IN THE SUPREME COURT OF THE
FEDERATED STATES OF MICRONESIA
TRIAL DIVISION – STATE OF YAP

THE PEOPLE OF THE MUNICIPALITY OF EAURIPIK, YAP, by and through SANTUS SARONGELFEG, JOHN HAGLELGAM, and MOSES MOGLIG,

Plaintiffs,

v.

F/V TERAKA NO. 168, F/V YUH YOW 127, their engines, masts, bowsprits, boats, anchors, chains, cables, rigging, apparel, furniture, and all necessaries thereunto pertaining,

In Rem Defendants,

YUH YOW FISHERY COMPANY, LTD., MARIN MARAWA, LTD., MASANAGA SHIMAZU, MALAYAN TOWAGE AND SALVAGE CORPORATION, HSIN HORNG FISHERY COMPANY, LTD., EDGAR R. PELEAZ, and CITY PRO MANAGEMENT, LTD.,

In Personam Defendants.

FEDERATED STATES OF MICRONESIA,

Plaintiff in Intervention,

v.

F/V TERAKA NO. 168, its engines, masts, bowsprits, boats, anchors, chains, cables, rigging, apparel, furniture, and all necessaries thereunto pertaining,

In Rem Defendant,

YUH YOW FISHERY COMPANY, LTD., MARIN MARAWA, LTD., and MASANAGA SHIMAZU,

In Personam Defendants.

CIVIL ACTION NO. 2011-3002

MEMORANDUM AND ORDER DENYING SUMMARY JUDGMENT

This comes before the court on 1) the Plaintiffs' Reply to Limitation of Liability Defense as Ordered by the Court on September 11, 2012 and Motion and

Memorandum in Support of Partial Summary Judgment, filed September 25, 2012; 2) Defendant Marin Marawa, Ltd.'s Surreply to Plaintiffs FSM and Eaurapik's Reply Addressing the Limitations of Liability Claim by Yuh Yow Fishery Company, Ltd. and Marin Marawa, Ltd., filed October 25, 2012; 3) Marin Marawa, Ltd.'s Opposition to Plaintiffs' Motion for Partial Summary Judgment, filed October 25, 2012; 4) Yuh Yow Fishery Company, Ltd.'s Opposition to Plaintiffs['] Motion for Partial Summary Judgment, filed October 25, 2012; 5) Malayan Towage and Salvage Corporation, Hsin Horng Fishery Company, Ltd., Edgar R. Peleaz, and City Pro Management, Ltd.'s Opposition to Plaintiffs' Motion for Partial Summary Judgment, filed October 25, 2012; 6) Errata: Correction to Defendant Marin Marawa, Ltd.'s Surreply to Plaintiffs' Reply Re: Court Order September 11, 2012, filed November 7, 2012; 7) Plaintiffs' Omnibus Reply to Defendants Marin Marawa, Ltd., Yuh Yow Fishery Company, Ltd., Malayan Towage and Salvage Corporation, Edgar R. Peleaz, and City Pro Management, Ltd.'s Opposition to Plaintiffs' Motion for Summary Judgment and Surreplies, filed November 21, 2012; and 8) Response by Malayan Towage and Salvage Corporation, Hsin Horng Fishery Company, Ltd., Edgar R. Peleaz, and City Pro Management, Ltd. to Plaintiffs' Omnibus Reply for Partial Summary Judgment, filed November 29, 2012. The court also notes the FSM Plaintiff's Reply Addressing Limitation of Liability Claim by Yuh Yow Fishery Company, Ltd. and Marin Marawa, Ltd. in Response to Court Order of 9/11/12, filed September 21, 2012.

Summary judgment is denied. The reasons follow.

I. THE PARTIES' POSITIONS

The class plaintiffs, the People of Eauripik ("Eauripik"), contend that they are entitled to a partial summary judgment on the issue of liability for trespass, nuisance, reckless and negligent conduct because it is undisputed that the maps and charts on board the F/V *Teraka No. 168* were inadequate and of too small a scale to

understand that the plotted course was directly through and across Eauripik atoll. Eauripik further seeks summary judgment that the asserted statutory limitation of liability defense should be stricken. Eauripik contends that the limitation of liability statute should be strictly construed and is inapplicable to its claims, that the limitation of liability statute is unconstitutional since it is overridden by Eauripik custom and tradition, and that the defendants' criminal conduct either waives the defense or estops them from asserting it. In the alternative, Eauripik contends that the value of the F/V *Teraka No. 168*'s insurance policies should be included in any amount set for any authorized limitation of liability fund, which, by Eauripik's calculation, should be $17 million to cover its claims as "fairly stated."

The FSM contends that the limitation of liability statute cannot be asserted in this case because the claims against Marin Marawa Ltd. and Yuh Yow Fishery Company, Ltd. are exempted from its coverage because they relate to the creation of a wreck and rendering it harmless and because, before a limitation defense can be pled, a limitation of liability fund must be constituted and it has not been.

Defendant Marin Marawa, Ltd. contends that it is premature to decide whether the limitation of liability defense applies in this case because only procedural steps have been taken with regard to limitation with proof of actual entitlement yet to come at trial. Marin Marawa contends that it has satisfied the procedural requirement for pleading the limitation defense including constituting a liability fund. Marin Marawa contends that the Eauripik custom of *gariya* cannot override the congressionally-enacted limitation statute. Marin Marawa asserts that since the FSM Secretary of Transportation never promulgated regulations under 19 F.S.M.C. 1107(1) then Supplemental Admiralty and Maritime Rule F(1) must apply and that when limitation of liability is asserted in answer, that assertion does not require a limitation bond or fund and, even if it were, the failure to post security is

not a jurisdictional bar to the limitation defense. Marin Marawa further asserts that since the FSM now claims ownership of the F/V *Teraka No. 168* through the receivership statute, there is nothing to constitute the owner's interest under Admiralty Rule F(1). Alternatively, Marin Marawa suggests that under the [1976 London] Convention on Limitation of Liability for Maritime Claims ("London Convention") the limitation amount would be $1,529,129.15. Marin Marawa also asserts that whether the statutory exceptions to the limitations defense apply to any part of Eauripik's claims cannot be determined until trial on the merits. Marin Marawa asserts that summary judgment cannot be granted to Eauripik since the navigational errors of a vessel's experienced and competent master are not imputed to the vessel's owner and since whether the F/V *Teraka No. 168* was adequately equipped with navigational aids is a material fact that is in dispute.

Yuh Yow Fishery Company, Ltd. ("Yuh Yow") asserts, supported by affidavits, that it was not an owner of or an operator or charterer of or controlled the F/V *Teraka No. 168* or any of the assisting vessels and that Eauripik has shown absolutely no evidence to the contrary. Yuh Yow also asserts that there is no evidence that it was the agent of any of the other defendants or that any other defendant was its agent. It also asserts that Eauripik has no evidence that it acted wrongfully or fraudulently so as to be the "alter ego" of Marin Marawa. Yuh Yow therefore contends that since Eauripik has not established a prima facie factual basis for summary judgment against it, summary judgment against it must be denied.

Malayan Towage and Salvage Corporation, Hsin Horng Fishery Company, Ltd., Edgar R. Peleaz, and City Pro Management, Ltd. ("the assisting defendants"[1])

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[1]These parties are called the "assisting defendants" because Eauripik premises their liability on their attempts to free the *Teraka No. 168* from the reef. City Pro Management, Ltd.'s vessel, the F/V *Yuh Yow No. 127*, was the first to try to free the *Teraka No. 168*, followed by Hsin Horng Fishery Company, Ltd.'s vessel, the

contend that Eauripik has not articulated any basis for holding them liable because Eauripik has not provided any evidence that they contributed to the damage of Eauripik reef or that they are owners, operators, agents, captains, or masters of each other. They thus contend that summary judgment cannot be entered against them.

Eauripik retorts that the defendants, while disdainful, do not contest the application of Eauripik custom and tradition to this litigation. Eauripik asserts that there is no genuine dispute that the shipowner, Marin Marawa, is liable because the F/V *Teraka No. 168*'s master, Captain Masanaga Shimazu, plotted its course directly over Eauripik atoll and that this deficient navigation was the actual and proximate cause of the vessel's grounding on the reef and the damage caused by that grounding.

The assisting defendants respond that Eauripik's summary judgment against them relies on Eauripik's assumption that the assisting defendants' efforts to refloat the F/V *Teraka No. 168* caused additional damage to Eauripik reef. The assisting defendants contend that there is no evidence of this or that they breached any duty they might owe to Eauripik or anyone else or that they are alter egos of the F/V *Teraka No. 168*'s shipowner.

II. SUMMARY JUDGMENT STANDARD

Under Rule 56, the court must deny a summary judgment motion unless it, viewing the facts and inferences in the light most favorable to the nonmovant, finds that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Rosario v. College of Micronesia-FSM, 11 FSM Intrm. 355, 358 (App. 2003); Iriarte v. Etscheit, 8 FSM Intrm. 231, 236 (App. 1998). In

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F/V *Fu Kuan 606*. Then the Malayan Towage and Salvage Corporation's tugboat, the M/Tug *Trabajador-I*, captained by Edgar R. Peleaz, was hired to and tried to free the *Teraka No. 168* from the reef and tow it to the Philippines, but could not.

order to succeed on a summary judgment motion, a movant plaintiff (in this case, Eauripik) must also overcome all affirmative defenses that the defendant has raised. Saimon v. Wainit, 16 FSM Intrm. 143, 146 (Chk. 2008); Zion v. Nakayama, 13 FSM Intrm. 310, 312 (Chk. 2005). Eauripik expends considerable effort to overcome Marin Marawa's limitation of liability defense.

III. Limitation of Liability Defense

A. *Limitation Statute's Constitutionality*

Eauripik contends that the limitation of liability statute must be unconstitutional or that a particular Eauripik custom, *gariya*, somehow renders the statute unconstitutional or unenforceable. The FSM Constitution expressly grants Congress the exclusive powers "to regulate navigation and shipping," FSM Const. art. IX, § 2(h), and to regulate foreign and interstate commerce, FSM Const. art. IX, § 2(g). The limitation of liability defense was enacted as a part of the National Maritime Act and under Congress's powers to regulate shipping and navigation and foreign and interstate commerce.

Eauripik has not shown that a Eauripikese custom divests Congress of its power to regulate shipping and commerce, or renders the limitation of liability statute, 19 F.S.M.C. 1101-1108, unconstitutional. Statutes are presumed to be constitutional. Urusemal v. Capelle, 12 FSM Intrm. 577, 586 (App. 2004); Jano v. FSM, 12 FSM Intrm. 569, 572-73 (App. 2004); Rodriguez v. Bank of the FSM, 11 FSM Intrm. 367, 382 (App. 2003). Eauripik has not overcome that presumption.

Furthermore, the international nature of admiralty and maritime law would necessitate that FSM statutory maritime law be applied uniformly throughout the FSM and not vary from island to island. "The concept of admiralty [law] . . . is related uniquely to the law of nations. It consists of rules in large part intended to govern the conduct of various nations in their shipping and commercial activities."

Lonno v. Trust Territory (I), 1 FSM Intrm. 53, 71 (Kos. 1982). Uniformity in its application is desirable.

B. *Fund Not Constituted*

Both Eauripik and the FSM contend that the limitation of liability defense cannot be pled because no the Limitation of Liability Fund has been constituted with the court. Marin Marawa contends that, since the FSM now claims to own the F/V *Teraka No. 168*, as the receiver of a wreck, it no longer has an ownership interest in the vessel so the limitation fund should start at zero so that its previous proffer of $1,000 would be adequate. Supplemental Admiralty and Maritime Rule F(1) contains the following methods to calculate a limitation fund amount:

> The owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the owner's interest in the vessel and pending freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the statutes' provisions as amended; or (b) at the owner's option shall transfer to a trustee to be appointed by the court, for the benefit of the claimants, the owner's interest in the vessel and pending freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the statutes' provisions as amended.

FSM Mar. R. F(1). The relevant FSM statute sets the Fund amount as "the sum of such amounts set out in regulations as are applicable to claims for which that person may be liable, together with interest thereon from the date of the occurrence giving rise to the liability until the date of the constitution of the fund." 19 F.S.M.C. 1108(2). The regulations referred to are those to be promulgated by the Secretary of the Department of Transportation and Communications implementing Title 19, chapter 11 and "taking into account the provisions of the [1976 London] Limitation of Liability Convention and the [1969] Tonnage Convention." 19 F.S.M.C. 1101. The Secretary has never promulgated any limitation of liability regulations. Those conventions (and thus any regulations taking them into account) calculate the limitation amount using certain tonnage calculations. Even in the absence of

regulations, Congress's intent in providing for a limitation of liability defense is clear – the Limitation of Liability Fund is to be calculated by the London Convention method and not based on the "value of the owner's interest in the vessel and pending freight."[2]

If there is any conflict between Rule F(1) and the limitation statute, then the statute must prevail since the Constitution permits the Chief Justice to promulgate procedural rules, FSM Const. art. XI, § 9(c),which Congress may amend by statute, FSM Const. art. XI, § 9(f). Congress thus has the authority to amend or create procedural rules by statute (and when Congress enacts a procedural rule, it is valid) but the Chief Justice does not have the power to amend Congressionally-enacted statutes. Thus, if the statute applies and the statute and the rule conflict, the statute must prevail. People of Tomil ex rel. Mar v. M/V Mell Sentosa, 17 FSM Intrm. 478, 479 (Yap 2011); FSM v. Kana Maru No. 1, 14 FSM Intrm. 365, 367 n.1 (Chk. 2006); FSM v. Wainit, 12 FSM Intrm. 376, 383 (Chk. 2004); *cf.* Jano v. King, 5 FSM Intrm. 326, 331 (App. 1992) (although a chief justice has the power to make rules, when Congress has acted pursuant to its power to provide statutory authority to the court the statute applies and the court need not have exercised its concurrent rule-making power). The court does not need to decide if the rule conflicts with the statute and is overridden by it because the rule itself provides that the Limitation of Liability Fund shall include "in addition such sums, or approved security therefor, as the

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[2]"Pending freight" or "freight pending" is a term of art. "Freight" refers to "the compensation paid to a carrier for transporting goods." BLACK'S LAW DICTIONARY 738 (9th ed. 2009). "The term 'freight pending', for purposes of constituting the [limitation of liability] fund, means the total earnings of the vessel for the voyage, whether for carriage of passengers or goods." 2 THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 15-7, at 314 (2d ed. 1994) (citing The Main v. Williams, 152 U.S. 122, 14 S. Ct. 486, 38 L. Ed. 381 (1894)). Exactly how this would apply to a fishing vessel that has not yet started fishing and has no catch yet is unclear.

court may from time to time fix as necessary to carry out the statutes' provisions as amended," FSM Mar. R. F(1)(a), or "together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the statutes' provisions as amended," FSM Mar. R. F(1)(b).

The "statutes' provisions as amended" – Title 19, chapter 11 (19 F.S.M.C. §§ 1101-1108, enacted as FSM Pub. L. No. 10-76, §§ 209-216) – clearly intend that the Limitation of Liability Fund amount be calculated according to the London Convention method. That Convention therefore must be used to calculate the amount of the Limitation of Liability Fund. Marin Marawa contends that under the London Convention the fund amount would be set at $1,529,129.15. No party has challenged the accuracy of that calculation. They do, however, challenge Marin Marawa's ability to assert that defense without first establishing a Limitation of Liability Fund. Eauripik and the FSM are correct that a fund must be constituted before the limitation defense to be effective. Since this is a matter of first impression and there was doubt over how to calculate the fund amount, the court orders that the London Convention calculation should be used along with the interest mandated by statute, which will be computed at the legal 9% rate. The court will use $1,529,129.15 as the base amount but will allow Eauripik and the FSM an opportunity to show that a more accurate calculation based on the London Convention would yield a higher figure. Once this amount ($1,529,129.15 + 9% interest since August 28, 2011) is deposited with the court in cash or an irrevocable letter of credit, 19 F.S.M.C. 1108(4), the defense may then be asserted.

Eauripik's claims as "fairly stated" are not a basis to calculate the amount at which a limitation of liability fund should be set. This should be obvious from the principle that the fund involves a limitation of liability while a plaintiff's claim as "fairly stated" does not involve any limitation.

C. *Procedure Once Defense May Be Asserted*

Eauripik contends that the limitation of liability defense should be stricken. At this point it is not apparent that the limitation of liability defense cannot be asserted against some or all of Eauripik's or the FSM's claims. If the defense can be asserted, then the court will proceed as follows:

> In the trial of a limitation proceeding, the burden of proof is divided between the parties, and there is a two-step analysis. The claimants must prove that the destruction or loss was caused by negligence or unseaworthiness of the vessel. The burden then shifts to the shipowner to demonstrate that he comes within the statutory limitation conditions: that there was no design, neglect, privity or knowledge on his part.

2 THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 15-5, at 311 (2d ed. 1994) (footnote omitted). The privity and knowledge issue is the favored method to deny the limitations defense. *Id.* § 15-6, at 312. "The determination of whether the shipowner has established a lack of privity and knowledge of the fault involves a delicately balanced inquiry. Privity and knowledge exist where the owner has actual knowledge, or could have or should have obtained the necessary information by reasonable inquiry or inspection." *Id.*

Thus, first Eauripik must prove that the loss was caused by negligence or unseaworthiness of the F/V *Teraka No. 168.* Next, Eauripik has the opportunity to prove that its claims are not the sort of claim to which the limitation of liability defense can be applied. But even if Eauripik's and the FSM's claims are subject to the limitation of liability defense, that still does not mean that the defense will succeed because the burden then shifts to the shipowner(s) to demonstrate that there was no design, neglect, privity or knowledge on the shipowner's part. If the shipowner(s) cannot demonstrate that, then the limitation of liability defense will not be allowed.

In this case, Eauripik asserts that it has proven negligence – the F/V *Teraka*

No. 168 did not have navigational charts for the area of the FSM where it was sailing and where Eauripik is located and that, as a result, when the F/V *Teraka No. 168* was ordered to rendezvous with another fishing vessel at a certain location, the F/V *Teraka No. 168*'s master plotted a course to that location that ran directly over Eauripik atoll. Eauripik contends that this negligence or unseaworthiness was within the privity and knowledge of Marin Marawa, the shipowner. Assuming that the absence of relevant navigational charts proves negligence or unseaworthiness, it is Marin Marawa's burden to prove that it was not within its privity or knowledge – that it did not have actual knowledge of the lack of charts and could not have obtained that necessary information by reasonable inquiry or inspection.

Accordingly, summary judgment is inappropriate at this time. Eauripik has not yet overcome Marin Marawa's affirmative defense of limitation of liability.

D. *Material Facts*

"FSM Civil Rule 56(d) provides that where summary judgment has been denied such that trial is necessary, the court 'shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted.'" AHPW, Inc. v. FSM, 12 FSM Intrm. 164, 168 (Pon. 2003). The following material facts do not appear to be genuinely disputed.

On August 28, 2011, Captain Masanaga Shimazu, the F/V *Teraka No. 168*'s master, was instructed to rendezvous with another fishing vessel to transfer some crew members to that other vessel. The F/V *Teraka No. 168*'s master plotted a course to the rendezvous point that ran directly over Eauripik atoll. The F/V *Teraka No. 168* was following that course when the second mate, Du Tan, who was on watch at the time, noticed lights in front of the F/V *Teraka No. 168*. The master came to the bridge and observed the situation for a while and said that the lights could be

from another fishing boat. The second mate also pointed out that the electronic chart had a light blue patch and that the F/V *Teraka No. 168*'s course was going to run right over it. The master pointed to the 307 meter sounding depth and said that the water was deep enough for the F/V *Teraka No. 168* and instructed the second mate to maintain his course. The electronic chart's light blue patch was an outline of FSM territorial waters and did not have any indication of or markings for land on it. There was also a copy of Admiralty Chart No. 762 (Eastern Caroline Islands) on board. Admiralty Chart No 762's coverage does not include the area where Eauripik atoll is located. The F/V *Teraka No. 168* maintained its course and ran hard aground on Eauripik reef. Later attempts to float it off or tow it off have not been successful.

Eauripik also contends that a material fact that exists without substantial controversy is that the damaged reef is valued at $600 a square meter. While it may be uncontested that the value of the reef on the main island of Yap is $600 per square meter, People of Gilman ex rel. Tamagken v. Woodman Easternline Sdn, Bhd., 18 FSM Intrm. 165, 175 (Yap 2012); People of Rull ex rel. Ruepong v. M/V Kyowa Violet, 14 FSM Intrm. 403, 418 (Yap 2006), the court cannot presume, without evidence, that $600 a square meter is an accurate value for any particular Yap outer island reef, especially where on the outer island there may be more reef and fewer people who have the right to rely on or depend on the reef's resources. The parties are free to prove that Eauripik's reef, or that the damaged part of it, is worth more or less than $600 per square meter.

IV. Conclusion

Accordingly, summary judgment is denied. Eauripik and the FSM, using the [1976 London] Limitation of Liability Convention and the [1969] Tonnage Convention method, may have until February 18, 2013 to challenge or correct the

calculation of the Limitation of Liability Fund amount. Marin Marawa may have until March 15, 2013, to constitute the Limitation of Liability Fund or that defense will be deemed waived and will be stricken.

So ordered the 22nd day of January, 2013.

Martin G. Yinug
Chief Justice

Entered this 22nd day of January, 2013.

Georgia Rungum
Assistant Clerk of Court

I served this Memo & Order Denying SJ
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