

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
KEY WEST DIVISION**

IN ADMIRALTY

CASE NO: 4:17-cv-10050

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.

PETER SOTIS,

Respondent/Claimant.

_____ /

**CLAIMANT PETER SOTIS' RESPONSE & MEMORANDUM OF LAW IN
OPPOSITION TO CLAIMANT SANDRA STEWART'S RENEWED MOTION TO STAY
LIMITATION ACTION**

Claimant, PETER SOTIS, by and through his undersigned counsel, hereby submits this Response and Memorandum of Law in Opposition to Claimant, SANDRA STEWART's, Renewed Motion to Stay Petitioner's Limitation Action [DE 127] ("Renewed Motion to Stay Limitation"). For the reasons set forth herein, Claimant, Peter Sotis respectfully requests that this Honorable Court retain jurisdiction over this multiple claim, inadequate fund limitation action,

which is properly before it, and enter an Order denying the Claimant Sandra Stewart's Renewed Motion to Stay Petitioner's Limitation Action.

BACKGROUND & PROCEDURAL HISTORY

1. This action arises from the death of Robert Stewart on January 31, 2017 following a dive boat excursion from Petitioner's vessel to the submerged wreck of Queen of Nassau.

2. Following the death of Robert Stewart, Stewart's Estate filed a wrongful death action seeking monetary damages in excess of \$15,000.00 in state court against Petitioner, HORIZON DIVE ADVENTURES, INC. ("Horizon") and Claimant, PETER SOTIS ("Sotis"), among others. [DE 12-1].

3. On May 23, 2017, Petitioner, Horizon filed its *Complaint for Exoneration From or Limitation of Liability* [DE 1] to limit its liability to Claimant STEWART to the value of the dive boat which was involved in the incident in which Mr. Stewart was killed pursuant to the Limitation Act, 46 U.S.C. §30501 *et. seq.*

4. On June 1, 2017, this Court entered an Order restraining the prosecution of any and all suits or legal proceedings of any nature or description whatsoever, except in this proceeding, against the Petitioner or the Vessel with respect to any claim arising out of or connected with the incident on January 31, 2017 [DE 9] and an Order requiring all Claimants to appear and make proof of their claims [DE 10].

5. On August 17, 2017, Claimant Stewart filed her Claim, Answer and Affirmative Defenses, attaching a copy of the state court wrongful death action seeking monetary damages on behalf of the Estate of Robert Stewart. [DE 12].

6. In August 2017, Claimant Peter Sotis also filed a Claim [DE 14] against Petitioner, Horizon, seeking judgment in his favour including attorney fees for his defense of the action, which all parties regarded as a contribution claim. *See* [DE 124].

7. On May 11, 2018, Claimant Sotis subsequently filed an amended claim which reasserted the claim for contribution and/or indemnity against Horizon and added adding a second claim for emotional distress. [DE 46].

8. On April 24, 2018, Claimant Stewart filed Claimant's Motion to Stay Limitation Action and Stay Entry of Injunction Against State Court Action [DE 35].

9. At the June 12, 2018 hearing of Claimant's Motion to Stay Limitation Action and Stay Entry of Injunction Against State Court Action [DE 35], Claimant Sotis again asserted a separate and distinct claim for contribution and/or indemnity including attorney's fees incurred in the defense in an ore tenus motion to supplement his pleadings. [DE 124].

10. At the June 12th hearing, this Court also stated that this case will proceed in this Federal court on the filing by the Petitioner and all matters will be under Admiralty. [DE 124].

11. On June 22, 2018, Claimant Sotis filed a Second Amended Answer, Affirmative Defenses and Counterclaim [DE 68], which included a revised statement of Sotis' intentional infliction for emotional distress claim against Petitioner, Horizon.

12. On July 17, 2018, Stewart filed its *Claimant Stewart's Motion to Strike or Dismiss Claimant Peter Sotis' Claims for Intentional Infliction of Emotional Distress and Negligent Infliction of Emotional Distress* [DE 78] which challenged the merits of Sotis' emotional distress claim, but in no way addressed Sotis' Claim against Petitioner, Horizon, for contribution and/or indemnification.

13. 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].

14. On December 11, 2018, Claimant Stewart filed its Renewed Motion to Stay the Limitation, which Claimant Sotis' now opposes, identifying the Report and Recommendation as one of "*two crucial developments in this matter.*" [DE 127].

15. On December 13, 2018, this Court entered an Order granting *Claimant Stewart's Motion to Strike or Dismiss Claimant Peter Sotis' Claims for Intentional Infliction of Emotional Distress and Negligent Infliction of Emotional Distress* [DE 78] but making no mention of the second count of Sotis' Claim for contribution and/or indemnification that remains intact. [128].

MEMORANDUM OF LAW

Claimant Sandra Stewart's Renewed Motion to Stay the Limitation states that Petitioner, Horizon, is only "*trying to limit its liability to Claimant STEWART to the value of the M/V Pisces.*" However, through this limitation action, the Petitioner, Horizon, has asserted its entitlement to **limit its liability to all Claimants** under the provisions of the Limitation of Liability Act, permitting vessel owners to limit liability for damage or injury, occasioned without the owner's privity or knowledge, **to value of vessel or owner's interest in vessel.** 46 U.S.C. §30501 *et. seq.*; *Lewis v. Lewis and Clark Marine, Inc.*, 531 U.S. 438, 446 (2001).

As the Eleventh Circuit explained in *Beiswenger Enterprises Corp. v. Carletta*:

"When faced with liability for a maritime accident, a vessel owner may file a petition in federal court seeking protection under the Limitation Act. Provided that the accident in question occurred without the vessel owner's "privity or knowledge," the Act limits the owner's liability to the value of his or her interest in

the vessel and its pending freight. 46 App.U.S.C. § 183(a). After the vessel owner deposits with the court an amount representing the value of the vessel and its freight (the “limitation fund”), the district court stays all related claims against the vessel owner pending in any other forum, and directs all potential claimants to file their claims against the vessel owner in the district court within a specified period of time. 46 App.U.S.C. § 185; Fed.R.Civ.P. Supplemental Rules F(3), F(4); see In re Dammers & Vanderheide & Scheepvaart Maats Christina B.V., 836 F.2d 750, 755 (2d Cir.1988); Universal Towing Co. v. Barrale, 595 F.2d 414, 417 (8th Cir.1979). When the damage claims have been filed, the district court proceeds to resolve the vessel owner's claim to limited liability. See Dammers, 836 F.2d at 755.”

“If the vessel owner is found liable, but limitation is granted, the admiralty court distributes the limitation fund among the damage claimants in an equitable proceeding known as a concursum. See S & E Shipping Corp. v. Chesapeake & Ohio Ry. Co., 678 F.2d 636, 643 (6th Cir.1982) (“The purpose of the concursum, the proceeding before the admiralty court in which all competing claims must be litigated, is to provide for a marshalling of assets and for a setting of priorities among claims where the asserted claims exceed the value of the vessel and its freight.”); In re Moran Transp. Corp., 185 F.2d 386, 389 (2d Cir.1950) (“[T]he purpose of limitation proceedings is not to prevent a multiplicity of suits...” cert. denied, 340 U.S. 953, 71 S.Ct. 573, 95 L.Ed. 687 (1951).” Beiswenger Enterprises Corp. v. Carletta, 86 F.3d 1032, 1036 (11th Cir. 1996).

The United States Supreme Court stated in Lewis v. Lewis & Clark Marine, Inc.:

“The district courts have jurisdiction over actions arising under the Limitation Act, and they have discretion to stay or dismiss Limitation Act proceedings to allow a suitor to pursue his claims in state court. If the district court concludes that the vessel owner's right to limitation will not be adequately protected—where for example a group of claimants cannot agree on appropriate stipulations or there is uncertainty concerning the adequacy of the fund or the number of claims...” Lewis v. Lewis & Clark Marine, Inc., 531 U.S. 438, 454, 121 S. Ct. 993, 1004, 148 L. Ed. 2d 931 (2001).

Despite the federal courts recognition of “the significance of jury trials to claimants” and their attempts “to reconcile the ‘saving to suitors’ clause with the purpose of the Limitation Act,” in many circumstances “the need for the limitation proceeding outweighs the claimant's interests under the ‘saving to suitors’ clause.” Universal Towing Co. v. Barrale, 595 F.2d 414, 418 (8th Cir. 1979). However, in “in two kinds of limitation cases, the federal courts have permitted

claimants to pursue their remedies in a forum of their own choosing.” Universal Towing Co. v. Barrale, 595 F.2d 414, 418 (8th Cir. 1979)

“First, **if the limitation fund**, which represents the value of the vessel and its cargo, **exceeds the aggregate of the claims to be made against it**, a concursus is unnecessary and the district court must allow claimants to proceed in other forums. See, e.g., *Lake Tankers*, 354 U.S. at 150-54, 77 S.Ct. at 1271-73; *S & E Shipping*, 678 F.2d at 643; *Universal Towing*, 595 F.2d at 418; *In re Moran Transportation*, 185 F.2d at 389 (citing *Curtis Bay Towing Co. v. Tug Kevin Moran*, 159 F.2d 273 (2d Cir.1947)).” Complaint of Dammers & Vanderheide & Scheepvaart Maats Christina B.V., 836 F.2d 750, 755 (2d Cir. 1988). Because the “claimants are no longer competing among themselves for a greater portion of a limited fund... the purpose of the Act will not be thwarted if claimants are allowed to proceed in a forum of their choosing.” Universal Towing Co. v. Barrale, *supra*.

“Second, **when a lone claimant brings an action seeking an amount in excess of the limitation fund**, the district court must lift the stay against other proceedings if that claimant concedes the admiralty court's exclusive jurisdiction to determine all issues relating to the limitation of liability.” *Id.* Damage claimants in limitation of liability proceeding with multiple claims, but an inadequate fund, “may proceed against vessel owner outside admiralty court upon filing of appropriate protective stipulations which create functional equivalent of a single claim situation.” Beiswenger Enterprises Corp. v. Carletta, 86 F.3d 1032 (11th Cir. 1996). “This procedure protects the vessel owner's rights under the Limitation Act, while allowing the damage claimants to pursue their common law remedies-a result consistent with the mandate of the saving to suitors clause. Cf. *Dammers*, 836 F.2d at 760 (explaining that “admiralty courts must strive

whenever possible to promote the policies underlying both [the Limitation Act and the saving to suitors clause]”).” Id. at 1039.

In the instant case, the Claimant Stewart’s Renewed Motion to Stay Limitation is entirely premised on the erroneous assertion that what Stewart calls “*two crucial developments in this matter*” have rendered this action a single claimant proceeding entitling Claimant Stewart to stay this action and pursue her remedies in state court. This completely meritless argument seems to disregard Claimant Sotis’ intact claim for contribution and/or indemnification and misemploy the requirements to proceed against the vessel owner outside the admiralty court that were articulated by the Eleventh Circuit in Beiswinger.

I. MULTIPLE CLAIMANT INSUFFICIENT FUND LIMITATION ACTION

“It is... well settled that the potential for claims for attorneys’ fees or costs against a shipowner by a claimant or a third party creates a multiple claimant situation necessitating a concursus.” See, e.g., S & E Shipping, 678 F.2d at 645-46; Universal Towing, 595 F.2d at 419.” Complaint of Dammers & Vanderheide & Scheepvaart Maats Christina B.V., 836 F.2d 750, 756 (2d Cir. 1988).

However, Claimant Stewart appears to entirely disregard the existence of Claimant Sotis’ Claim for Contribution and/or Indemnity in her Renewed Motion to Stay this Limitation action. Instead, Stewart’s Renewed Motion appears to inaccurately suggest that the Report and Reconsideration [DE 125], and ultimately this Court’s Order [DE 128] granting Stewart’s Motion to Strike Sotis’ emotional distress claims, created a single claimant scenario in which Claimant Stewart is entitled to unilaterally select the forum in which to prosecute her claim pursuant to the “Savings to Suitors” clause.

Claimant Sotis has a viable Contribution and/or Indemnity, where the fees and costs that Claimant Sotis' has and will incur in his defense are reasonably anticipated to greatly exceed the value of the Limitation Fund. Thus, regardless of the status of Sotis' emotional distress claim, this action remains a multi-claimant limitation proceeding and the Stay of these proceedings to allow Stewart to proceed in State court is not appropriate.

Stewart's renewed efforts to characterize the litigation as a single claimant limitation should be rejected and Stewart's Renewed Motion should be denied. This is not a single claimant scenario and Stewart cannot unilaterally select the forum in which to try both claims. No adequate fund exception applies and the limitation fund is insufficient to pay all claims. action were specious and should be denied.

II. STEWART'S PROPOSED STIPULATIONS ARE INADEQUATE

Second, Claimant Stewart's argues that her 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 and her other stipulations as stated in her Renewed Motion to Stay Limitation are sufficient to transform this action into the functional equivalent of a single claim case, regardless of whether Claimant Sotis' consents to these stipulations and regardless of whether those stipulations are sufficient to protect the right of the Petitioner to seek limited liability under federal law.

Stewart's proposed stipulations do not protect the vessel owner from the prospect of liability in excess of the limitation fund and do not eliminate the need for concursus or preclude the Estate from seeking to enforce a judgment against a person or entity that would be entitled to seek indemnity or contribution from pursuant to *Beiswenger*. The proposed stipulations clearly fail

to meet the requirements articulated by the Eleventh Circuit in *Beiswinger* to proceed against the vessel owner outside the admiralty court upon the filing of appropriate protective stipulations.

Instructive here is the Eleventh Circuit's decision in *Beiswenger Enterprises Corp. v. Carletta* stating that:

“Although no prior case in this Circuit has employed the foregoing stipulation method to transform a multiple-claims-inadequate-fund case into the functional equivalent of a single claim case, we follow the numerous decisions cited above in doing so today. As an initial matter, we note that the Supreme Court has approved the use of stipulations in other contexts to accomplish similar purposes. In Lake Tankers Corp. v. Henn, 354 U.S. 147, 77 S.Ct. 1269, 1 L.Ed.2d 1246 (1957), the Court approved the use of stipulations by multiple claimants to reduce the aggregate amount of their claims to a level below the limitation fund. See id. at 149, 77 S.Ct. at 1270-71. The stipulations thus eliminated the need for a concursus, because the vessel owner no longer faced the prospect of excess liability. See id. at 152, 77 S.Ct. at 1272. Significantly, in allowing the state court action against the vessel owner to proceed, the Court explicitly rejected the argument that the Limitation Act protects the vessel owner against a multiplicity of suits. See id. at 153-54, 77 S.Ct. at 1273. Because of the saving to suitors clause, the Court reasoned, the shipowner may not force the damage claimants to litigate their claims in the admiralty court unless a concursus is necessary to protect the vessel owner's claim of limited liability under the Act.” *Beiswenger Enterprises Corp. v. Carletta*, 86 F.3d 1032, 1039 (11th Cir. 1996).

Stewart's stipulations do not create an adequate fund case or a single claimant scenario, where Stewart has not agreed stipulated that she will not assert any judgment against Sotis or any other party to the extent that it exceeds the value of the limitation fund. *Id.* Stewart's stipulations do not mirror the *Beiswenger* language or location.

CONCLUSION

The Claimant's Renewed Motion to Stay the Limitation Action should be denied. As previously determined by this Court, this is a multi-claimant Limitation proceeding with an inadequate Limitation Fund. The dismissal of one of the causes of action maintained by Sotis does not change the nature of the proceeding as his contribution claim remains.

WHEREFORE, Mr. SOTIS respectfully request that this Honorable Court deny the Claimant Sandra Stewart's Renewed Motion to Stay this Limitation Action.

Respectfully submitted,

By: /s/ Neil Bayer
NEIL BAYER, ESQ.
Florida Bar No: 615684
Neil.bayer@kennedyscmk.com
KENNEDYS CMK LLP
1395 Brickell Ave.
Suite 610
Miami, FL 33130
Telephone: 305-371-111
Counsel for Claimant Peter Sotis

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was electronically filed with the Clerk of the Court using the CM/ECF system, on this 9th day of January, 2019, and that the foregoing document is being served this day on all counsel of record identified on the attached Service List, via transmission of Notices of Electronic Filing generated by CM/ECF.

KENNEDYS CMK LLP 1395 Brickell Ave. Suite 610 Miami, FL 33131 Tel.: (305) 371-1111 E-Mail: neil.bayer@kennedyscmk.com By: <u> /s/ Neil Bayer </u> Neil Bayer, Esquire FBN: 615684

SERVICE LIST

Michael A. Haggard, Esq.
Douglas J. McCarron, Esq.
Pedro P. Echarte, III, Esq.
The Haggard Law Firm, P.A.
330 Alhambra Circle, First Floor
Coral Gables, FL 33134
PPE@haggardlawfirm.com
Kvizcaino@haggardlawfirm.com
Kvizcaino@haggardlawfirm.com
mah@haggardlawfirm.com
djm@haggardlawfirm.com
ppe@haggardlawfirm.com
bdiaz@haggardlawfirm.com
clopez@haggardlawfirm.com
kvizcaino@haggardlawfirm.com

Philip D. Parrish
Philip D. Parrish, P.A.
7301 SW 57 Court, Suite 430
Miami, FL 33143
Tel: 305-670-5550
phil@Parrishappeals.com
betty@parrishappeals.com

Donna E. Albert, Esq.
Law Office of Donna E. Albert, P.A.
7999 North Federal Highway, Suite 320
Boca Raton, Florida 33487
dea@donnaalbert.com
office@donnaalbert.com
carissa@donnaalbert.com

Christopher R. Fertig, Esq.
Darlene M Lidondici, Esq.
Fertig & Gramling
200 SE 13 Street
Ft. Lauderdale, DL 33316
Tel.: 954-763-5020
Chris.fertig@fertig.com
dml@fertig.com