RECENT DEVELOPMENTS IN SALVAGE LAW

Maritime Law Association, Salvage Committee, Fall 2004[1]

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Thames Shipyard & Repair Company v. United States, 350 F.3d 247, 2004 AMC 112 (1st Cir., Nov. 26, 2003), reh'g denied (1st Cir., Jan. 26, 2004), cert. denied, 124 S.Ct. 2849 (June 14, 2004) and Northern Voyager Ltd. Partnership v. United States, 124 S.Ct. 2848 (June 14, 2004).[2]

On November 2, 1997, the Northern Voyager, a 144-foot fishing vessel began to take on water and list to port off the coast of Gloucester, Massachusetts. The Coast Guard responded and threatened to physically subdue the captain if he did not evacuate the vessel because of perceived increasing safety concerns. The captain wanted to discuss further pumping and salvage efforts, including the possibility of commercial salvage. Evidence was presented that certain actions the captain and crew could have taken may have bought enough time for salvors to reach the vessel and that a salvor was en route who was instructed by the United States Coast Guard not to communicate with the captain in order to keep the frequency clear.

The Court held that when its acts are within the discretionary function exception, the government is not liable, although it orders the removal of the captain and crew

[1] Author's notes: A special thank you to Rountree, Losee & Baldwin, LLP and its staff for their assistance with this undertaking; on citations: citations to the case which is the subject of this update are cited as follows: "At [page number from American Maritime Cases]"; questions or comments should be directed to Jason R. Harris of Rountree, Losee & Baldwin, L.L.P.; 2419 Market Street; Post Office Box 1409; Wilmington, North Carolina 28402-1409; (910) 763-3404; facsimile (910) 763-0320.

[2] Case update is substantially derived from the Author's Recent Developments in Admiralty Law in the United States Supreme Court and the First, Second, Third and Fourth Circuits, Southeastern Admiralty Law Institute Program Materials, June 25-26, 2004.

from a vessel and the vessel sinks due to lack of additional salvage efforts. 14 U.S.C. 88 permits the Coast Guard to perform "any and all acts necessary to rescue and aid persons and protect and save property" when necessary to protect lives. The authority to order or not to order a forced evacuation is within the scope of protected discretionary authority.

The Court suggested, however, that a claim may exist if the government negligently interfered with a potential salvor or failed to inform the master of a potential salvor that could have rendered aid if the salvor could have arrived before the ship sank and could have saved her.

Judge Juan Torruella concurred in part and dissented (noting the "far reaching implications for the maritime and marine insurance industries") with the Court's empowering the Coast Guard with "extraordinary executive powers" to remove the vessel's most qualified and knowledgeable person who refuses unwanted salvage assistance.

Salty Dawg Marina, Inc. v. The M/Y EASTERN STAR, 2004 AMC 497 (BOAT/U.S. Salvage Arbitration, New York (Jan. 7, 2004).

Nicholas Kutscera owned the M/Y EASTERN STAR, a 1969 85 foot motor yacht which he ran aground near Manteo, North Carolina. Plaintiff successfully extracted the vessel during what it contends were 25-30 mph winds gusting to 45 mph with 2-4 foot waves while the wooden hull was rising and falling sharply onto the banks. The owner disagreed with the degree of peril cited.

The parties signed a BOAT/US form invoice with no rate information filled in and a Boat Owners Association of the United States Standard Form Yacht Salvage Agreement containing a "No Cure, No Pay" provision. Kutscera claimed it was signed under duress. The Panel held "[s]uch a contract is specifically designed to eliminate any duress factor from the equation, and assure an objective, third-party appraisal of the value of salvage services after the services have been completed and the degree of danger and the extent of the required services can be analyzed." At 499.

Upon reviewing the BOAT/US Salvage Arbitration Plan entitled "Arbitration Guiding Principles in the BOAT/US Salvage Arbitration Plan" and applying 9 factors, the Panel allowed Plaintiff's initial claim of $12,750.00 ("a multiple of roughly 4+ times [Plaintiff's] normal non-salvage hourly rate based on the portal to portal time involved for two vessels ($150.00/hr x 2 vessels x 10 hours), constitutes a full and fair salvage award, providing a sufficient reward to a commercial salver consistent with its risk and investment"). At 501. Legal fees were allowed but were reduced from $7,839.95 to $5,000.00. Prejudgment interest was also allowed.

Richard T. Auerbach v. Tow Boat U.S., 303 F. Supp.2d 538, 2004 AMC 370 (D.N.J., Jan. 14, 2004).

Plaintiff Auerbach sought to recover damages from Boat U.S. and its licensed private towing company in New Jersey Superior Court, Monmouth County for breach of contract and negligent provision of towing services. On August 2, 2002, Defendants allegedly refused to tow Auerbach's disabled vessel from Sandy Hook Bay unless he paid a salvage fee. On August 3, 2002, Defendants allegedly sent an inadequate boat and

failed to return with a suitable one. On August 4, 2002, another tow was requested "to no avail" and the boat became a total loss.

Defendants unsuccessfully sought to remove the case for a number of reasons, one being that salvage matters are within the exclusive jurisdiction of federal courts and are not subject to the saving-to-suitors clause in 28 U.S.C. 1333(1).

A state-court suitor can be saved from removal only in an in personam admiralty action not otherwise removable (i.e., by diversity, not existent in the instant case). An in rem salvage action is within the exclusive jurisdiction of the federal courts. Auerbach's claims did not include a claim for a marine-salvage bounty nor a voluntary rescue. Although they involved provisions of towing or salvage services, the action is in personam and is subject to the saving-to-suitors clause.

Notably, the Court denied Auerbach's claim for costs and expenses based on Defendants' "good-faith argument for removal." At 377.

Barry Geftman v. Boat Owners Assoc. of the United States, 2004 WL 1950389, 2004 AMC 920 (D.S.C. Feb. 5, 2004).

Disabled Plaintiff's 48-foot vessel, the M/V LOW PROFILE, suffered navigational equipment failure, eventually ran out of fuel and drifted off the coast of Charleston, South Carolina toward doom. Plaintiff requested a mere "fuel drop" from the United States Coast Guard, but not a tow or salvage. The Coast Guard dispatched a private operator to perform the task. Despite the request of the private operator and the Coast Guard, Geftman initially refused to anchor, provided incorrect coordinates of his location, and left his reported position, drifting into the dangerous breakers near Stono Inlet and eventually beached on Kiawah Island.

Plaintiff sued based on maritime negligence. The Court, quoting Homer's The Odyssey[3] found Plaintiff failed to prove any negligence of the private operator who obtained fuel, went to the reported location, searched but eventually stopped searching for the (relocated) vessel without notifying Plaintiff.

Runnin' Easy 3, Inc. v. Offshore Marine Towing, Inc., 2004 AMC 1773 (S.D. Fla., Mar. 1, 2004).

Plaintiff sought a declaration from the Court that an entire salvage contract (rather than merely an arbitration clause therein) unenforceable because, as it alleged, the Master of the vessel at issue did not have authority to bind the vessel owner to the contract, the salvage demand was exorbitant and Defendant performed no salvage services after the contract was signed.

The Court followed Prima Paint Corp v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967) in holding that "arbitration clauses are separable from the contracts in which they are included so that a claim of fraudulent inducement of the contract generally is a matter to be resolved by the arbitrator, whereas a claim that the arbitration clause itself was fraudulently induced is for the Court to decide because such a claim puts the making of the arbitration agreement in issue." At 1779.

The Court stayed the litigation pending arbitration.

[3] "See now, how men lay blame upon [the] gods for what is after all nothing but their own folly." Book 1.

<u>Royal Ins. Co. of America v. BHRS, LLC</u>, 2004 WL 1948645, 2004 AMC 1192 (S.D. Fla., Apr. 6, 2004).

The Court confirmed an Arbitration Award in favor of the salvor over the owner's claim that he was fraudulently induced to sign a "No Cure, No Pay" agreement. Dr. Samole owned the BIG DADDY which his son ran aground in Miami Beach, Florida. When Dr. Samole arrived at the marina repair facility he asked an agent of the salvor if he owed any money for the salvage services to which the agent replied "No, don't worry, the insurance company will pay it." At 1192 to 93. Notably, Dr. Samole failed to read the contract.

To invalidate an arbitration clause in a contract, the court suggested there must be substantial evidence that the contract never existed at all and that a party must make a misrepresentation of the character or essential terms of the contract, making assent to the contract impossible.

The Court held that the agent's "statement does not constitute substantial evidence of fraud in the factum by any stretch of the imagination." At 1196.

<u>International Aircraft Recovery, LLC v. Unidentified, Wrecked & Abandoned Aircraft</u>, 2004 AMC 1724 (11th Cir. June 18, 2004).

In 1990, Scientific Search Associates located the wreck of a Navy Devastator TBD-1 torpedo bomber that crashed off the coast of Florida on July 1, 1943. It offered to sell video footage and the location of the wreck to the National Museum of Naval Aviation which, in a letter dated February 8, 1991, declined and stated in part "[a]ny attempt at so salvaging the TBD, without the express written permission of the Department of the Navy, through its museum, will result in a recommendation from this

office to institute whatever action is appropriate to prevent an unauthorized taking." At 1726.

Later, the director of the NMNA forwarded International Aircraft Recovery, LLC a copy of the letter upon learning that International Aircraft Recovery, LLC was interested in recovering the wreck.

The issue before the Court was whether the 1991 letter was an "effective rejection" of salvage services by the government. The Court held that it was and denied compensation to International Aircraft Recovery, LLC.

RMS Titanic, Inc. v. Wrecked & Abandoned Vessel, 2004 AMC 1817 (E.D. Va. July 2, 2004).

Much like the recent popular movie, the legal issues associated with the artifacts from the Titanic seems interminable. Three issues of importance to the practitioner follow.

First, the Court refused to recognize a 1993 French Proces-Verbal (an official record of oral proceedings) purporting to grant title of 1,800 artifacts to the Plaintiff-salvor. Its basis included the lack of the administrator's authority under French law to award title without making factual finings regarding the cost of the salvage service and the value of the saved property and United States policy of memorializing rather than commercializing the artifacts.

Second, the Court refused to apply the law of finds to 5,900 artifacts. RMS Titanic, Inc. sought to be declared owner rather than salvor of particular artifacts, possibly because of the 4h Circuit's expression of belief that a salvage case could be "converted" into a finds case (See RMS Titanic, Inc. v. Wrecked & Abandoned Vessel,

286 F.3d 194, 2002 AMC 1136 (4th Cir. 2002)) or because of the third issue discussed below. RMS Titanic, Inc. could not "have its cake and eat it too" (at 1831) by being declared the owner under the law of finds as to 5,900 artifacts but simultaneously being protected as the exclusive salvor-in-possession of the as-yet unrecovered artifacts in and surrounding the wreckage. Notably, RMS Titanic made representations and arguments to the Court estopping them from asserting the law of finds, particularly relating to their intent to save the property rather than acquire it.

Finally, the Court laid a foundation for an October 18, 2004 hearing to determine the salvage award. They intend to: (1) determine the market value of the artifacts, (2) apply five Blackwell factors and another factor to address preservation efforts, (3) fix a total salvage award, (4) determine RMS Titanic, Inc.'s contribution to the salvage efforts relative to the uncompensated or under compensated services of other entities who assisted in the recovery or preservation of the artifacts, and determine what remaining portion of the total savage award it is entitled to receive; (5) consider remuneration received for the display of artifacts and production of documentaries; (6) thereafter decide how to sell the artifacts, hinting that they are not inclined to make an in specie salvage award (i.e., transferring the artifacts to RMS Titanic, Inc. in lieu of a judicial sale).

The story is not over: on June 18, 2004, the United States signed an international agreement designating the RMS Titanic an international memorial which could jeopardize RMS Titanic, Inc.'s rights as salvor-in-possession. Additionally, the cited decision has been appealed so there is no reason for fans to rush to a Marshall's sale just yet.

Historic Aircraft Recovery Corp v. Wrecked & Abandoned Voight F4U-1 Corsair Aircraft, 294 F. Supp.2d 132, 2004 AMC 625 (D. Me. Nov. 24, 2003).

On May 16, 1944, two Voight Corsair F4U-1 Fighter Aircraft, piloted by two members of the British military taking part in a World War II training mission, collided and the remains fell into Sebago Lake in Maine. Sebago Lake is "essentially landlocked and navigation is limited to other connected bodies of water within Maine" and is "generally used for recreation." At 627.

Maine and the United Kingdom successfully sought to dismiss the salvor's claim to the remains based on the Court's lack of jurisdiction. They each appeared to assert their own claims: Maine, based on non-abandonment and ownership of the submerged lands; the United Kingdom, based on their interest in preserving military gravesites of the pilots who were not recovered[4].

The Court rejected application of the admiralty jurisdiction test from Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 1995 AMC 913 (1995) noting the issue in Grubart was the test for admiralty jurisdiction over torts but that the issue in the instant case was to determine the test for admiralty jurisdiction over salvage claims.

The Court rejected Plaintiff's syllogism that there is admiralty jurisdiction over all salvage claims, reasoning that the proposed test failed to account for the specific nature of the body of water.

[4] Author, The University of Maine, Ocean and Coastal Law Journal, Vol. 7, Book 1, "The Protection of Sunken Warships as Grave Sites at Sea," (Spring 2002); and The University of Miami, Inter-American Law Review, Vol. 33, No. 1, "The Protection of Sunken Warships as Objects Entitled to Sovereign Immunity," (Spring 2002).

The Court applied a two-part "outer limit" test of admiralty jurisdiction in holding it lacked jurisdiction over the salvage claim: (1) what is the location of the waterway; and (2) what is the item that is the subject of the proposed salvage?

The Court noted the landlocked nature of Sebago Lake but refused to "state a general rule regarding whether an aircraft should ever be found subject to salvage." At 635. Based on the failure of the first element of the test, the Court denied jurisdiction and dismissed Plaintiff's First Amended Complaint.