

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

ANNETTE POPE CARTER :
 :
 vs. : C.A. NO. 86-0532 L
 :
 M/V LAST WAVE (ex-BRAVO), :
 Her Engines, Tackle, Apparel, :
 Furniture, Equipment and All :
 Other Necessaries Thereunto :
 Appertaining :

MEMORANDUM AND ORDER

RONALD R. LAGUEUX, United States District Judge.

This matter primarily concerns the issue of whether a shipowner in a purported in rem admiralty proceeding may waive the jurisdictional requirements of arrest and notice so as to bind a holder of a first preferred ship mortgage to a default judgment in a subsequent proceeding.

On April 7, 1985, plaintiff Annette Pope Carter filed a complaint in the United States District Court for the Eastern District of North Carolina against Theodore Eysenbach, New Island Charters, Inc., (New Island Charters)

and the M/V Last Wave (ex-Bravo). In her complaint, plaintiff alleged that Eysenbach negligently operated Last Wave in a manner which proximately caused plaintiff's injuries. New Island Charters it was alleged, constituted the corporate entity in which Last Wave was enrolled when the accident occurred.

On or about April 24, 1985, an attorney for New Island Charters and Last Wave signed a copy of the summons purporting to indicate that "service [was] accepted and a copy of summons and complaint received on behalf of corporate defendant and the vessel . . ." This was allegedly done pursuant to an agreement between plaintiff and New Island Charters in that case. Said shipowner agreed to waive the requirement of arrest of the vessel and allow plaintiff to proceed in rem in an admiralty court of the United States in consideration for terminating an action brought in the North Carolina state courts by the same plaintiff.

In August of 1985, the attorney for defendants moved the United States District Court in North Carolina to withdraw as counsel for New Island Charters and Last Wave, and to allow new counsel an additional thirty days in which to respond to plaintiff's complaint. On September 17, 1985,

both these motions were granted; however, the corporation and vessel failed to take any further action with respect to the matter. Thus, judgment by default was entered against those two defendants on July 11, 1986, in the amount of \$375,000.

The action before this Court was commenced in early September of 1986, after plaintiff discovered Last Wave to be within the District of Rhode Island. The September 1986 complaint alleged that on July 11, 1986, the United States District Court for the Eastern District of North Carolina rendered judgment against New Island Charters and Last Wave for \$375,000. It further alleged that no part of this judgment had been paid. Plaintiff, therefore, requested this Court to issue a warrant for the arrest of Last Wave so that the vessel could be condemned and sold to pay the judgment.

On September 9, 1986, plaintiff obtained arrest of the vessel and duly published notice of that fact. The vessel was subsequently sold at public auction by the United States Marshal and the proceeds of the sale were deposited with the Clerk of this Court.

After the sale, Irving Trust Company (Irving Trust), holder of a first preferred ship mortgage on the defendant vessel, filed a claim and answer to plaintiff's complaint. In its answer, Irving Trust contended that it should not be bound by the judgment of the North Carolina Federal Court because plaintiff "failed to acquire in rem jurisdiction over the vessel by seizure or otherwise."

On February 11, 1987, plaintiff moved for an order directing the clerk to apply the funds in the registry of court to satisfy the judgment. In the event that this motion was denied, plaintiff moved the Court for permission to amend her complaint. Irving Trust objected to the former motion and the matter was heard on March 31, 1987. Plaintiff's motions are now in order for decision.

The issue to be decided is whether an attorney for a shipowner and a vessel in an "in rem" admiralty proceeding may waive the jurisdictional requirements of arrest and notice so as to bind a holder of a first preferred ship mortgage.

Plaintiff concedes that the requirements of arrest and notice have not been met in the present case.

Nevertheless, plaintiff contends that the U.S. District Court for the Eastern District of North Carolina did not lack in rem jurisdiction over Last Wave because counsel for the vessel "appeared" before the court. This "appearance" allegedly occurred when counsel accepted service of process pursuant to an agreement between plaintiff and the shipowner. Plaintiff alleges that the shipowner agreed to waive the requirement of arrest and allow plaintiff to proceed in rem in a federal court in exchange for dropping a state court action. In addition, plaintiff claims counsel for the LAST WAVE appeared for the vessel by securing permission for new counsel to file an answer out of time.

Plaintiff's contentions, however, are flawed because they fail to account for the principle that a court may only exercise jurisdiction over potential litigants to the extent that adequate notice is provided to them. This basic principle is expostulated in the Supplemental Rules for certain Admiralty and Maritime Claims.

Under Supplemental Rule E(4)(b), the "in rem" jurisdiction of an admiralty court is predicated upon the

marshal taking physical control of the tangible property to be arrested. Once arrest has occurred the owner of the vessel may obtain release of the vessel by following the procedures outlined in Supplemental Rule E(5). Supplemental Rule C(4) then provides the following:

No notice other than the execution of process is required when the property that is the subject of the action has been released in accordance with Rule E(5).

The underlined words in the passage are important because they equate the concept of execution of process (i.e. arrest) with a form of notice. Thus, the extent of a court's jurisdiction is defined by the type of notice issued in the proceedings. At the stage in the proceedings known as arrest, only the owner (by means of the arrest) has been given notice that his ship is subject to a court proceeding. At this point in time, then, the court has jurisdiction of the res, but only to the extent of the owner's interest in the res. This conclusion is made clear by the next sentence in Rule C(4).

If the property is not released within 10 days after execution of process, the plaintiff shall promptly . . . cause public notice of the action and arrest to be given in a newspaper of general circulation in the district designated by order of the court.

As this sentence makes clear, upon arrest of the vessel, the jurisdiction of the court, while designated "in rem," is not truly in rem because other potential claimants in the vessel have not been notified that their interest is the subject of litigation. This "quasi in rem" proceeding, however, is transformed into a true in rem proceeding when general notice is published. The corresponding Note of the Advisory Committee explains:

General notice is required in order that all persons including unknown claimants may appear and be heard, and in order that the judgment in rem shall be binding on all the world.

Thus, it is not until all potential litigants in the res have been informed that their interest may be subject to termination by the court that the jurisdiction of the court is truly in rem.

That general notice need not be published simultaneously with arrest of the vessel (thus delaying the court from obtaining pure in rem jurisdiction for a period of time after arrest) is merely the result of a desire to save plaintiffs the unnecessary expense of publication in the event that the vessel is released. As the Advisory

Committee Note explains, publication, prior to release, is "too expensive and ineffective a formality to be routinely required."

When, as usually happens, the vessel or other property is released on bond or otherwise there is no point in publishing notice; the vessel is freed from the claim of the plaintiff and no other interest in the vessel can be affected by the proceedings.

If general notice had to be published every time a vessel was arrested, plaintiffs would incur a great deal of needless expense. On a majority of those occasions, the vessel would be released, and the need to apprise other potential claimants that their interests in the vessel could be subject to termination would never arise.

The reasoning embodied in the Supplemental Rules dictates the result in the present case. As has already been shown, the in rem jurisdiction of an admiralty court affects only the property interests of those persons who are adequately informed that their interests are subject to contention in court. From this postulate, it follows that a party who waives the arrest requirement waives this defect only to the extent of his property interest in the res.

Were he to waive such a defect regarding other owner interests in the res, he would be submitting the property rights of other persons to the jurisdiction of the court when those persons had not been adequately informed of such action. This would directly contradict the principles embodied in the Supplemental Rules.

In the present case, no notice was ever sent to Irving Trust informing it that its first preferred mortgage in Last Wave might be subject to termination by the North Carolina litigation. Also, no general notice by publication was given. Without such notice, the North Carolina Federal District Court never obtained jurisdiction over Irving Trust's property interest in Last Wave, and any waiver of the arrest requirement by New Island Charter's counsel operated only to the extent of giving the Court jurisdiction of New Island Charter's interest in Last Wave. It follows that said Court's judgment is not binding upon Irving Trust, and that Irving Trust has the right to dispute the facts giving rise to that judgment in this Court.

Plaintiff contends, however, that the case of Cactus Pipe & Supply Co., v. M/V MONMARTRE, 756 F.2d 1103

(5th Cir. 1985) is contrary to the above reasoning. In Cactus Pipe, a consignee brought an action against the vessel Monmartre for damage to a cargo of steel tubing which was incurred in the hold of the vessel during shipment. Id. at 1106. In response, the owner of Monmartre filed a claim without any jurisdictional objection to plaintiff's complaint. Id. at 1110. On these facts, the Fifth Circuit held that Monmartre had "appeared" and that such an appearance "perfected the in rem jurisdiction of the district court". Id.

Cactus Pipe, however, is clearly distinguishable from the present case. In Cactus Pipe only the interest of the owner of Monmartre was the subject matter of plaintiff's allegation of waiver. Moreover, the owner, obviously, had been notified of the district court action or it would not have filed a claim upon the vessel. The court, then, had no occasion to consider whether the filing of a claim by the owner also subjected the property interest of an unnotified third party to the court's "in rem" jurisdiction.

Indeed, when the Fifth Circuit had occasion to consider this issue a few years prior to rendering the

Cactus Pipe decision, it apparently indicated that an unnotified third party's interest could not be so waived. In Tresor Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel, 569 F.2d 330, 335 (5th Cir. 1978), plaintiff brought an in rem action to confirm title to an unidentified and wrecked vessel believed to be the Neustra Senora de Atorcha. Id. at 333. Since some of the vessel's remains lay outside the district court's territorial jurisdiction, no arrest or notice was published regarding the court action. Id. at 335. The United States then intervened as a party-defendant, stipulated to the court's admiralty jurisdiction, and asserted a property right in the res. Id.

On these facts the Fifth Circuit upheld the portion of the district court's order which held the U.S. government had waived "the usual requirement that the res be present within the territorial jurisdiction of the court" when the government stipulated to the court's admiralty jurisdiction. Id. The Fifth Circuit, however, disapproved of the district court's order which indicated plaintiffs had

"exclusive title to, and the right to immediate and sole possession of the vessel and cargo as to other claimants, if any there be, who [were] not parties or privies to this litigation." Id. at 336.

Although the Court did not clearly state the reasons for its decision, the Court apparently based its determination upon the failure of plaintiff to inform any non-party claimants who may have had interests in the vessel or its booty. As a result, the district court only obtained jurisdiction over the United States and not over claimants who had no opportunity to decide whether to dispute the jurisdiction of the court in the first place. This holding (along with the narrow reading of Cactus Pipe suggested above) indicates that the Fifth Circuit would not reach a decision contrary to that reached by this Court were it to reconsider the issue some time in the future.

The next issue to be decided in this case is whether Irving Trust Co. has such an identity of interest with New Island Charters so as to be precluded from relitigating the issue of the North Carolina Federal District Court's jurisdiction. It is the general rule that

a non-party may not be precluded from relitigating an issue decided in a prior action. There is, however, an exception to this principle. Where the non-party has the same practical opportunity to control the course of the proceedings that he would have had had he been a co-party in the original action, then the non-party may be precluded from relitigating an issue already decided in the original action. C. Wright, A. Miller & E. Cooper, 18 FEDERAL PRACTICE & PROCEDURE § 4451 (1981).

Plaintiff never briefed this issue. It was stated by plaintiff's counsel at oral argument that the President of New Island Charters, J. Thomas Stephens, was also a consultant for Irving Trust. Plaintiff then contended that by virtue of the dual role played by Stephens in both companies, Irving Trust should be precluded from relitigating the in rem jurisdiction which the North Carolina Federal District Court properly exercised with respect to New Island Charters. This argument fails because plaintiff failed to present any evidence indicating that Irving Trust (via Stephens) had a practical opportunity to control the course of the North Carolina litigation.

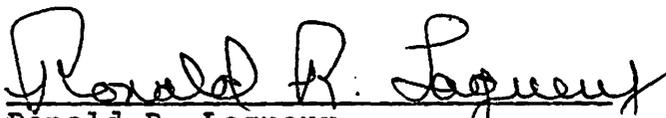
Without such evidence, plaintiff may not contend that Irving Trust is precluded from litigating the scope of the North Carolina Federal District Court's jurisdiction.

For all the above reasons, plaintiff's motion for an order directing the Clerk of the Court to apply funds to satisfy the judgment is denied.

One more matter needs the Court's attention. In the event that the above motion was denied, plaintiff moved to amend her complaint to state a claim against LAST WAVE based on negligence. There being no objection filed or voiced by Irving Trust, such motion is granted. Plaintiff will have 20 days to file an amended complaint and Irving Trust 20 days thereafter to respond.

It is so Ordered.

ENTER:



Ronald R. Lagueux
United States District Judge

4/29/87
Date