Without such competition for the limitation fund, a *concursum* is unnecessary, just as in a true single claimant case, and the claimants may litigate liability and damages issues in their chosen fora.

Beiswenger, 86 F.3d at 1038.

Then, citing to the United States Supreme Court's decision in *Lake Tankers Corp. v. Henn*, 354 U.S. 147, 77 S.Ct. 1269, 1 L.Ed.2d 1246 (1957), the Eleventh Circuit held that "because of the Saving to Suitors clause . . . the ship owner may not force the damage claimants to litigate their claims in the admiralty court unless a *concursum* is *necessary* to protect the vessel owners claim of limited liability under the act." *Beiswenger*, 86 F.3d at 1039 (emphasis added).

Here, the fact that SOTIS has asserted a prospective claim for contribution or indemnity cannot be the basis to defeat Claimant STEWART's rights under the Saving to Suitors clause because Claimant STEWART has filed stipulations that "eliminate any possibility that competing claims will exhaust the limitation fund before the admiralty court has the opportunity to determine whether to grant limited liability to" Petitioner HORIZON DIVE. *Beiswenger*, 86 F.3d at 1043. Specifically, Claimant STEWART has agreed to enter into the necessary *Beiswenger* stipulations to protect the vessel owner's claim of limited liability under the act and to not enforce any state court judgment against any party (just as in *Beiswenger*) until limitation is denied. In addition, STEWART has filed the necessary *Beiswenger* stipulations concerning *res judicata*, issue preclusion, and attorneys' fees eliminating any risk that another Court will rule upon limitation issues or that the limitation fund will be exhausted before the admiralty court has the opportunity to rule on limitation in this proceeding.

In the present case, all concerns of a "multi-claimant" situation, which only arise from SOTIS' "claim" for contribution and indemnification are eliminated by Claimant STEWART's stipulations as set forth in her original motion. However, in an abundance of caution, Claimant STEWART hereby files the following additional stipulation:

16. Claimant 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 a cross-claim or otherwise, that would expose the Petitioner to liability in excess of \$168,000.00,

until such time as this Court has adjudicated Petitioner's right to limit that liability.

Given the striking of SOTIS' claim for emotional distress coupled with Claimant STEWART's *Beiswenger* stipulations, this case has been transformed into the equivalent of a single claimant case with no concern that any claim will exhaust the limitation fund before the admiralty court has the opportunity to rule on the issues presented in this case. Stipulation 16 addresses Petitioner HORIZON DIVE's concern [DE 131, p. 9-10] that SOTIS must be prevented from seeking to enforce any contribution judgment in excess of the limitation fund because Claimant STEWART is stipulating not to enforce any judgment against SOTIS, and SOTIS' "claim" for contribution and indemnification are based solely on his liability to Claimant STEWART. Accordingly, there is no need for a *concursum*, and STEWART's rights to pursue her claim in her chosen fora trump Petitioner HORIZON DIVE and SOTIS' collusive desire to force STEWART to pursue her claim solely in this proceeding.

Petitioner HORIZON DIVE's argument that Claimant STEWART is attempting to "divest this Court of jurisdiction over the limitation action . . ." [DE 131, p. 1] is simply incorrect. Claimant STEWART is doing no such thing. Indeed, Claimant STEWART's stipulations establish that all limitation issues will be litigated in this Court upon the conclusion of Claimant STEWART's state court actions. Petitioner HORIZON DIVE hopes to muddy the waters with inaccurate and inflammatory allegations lodged against Claimant STEWART. However, a deliberate review of the present posture of this case demonstrates that the facts are indistinguishable from *Beiswenger*, requiring the granting of Claimant STEWART's renewed Motion and the relief sought therein.

Noticeably absent from Petitioner's response is any discussion whatsoever of the Claimant STEWART's right, pursuant to the Saving to Suitors clause, and the United States

Supreme Court's decision in *Lewis v. Lewis & Clark Marine, Inc.*, 531 US 438 (2001), to proceed in her chosen fora. *Beiswenger, supra*. See also, *In re Parker Towing Company, Inc.*, 2018 WL 1220708 (S.D. Ala. 2018).²

Petitioner HORIZON DIVE's Tangential Arguments Are Neither Valid Nor Are They Relevant to the Issue Presented By Claimant STEWART's Motion

1. *Claimant STEWART Has Not Engaged in a Pattern of Delay and Obstruction; Rather Claimant SOTIS is Responsible for Any Delay in These Proceedings*

Petitioner HORIZON DIVE's next argument is that Claimant STEWART has engaged in a pattern of delay. First, this argument is not relevant to the determination of the issues before the Court. Second, the argument is simply not true. Rather, the record in this case reflects that it is Petitioner HORIZON DIVE and SOTIS, acting in concert, who have delayed and complicated these proceedings in an effort to defeat Claimant STEWART's right, to pursue her common law *in personam* claims in state court.

On April 24, 2018, nearly a year ago, Claimant STEWART filed her original Motion to Stay Limitation Action [DE 35]. In response, Claimant SOTIS filed an "Amended Answer, Affirmative Defenses and Claim," in which he alleged, for the first time, and for the sole purpose of defeating Claimant STEWART's Motion to Stay these proceedings, a specious claim for

² It should be noted the Limitation of Liability Act was passed in 1851 "to encourage ship building and to induce capitalists to invest money in this branch of industry." *Lewis & Clark Marine, Inc.*, 531 US, at 446 (quoting *Norwich N.Y. Transp. Co. v. Wright*, 13 Wall. 104, 121, 20 L.Ed. 585 (1871)). However, the act has been much criticized since. For example, the Eleventh Circuit has described it as "hopelessly anachronistic" See *In Re: Keys Jet Skis, Inc.*, 893 F.2d 1225, 1228 (11th Cir. 1990) (quoting *Univ. of Texas Med. Branch at Galveston v. United States*, 577 F.2d 434, 441 (5th Cir. 1977)). Likewise, maritime commentators agree that the statute is outdated:

The Limitation Act, passed in the era before the corporation had become the standard form of business organization and before present forms of insurance protection (such as Protection and Indemnity insurance) were available, shows increasing signs of economic obsolescence.

G. Gilmore & C. Black, the Law of Admiralty, §10-4, at 822 (2d Ed. 1975). See generally, *In Re: Esta Later Charters, Inc.*, 875 F.2d 234 (9th Cir. 1989) (canvassing criticism of the Act). In light of the foregoing, the Court must especially consider and appreciate Claimant STEWART's rights to proceed in her chosen forum pursuant to the Saving to Suitors clause of the U.S. Constitution.

intentional infliction of emotional distress. That amendment was filed without leave of Court and without agreement of the parties.

As the Magistrate Judge noted in her Report and Recommendation, which this Court has adopted, that amended claim was the primary subject of discussion at the June 12, 2018 hearing on Claimant STEWART's Motion to Stay. [DE 125, p. 3]. In an abundance of caution, this Court exercised its discretion and permitted SOTIS to file a Second Amended Answer and Affirmative Defenses and Claim to attempt to assert a viable claim, and also gave Claimant STEWART an opportunity to challenge that claim. The Magistrate Judge has now issued a Report and Recommendation that the claim for intentional infliction of emotional distress must be dismissed with prejudice [DE 125], which were adopted and affirmed. [DE 128].

It is Claimant SOTIS, not Claimant STEWART, who has caused any perceived delay in these proceedings, and who has attempted to thwart Claimant STEWART's rights under the Saving to Suitors clause. At this juncture, as set forth above, there is no longer any legitimate basis to deny Claimant STEWART's renewed motion and delay her case any longer.

2. *Claimant STEWART's Right Under the Saving to Suitors Clause To Pursue Her Action in State Court Does Not Repudiate Federal Law or Destroy Uniformity Of Maritime Law; It Reinforces Both Concepts.*

Petitioner HORIZON DIVE's commentary on what it perceives to be Claimant STEWART's motives for pursuing her claim in her chosen fora are inaccurate, ill-conceived, and most importantly not relevant to the determination of the issue presented in this motion – which is whether this case is a single claimant proceeding (or its functional equivalent) allowing Claimant STEWART to proceed in her wrongful death action at this time.

Without fully addressing the merits of Petitioner HORIZON DIVE's irrelevant and self-serving commentary on this point, Claimant STEWART notes that *Kipp v. Amy Slate's Amora*

Dive Center, Inc., 251 So.3d 941 (Fla. 3d DCA 2018), *rev. den.*, 2018 WL 5733529 (Fla. 2018) is perfectly consistent with, and, in fact, maintains complete fidelity to the Death On the High Seas Act and Federal law. More importantly, pursuant to the Saving to Suitors clause, it is Claimant STEWART's choice on what forum to have her damages decided, even if the procedures or remedies may be slightly different (*e.g.*, the claimants in *Beiswenger* were permitted to proceed in state court with a jury trial despite the fact that in admiralty they would have litigated their claims in a bench trial).

3. *Claimant STEWART Has Standing in These Proceedings*

Notwithstanding the fact that Claimant STEWART has stipulated, for the purposes noted above, that she will not seek to enforce any judgment against the limitation fund, Claimant STEWART is nevertheless a claimant in this action and she has made a claim. HORIZON's reliance upon *In re Beauvois*, 2010 WL 5055833 (M.D. Fla. 2010) is misplaced, because in that case the injured party never filed a claim, but rather only filed an answer and affirmative defenses to the petition. Here, Claimant STEWART, to simplify the issues before this Court and in an effort to avoid duplicative, time-consuming and expensive damages discovery at this time, has merely stipulated that she will not seek to enforce any judgment against the limitation fund if the Court ultimately rules that Petitioner HORIZON DIVE is entitled to limit or exonerate itself from liability. Claimant STEWART still seeks damages from Petitioner HORIZON DIVE for the wrongful death of Robert Stewart – albeit damages that she has agreed not to enforce or recover until this case has been decided. Thus, and because this Court has issued a monition precluding Claimant STEWART from proceeding in her preferred forum and against other parties not in this action, Claimant STEWART clearly has standing in this action.

CONCLUSION

For the foregoing reasons STEWART respectfully requests that this Court grant her Renewed Motion to Stay Limitation Action.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on e 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.

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