1993 WL 427443
United States District Court, S.D. New York.

IGNAZIO MESSINA & C.S.P.A., Plaintiff,
v.
OCEAN REPAIR SERVICE CO., Steamco Corp., Apex Marine Corporation and Avon Steamship Company, Inc., Defendants.
OCEAN REPAIR SERVICE CO. and Steamco Corporation, Defendants and Third–Party Plaintiffs,
v.
MORGAN GUARANTY TRUST COMPANY OF NEW YORK, Continental Illinois National Bank and Trust Company of Chicago, National Westminster Bank, U.S.A., and Banque De La Societe Financiere Europeene, Ship Holding Corporation, Continental Illinois Property Corporation, No. 2, Wall Shipping Corp., Rothbury Company Limited, and JPM Shipping Corporation, Third–Party Defendants.

Nos. 86 CIV. 7898 (KMW).
|
Oct. 19, 1993.

MEMORANDUM OPINION AND ORDER

KIMBA M. WOOD, District Judge.

***1** Defendants and third-party defendants renew their motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and pursuant to this court's Memorandum Opinion and Order dated June 13, 1991. For the reasons set forth below, defendants' and third-party defendants' renewed motion for summary judgment is granted in part and denied in part.

PROCEDURAL BACKGROUND

This action arises from engine damage which allegedly resulted from negligent inspection and restoration work (the "work") on the M/V Hellenic Innovator (the "Vessel"). The work was performed by SteamCo Corporation ("SteamCo") and Ocean Repair Service Corporation ("Ocean Repair") under the supervision of Apex Marine Corporation ("Apex") and Avon Steamship Company ("Avon") (collectively "defendants"). Defendants performed the work for the third-party defendants, which consist of JPM Shipping Corporation ("JPM"), the owner of the Vessel at the time of the work, and various banks, bank subsidiaries and bank affiliates (collectively, the "Banks"), which held various interests in the vessel at the time of the work. [1] Plaintiff Ignazio Messina and C.S.P.A. ("plaintiff") subsequently purchased the Vessel from JPM.

The original action was brought in 1986 against SteamCo and Ocean Repair for common law tort, maritime tort and breach of implied warranty to a third-party beneficiary. The action was subsequently stayed until 1989 because SteamCo and Ocean Repair were in bankruptcy proceedings. In 1989, plaintiff amended its complaint to add Apex and Avon as defendants. Plaintiff also added the maritime claim of breach of an implied warranty of workmanlike service in the vessel service contracts between defendants and the third-party defendants.

In late 1990, Avon, Apex and the Banks moved to dismiss the Complaint, for judgment on the pleadings or, in the alternative, for summary judgment. SteamCo and Ocean Repair cross-moved to dismiss the Complaint, and opposed the Banks' motion to the extent that it seeks to deny contribution or indemnity to SteamCo or Ocean Repair.

In its Memorandum Opinion and Order dated June 13, 1991 (the "1991 Opinion and Order"), the court granted defendants' [2] motion to dismiss Counts 1 and 2 of the Complaint (common law tort and maritime tort) and denied without prejudice defendants' motion to dismiss Count 3 (breach of a service contract to a third party beneficiary under New York law) and Count 4 (breach of an implied warranty of workmanlike performance to a third-party beneficiary under maritime law). The court noted that "at this stage of the proceedings, with no discovery conducted, it is impossible to determine what defendants' intentions were with respect to third-party beneficiaries to their contracts." 1991 Opinion and Order, at 14. Accordingly, the court ordered that the parties could conduct limited discovery on the issue of intent pursuant to Fed.R.Civ.P. 56(f). The parties have completed discovery on this issue.

***2** Defendants now renew their motion for summary judgment. In their renewed motion, defendants point to certain preliminary questions of law that may govern the remaining claims in this case, including choice of law and whether the implied warranty of workmanlike performance

under maritime law applies to a subsequent owner of a ship and to one who suffers only economic loss. Defendants further contend that even if the court answers these questions in favor of preserving plaintiff's remaining claims, plaintiff has not demonstrated that it was an intended, third-party beneficiary to the vessel service contracts.

The court first considers the choice of law and determines that the vessel service contracts are governed by the general maritime law, and that maritime law is properly plaintiff's exclusive remedy. Consequently, the court grants defendants' motion for summary judgment on Count 3 of the Complaint (breach of a service contract under New York law). Next, the court considers the application of maritime law to Count 4 of the Complaint and determines that plaintiff may have stated a claim under maritime law providing that it can demonstrate that it was an intended, third-party beneficiary to the vessel service contracts. The court concludes that plaintiff has satisfied its burden for purposes of defeating summary judgment that plaintiff was a third-party beneficiary. Accordingly, the court denies defendants' motion for summary judgment with respect to Count 4.

FACTUAL BACKGROUND

For purposes of this motion, the following facts are uncontroverted. In November 1983, Morgan Guaranty Trust Company of New York, Continental Illinois National Bank and Trust Company of Chicago, National Westminster Bank, U.S.A., and Banque de la Societe Financiere Europeene (the "Banks"), as mortgagees, commenced *in rem* foreclosure actions against the Vessel. The Banks were subsequently given the responsibility of ensuring the preservation of the Vessel pending its sale by the court. Def. 3(g) Statement, ¶¶ 1–2. The Banks retained Avon (and indirectly its affiliate Apex) as their agent "for these and related purposes." *Id.* In March 1984, the Vessel was sold to the Banks at a judicial sale and the Banks subsequently transferred their ownership to subsidiary corporations, Ship Holding Corporation, Continental Illinois Property Corporation No. 2, Wall Corporation and Rothbury Company Limited. The bank subsidiaries in turn transferred legal ownership of the Vessel to JPM, as trustee. From early 1984 until the Vessel was sold to plaintiff in November 1985, the Banks were the beneficial owners of the Vessel. Def. 3(g) Statement, ¶ 4. During this period, the Banks utilized the services of SteamCo and Ocean Repair, a subcontractor of SteamCo, for purposes of "general maintenance, winterization and lay-up of the Vessel." Def. 3(g) Statement, ¶ 5.

In a January 31, 1985 survey of the Vessel by surveyors for the purpose of maintaining the Vessel's insurance, the surveyors recommended that, *inter alia,* one piston, connecting rod and main bearing of each main engine be opened up and examined for the purpose of ascertaining the condition of the engines. *See* Def. 3(g) Statement, ¶ 6. In response to this suggestion, the engine of the Vessel was opened up and examined some time between April and July, 1985 (the "engine inspection and restoration work"). *Id.* The work was performed by Ocean Repair and SteamCo, under the supervision of Apex and Avon. *See* Def.Br., at 8, n. 6. Plaintiff alleges that the defendants failed to properly tighten the bolts when the engine cylinder was reassembled, which resulted in extensive damage to the engine after plaintiff purchased and assumed control of the Vessel in November 1985. *See* Pl. Br., at 11–12.

***3** Plaintiff's purchase of the Vessel was subject to an express disclaimer of all warranties, express or implied. *See* Memorandum of Agreement ("MOA), Affidavit of George Stapleton, Exh. K [hereafter "Stapleton Aff."]. Plaintiff maintains that the disclaimer of warranties does not extend to any contracts other than the sale contract between plaintiff and JPM and that no party other than JPM may rely upon the disclaimer. *See* Pl. 3(g) Statement, ¶ 8. Plaintiff also contends that it was an intended, third-party beneficiary of the Vessel service contracts between defendants and the Banks. Defendants dispute these assertions.

DISCUSSION

I. *Plaintiff's Remaining State Law Claim*

In Count 3 of its Complaint, plaintiff alleges breach of a service contract to a third-party beneficiary under New York law. Defendants assert that the contracts in issue are maritime contracts and that federal maritime law is controlling in this action. *See* Def.Br. at 26; Def. Prior Br. at 21. The court agrees.

Contracts for the repair and servicing [3] of vessels are deemed "maritime contracts" and are governed by federal maritime law. *See North Pacific S.S. Co. v. Hall Brothers Co.,* 249 U.S. 119, 128–129 (1919); *Booth Steamship Co. v. Meier & Oelhof Co.,* 262 F.2d 310, 312–313 (2nd Cir.1958). Maritime law controls "the implied terms of agreements of independent contractors to do repair work on vessels," *Booth,* 262 F.2d at

312, including, as here, implied warranties and recognition of third-party beneficiaries. *See, e.g., Fairmont Shipping Corp. v. Chevron Int'l Oil Co.,* 511 F.2d 1252 (2d Cir.), *cert. den.* 423 U.S. 838 (1975) (implied warranty of workmanlike performance in maritime service contract); *Crumrady v. The J.H. Fisser,* 356 U.S. 423 (1959) (recognition of right of third-party beneficiary in maritime law). While state law may supplement maritime law where the latter is incomplete, it will not be applied where it conflicts with a strong federal maritime policy interest or undermines general uniformity in the maritime law. *See Pope & Talbot, Inc., v. Hawn,* 346 U.S. 406, 409–410 (1953). *See* also *Benedict on Admiralty* ¶ 112 (1988 ed., 1992 supp.).

The maritime character of these vessel contracts and the well-developed state of maritime law governing the disputed terms of the contracts imply a remedy exclusively grounded in maritime law. *See Kossick v. United Fruit Co.,* 365 U.S. 731, 742 (1961) (contracts "known to be a natural phenomenon in maritime affairs" should be governed by maritime law and "local law [may not] control their validity"). *See also Battery Steamship Corp. v. Refineria Panama, S.A.,* 513 F.2d 735, 738–739 (2d Cir.1975) (contracts that "pertain directly to and are necessary for commerce ... upon navigable waters" are generally governed by maritime law and state law may not interfere with the "uniformity requirements" of such maritime law) (citations omitted). Consequently, the court grants defendants' motion for summary judgment with respect to Count 3 of the Complaint, in which plaintiff claims breach of a service contract to a third-party beneficiary under New York law.

II. *Plaintiff's Remaining Maritime Law Claim*

***4** Plaintiff asserts that under maritime law it may recover for defendants' breach of the implied warranty of workmanlike performance, assuming that plaintiff also demonstrates that it was an intended, third-party beneficiary to the vessel service contracts. Defendants contend that the implied warranty of workmanlike performance is not applicable to the circumstances of this action even if plaintiff satisfies its burden that it was an intended third-party beneficiary. Accordingly, the court first determines whether the implied warranty of workmanlike performance is applicable to the circumstances of this action.

A. *The Implied Warranty of Workmanlike Performance*

Under certain circumstances, courts have recognized an implied warranty of workmanlike performance in maritime contracts. This warranty derives from a line of authority beginning with *Ryan Stevedoring Co., Inc. v. Pan Atlantic Steamship Corp.,* 350 U.S. 124 (1956), in which the Supreme Court held that, in a contract between a vessel owner and a stevedore, a warranty is implied in favor of the vessel owner as a means to indemnify the latter for liability to a third party arising from the stevedore's breach of contract. The *Ryan* rule was later interpreted by the Second Circuit as follows:

> [W]e find the crucial elements of *Ryan* to be as follows: a shipowner, relying on the expertise of another party (the contractor), enters into a contract whereby the contractor agrees to perform services without supervision or control by the shipowner; the improper, unsafe or incompetent execution of such services would foreseeably render the vessel unseaworthy or bring into play a pre-existing unseaworthy condition; and the shipowner would thereby be exposed to liability regardless of fault. Where these elements are present, there will be implied in the contract an agreement by the contractor to indemnify the shipowner for any liability it might incur as the result of an unseaworthy condition caused or brought into play by the improper, unsafe or incompetent performance of the contractor.

Fairmont Ship Corp. v. Chevron International Oil Co., Inc., 511 F.2d 1252, 1258 (2d Cir.) *cert. den.,* 423 U.S. 838 (1975).

Some courts have refused to extend the *Ryan* doctrine beyond its application to the specific factual context in which it arose. *See, e.g., Bosner S.A. v. Tvg. L.A. BARRIOS,* 796 F.2d 776, 783–786 (5th Cir.1986); *Phillips Petroleum Co. v. Stokes Oil Co.,* 863 F.2d 1250, 1255–1257 (6th Cir.1988); *Continental Grain v. Puerto Rico Maritime Shipping,* 972 F.2d 426, 438–439 (1st Cir.1992). In this circuit, however, an implied warranty of workmanlike performance is recognized in all maritime service contracts, not just those contracts giving rise to the indemnity obligation recognized in *Ryan. Fairmont,* 511 F.2d at 1259. In *Fairmont,* the court confirmed

the general applicability to all maritime service contracts of the "harmonious rule of contract law that one who contracts to provide services impliedly agrees to perform in a diligent and workmanlike manner." *Id.* Thus, the implied warranty of workmanlike performance recognized in this circuit is far broader in scope than that recognized in other circuits.

B. *The Implied Warranty of Workmanlike Performance and the Economic Loss Rule*

***5** Defendants contend that the Supreme Court's decision in *East River S.S. v. Transamerica Delaval,* 476 U.S. 858 (1986) suggests that the implied warranty of workmanlike performance will no longer be recognized in maritime service contracts where a commercial party alleges only "economic loss," that is, injury only to the vessel itself and not injury to persons or to other property. *See* Def.Repl. Br. at 16–18. Here, plaintiff is alleging only economic losses. *See* First Amended Complaint, ¶ 15.

In *East River,* the Supreme Court created the economic loss rule to prevent contract law from "drown[ing] in a seat of tort" 476 U.S. at 872. The *East River* court held that, under maritime law, a manufacturer in a commercial relationship has no duty under negligence or strict product liability to prevent a product from injuring itself. 476 U.S. at 871. Subsequent decisions have extended the *East River* economic loss rule to commercial parties other than manufacturers. *See Corp. of India v. American Bureau of Shipping,* 744 F.Supp. 447, 449 (S.D.N.Y.1990) (applying *East River* economic loss rule to provider of services). In its 1991 Opinion and Order, this court dismissed plaintiff's maritime tort claim based upon application of the *East River* economic loss rule. Opinion and Order, at 7–11.

However, the economic loss rule is inapplicable to plaintiff's claim deriving from the implied warranty of workmanlike performance. The *East River* court expressly reaffirmed that the law of warranty, including implied warranty, continues to apply to claims involving economic loss only. 476 U.S. at 2302–2303 ("Damage to a product itself is most naturally understood as a warranty claim.... The maintenance of product value is precisely the purpose of express and *implied* warranties") (emphasis added). Thus, the *Fairmont* implied warranty of workmanlike performance is undisturbed by the economic loss rule recognized in *East River.*

C. *The Implied Warranty of Workmanlike Performance And Its Application to Third–Party Beneficiaries*

Although the *Ryan* court was faced only with a vessel owner and contractor that were in privity, 350 U.S. at 126, in subsequent decisions, the Court recognized an implied warranty of workmanlike performance in favor of the vessel *in rem* and the vessel owner, even though neither party was in privity with the contractor. *Crumrady v. J.H. Fisser,* 358 U.S. 423, 428 (1958) (implied warranty in favor of the vessel *in rem*); *Waterman S.S. Corp. v. Dugan & McNamara, Inc.,* 364 U.S. 421, 423–425 (1960) (implied warranty in favor of the vessel). In *Crumrady,* the Court noted:

> The warranty which a stevedore owes when he goes aboard a vessel to perform services is plainly for the benefit of the vessel whether the vessel's owners are parties to the contract or not. That is enough to bring the vessel into the zone of modern law that recognizes rights in third-party beneficiaries

***6** 358 U.S. at 428 (citing Restatement, Law of Contract § 133). In *Waterman,* the Court made explicit that "the shipowner, no less than the ship, is the beneficiary of the ... warranty of workmanlike service." 364 U.S. at 425. Thus, the implied warranty of workmanlike performance is available to the vessel *in rem* and to the vessel owners, because both parties are recognized as third-party beneficiaries to the maritime service contract.

Defendants assert that there is no authority for recognizing the implied warranty of workmanlike performance in favor of a subsequent owner of a vessel where, as here, the subsequent owner is not in privity with the party that allegedly provided negligent maritime services. Def.Br. at 29. The court disagrees. The mere fact that plaintiff in this case did not own the vessel at the time of contract formation or execution does not render the third-party beneficiary doctrine wholly inapplicable; it merely requires plaintiff to demonstrate that it was an intended third-party beneficiary under the well-established principles governing the recognition of third-party beneficiaries. *See* Restatement (Second) of Contracts § 302.

Therefore, the court concludes that plaintiff has stated a claim under maritime law for breach of implied warranty of workmanlike performance, provided that plaintiff can

establish that it was a third-party beneficiary of the vessel service contracts.

D. *Plaintiff's Status as an Intended Third–Party Beneficiary to the Vessel Service Contracts*

Plaintiff will have raised a material issue of fact concerning its purported status as an intended, third-party beneficiary to the vessel service contracts, if there is legally sufficient evidence that the parties to the vessel service contracts intended to confer a benefit on plaintiff. *See* 1991 Opinion and Order, at 14. The parties have completed limited discovery on this issue pursuant to Fed.R.Civ.P. 56(f) and this court's prior Opinion and Order.

The court is mindful that caution must be exercised when making a determination of intent on summary judgment. *See Resource Dev. v. Statue of Liberty—Ellis Island* 926 F.2d 134, 141 (2d Cir.1991). The intent to confer a benefit on third parties involves a finding of fact that is rarely appropriate for summary judgment. *See Heyman v. Commerce and Industry Insurance Co.* 524 F.2d 1317, 1320 (2d Cir.1975). However, "the summary judgment rule would be rendered sterile ... if the mere incantation of intent or state of mind would operate as a talisman to defeat an otherwise valid motion." *Resource Dev.,* 926 F.2d at 141.

Although ambiguities and all reasonable inferences are to be resolved in the non-movant's favor, where, as here, the non-movant bears the ultimate burden of proof in resisting a summary judgment motion, it must set forth specific facts showing that there is a genuine issue for trial. *See Apex Oil Co. v. DiMauro,* 822 F.2d 246, 252 (2d Cir.1987) (citation omitted). Thus, "the burden on the moving party may be discharged by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catreff,* 477 U.S. 317, 325 (1986).

***7** Here, plaintiff must demonstrate that "the circumstances show that the promisee [*i.e.,* the Banks] intended to give the beneficiaries [*i.e.,* plaintiff] the benefit of the promised performance." *United States v. C–Way Construction,* 909 F.2d 259, 265 (7th Cir.1990) (citing Restatement (Second) of the Contracts § 302(1)(b). Thus, in deciding the issue of intent, the court properly may look beyond the contracts themselves and inquire into the surrounding circumstances. [4] *See Trans–Orient Marine v. Star Trading & Marine,* 925 F.2d 566, 573 (2d Cir.1991) (New York law). In conducting this inquiry, the court is guided by the well established principle that it is not necessary that a third-party beneficiary be identified or even identifiable at the time the contract is made. *World Trade Knitting v. Lido Knitting,* 551 N.Y.S.2d 930, 933–934 (A.D.2d Dept.1990).

To show that it was defendants' intent that plaintiff benefit from the vessel service contracts, plaintiff points to certain deposition testimony of John Scully, then Morgan's Senior Vice President for global shipping:

> Q. After the syndicate bought the HELLENIC INNOVATOR what did they intend to do with the ship?
>
> A. Well, we had no concrete plan. *We intended basically to offer it for sale* through brokers, as was true with all of the ships that were possessed at auction by the mortgagee.
>
> ---
>
> Q. ... Was the effort to sell the INNOVATOR undertaken promptly in March of 1984 after you bought the ship in at auction?
>
> A. As I recall, I think it was....
>
> ---
>
> Q. If you look at the third paragraph [of Conway Aff., Exh. A., Exh. 2], the second sentence says, "If anything deserves our full attention and highest priority, it is the sale of these three ships at the best price."
>
> A. (Perusing document). Right.
>
> Q. Does that accurately reflect the views you held at the time of this memo?
>
> A. Yes.
>
> ---
>
> Q. And in January of 1985, was it still the goal of the syndicate to sell the ship as quickly as possible?
>
> A. As far as I recall, yes.

Conway Aff., Exh. A, pp. 19, 20, 22 and 28 (emphasis added).

Plaintiff also points to a memorandum dated July 23, 1984 in which Mr. Scully advised two bank vice presidents of his

decision to reject a short-term sale/repurchase plan involving a group of vessels, including the subject Vessel:

> ..., the 3 large Ro–Ro's represent the 3 most important assets in the Hellenic fleet, as you well know, and therefore, the greatest potential source of recovery on our loan. *If anything deserves our full attention and highest priority, it is the sale and these 3 ships at the best price ...*
>
> ... we ought to be able to move these vessels into sale by September or certainly October the latest. *I think all our attention should be devoted to that ...*
>
> There are other promising possibilities involving time and bareboat charters ... The reasons for rejecting this proposal apply just as well to the charter schemes and *I think we should turn these down* also ... I think we should only consider this when we fell we have virtually exhausted all possibilities of direct sale.

***8** Conway Aff., Exh. A., Exh. No. 2 (emphasis added).

In addition, plaintiff points to the deposition testimony of George Stapleton, a Morgan employee who worked under Mr. Scully after September 1984, as evidence of the Bank's intent to sell the Vessel:

> Q. During the time that you were preparing the first bid in October of 1984, were any other activities underway to try to dispose of the HELLENIC INNOVATOR?
>
> A. *We were working to sell all of the HELLENIC assets.* We were not exclusively focused on the Navy.

> Q. Did there come a time in 1985 when the bank started receiving firm offers for the sale of the HELLENIC INNOVATOR?
>
> A. It is difficult to recall. At the time from joining in September of 1984 through 1985 and probably into 1986 I was working on the sale of the rest of the fleet, as well, so to be specific as to when firm offers came in for the RO/RO vessels, I would not be able to say. *I think our focus was to sell them as a group, if possible.*

> Q. And throughout 1985 you were attempting to sell the HELLENIC INNOVATOR, along with the rest of the HELLENIC Fleet; is that correct?
>
> A. Some of the Fleet I believe had already been sold at that time, but *whatever we had left in the bank's possession were actively being marketed.*

Conway Aff., Exh. B, pp. 14–5, 24, and 29 (emphasis added).

The May 1, 1984 Trust Agreement between the Lender Subsidiaries and JPM also provides evidence of the Banks' intentions to sell the Vessel. The Trust Agreement recites that "the purpose of the trust is to liquidate the Trust Estate [the Vessel] ... on the best price and terms obtainable ..." Stoltz II, Exh. 21, Section 2.1. It required JPM to "... make continuing efforts to dispose of [the Vessel] Stoltz II, Exh. 21, Section 5.1. Further, JPM was instructed to "maintain, service and repair [the Vessel] so as to keep [the Vessel] in good seaworthy condition ... provide for lay-up ... and take such action as shall be approved by [the Bank subsidiaries] with respect to the marketing of [the Vessel] and the preservation, collection and disposition of the same ... Stoltz II, Exh. 21, Section 5(c). The Agreement also provided that the trust would terminate when JPM sold the Vessel. *See* Stoltz II, Exh. 21, Section 13.1.

Plaintiff also contends that because the engine inspection and restoration work by defendants Ocean Repair and SteamCo took place after preliminary negotiations between the Banks and plaintiff had commenced, work must have been performed, at least in part, to satisfy plaintiff. *See* Pl. Br., at 22. Plaintiff points to evidence that when plaintiff requested permission to undertake an internal inspection of the Vessel's engines, the Banks requested that plaintiff rely upon the report of the Ocean Repair and SteamCo inspection rather than re-inspect the engines. *See* Stoltz Aff. II, Exh. 22 and Stoltz Aff. I, Exh. 11. In this way, plaintiff asserts, the Banks expressly made plaintiff an intended beneficiary of the vessel service contracts. *See* Pl. Br. at 22.

***9** Defendants "do not dispute any of plaintiff's allegations of fact" contained in the above-referenced material. *See* Def. Reply Br. at 6. Defendants' arguments in favor of summary judgment on the issue of intent rely on two points: *first,* that there is evidence in the record that establishes that the Banks considered bareboat and time charters as alternatives to the outright sale of the Vessel, and that this evidence militates against a finding of the requisite intent; and *second,* plaintiff effectively disclaimed any right to third-party beneficiary status to the vessel service contracts when it disclaimed express and implied warranties in its purchase of the vessel from JPM. Each of these points is discussed in turn.

Defendants concede that an immediate sale of the vessel was "initially the preferred alternative." Def. br. at 8. However, defendants contend that "market conditions in 1984 and 1985 forced the banks to explore all options ...," including bareboat and time charters, as alternatives to the outright sale of the Vessel. *Id.* Defendants point to evidence in the record that they evaluated the financial return on various chartering arrangements. *See* Conway Aff., Exhs. C and E.

Defendants' proffered evidence is insufficient to sustain a motion for summary judgment on the issue of intent, especially in view of the fact that defendants do not dispute any of plaintiff's factual allegations. With respect to defendants' first point, then, plaintiff has met its burden of "set[ting] forth specific facts that there is a genuine issue for trial." *Apex Oil Co. v. DiMauro,* 822 F.2d 246, 252 (2d Cir.1987) (citation omitted). Defendants have failed to satisfy their burden of " 'showing' ... that there is absence of evidence to support [plaintiff's] case." *Celotex Corp v. Catreff,* 477 U.S. 317, 325 (1986).

Defendants' second point is grounded in the legal significance of the "as is/where is" clause that is part of the Memorandum of Agreement ("MOA") and bill of sale when plaintiff purchases the Vessel from JPM. [5] Defendants assert that by waiving express and implied warranties in the MOA with JPM, plaintiff effectively waived any claim as a third-party beneficiary of the vessel service contracts between the banks and the defendant vessel service providers. *See* Def.Br. at 25–26. Plaintiff denies defendants' contention and asserts that the "as is/where is" clause runs only in favor of the seller of the Vessel, JPM, and does not protect any other party. *See* Pl. Br. at 29, n. 14. Moreover, plaintiff contends that it agreed to purchase the Vessel "as is/where is" without actually inspecting the Vessel's main engines because it reviewed the Vessel's inspection report and relied on the representations contained in the report to the effect that a portion of the Vessel's main engines had been inspected (by Ocean Repair and SteamCo under the supervision of Apex and Avon) and was found to be in good working order. Pl.Br. at 30–31.

***10** Evidence of a clear and unequivocal intention to relinquish a known right is required to establish a waiver. *See McAllister Lighterage Line v. Insurance Co. of North America,* 244 F.2d 967, 871 (2d Cir.1957). *See* also *Public Warehouses v. Fidelity & Deposit Co.,* 77 F.2d 831, 833 (2d Cir.1935). Here, the novel question is whether the waiver of rights under one contract should be construed on summary judgment as a waiver of implied rights as a third party beneficiary to other contracts. Maritime law provides no clear answer to this question. Plaintiff points to a decision under New York law in which a lessee, who was the third-party beneficiary of the contract of purchase by the lessor, was entitled to the benefits of the express and implied warranties of the contract of purchase in spite of the fact that the lessor had disclaimed all warranties in the lease. *Uniflex v. Olivetti Corp.,* 86 A.D. 538, 455 N.Y.S.2d 993 (1st Dept.1982). In view of this decision and the *McAllister* standard governing the establishment of a waiver in the maritime law, the court is unwilling on summary judgment to determine that plaintiff in the MOA waived its purported rights as a third-party beneficiary to the vessel service contracts. [6]

CONCLUSION

For the reasons set forth above, the court: (1) grants defendants' motion for summary judgment with respect to Count 3 of the Complaint; and (2) denies defendants' motion for summary judgment with respect to Count 4 of the Complaint.

SO ORDERED.

All Citations

Not Reported in F.Supp., 1993 WL 427443, 1994 A.M.C. 402

Footnotes

1 The Banks' former interest in the Vessel as well as their relationship to the other parties in this action are described in pages 4–5 *infra.*

2 Unless otherwise indicated, the term "defendants" as used in this opinion includes both the defendants in the primary action and the third-party defendants.

3 The contracts in issue include a letter agreement dated December 13, 1983 between the Banks and Avon, designating Avon as the Banks' agent. *See* Stapleton Aff., Exh. A. Defendants characterize the subject matter of this agreement as "ensuring the preservation of the Vessel ... and related purposes." Def. 3(g) statement ¶ 2. Plaintiff does not dispute this characterization. The remaining vessel service agreements are oral. *See* Stapleton Tr. at 27, 52. The Banks' oral

agreement with Apex, an affiliate of Avon, was for the same purposes as that recited in the letter agreement. *See* Def. 3(g) Statement, ¶ 2. The agreements with SteamCo and Ocean Repair were for purposes of "general maintenance, winterization and lay-up of the Vessel...." Def. 3(g) Statement, ¶ 5. Plaintiff does not dispute these characterizations of the oral agreements.

4 In its 1991 Opinion and Order, the court included within its opinion a passage from *In re Gulf Oil Cities Service Tender Offer Lit.,* 725 F.Supp 712, 753 (S.D.N.Y.1989) which in turn included a statement to the effect that the contracting parties' intent "must be shown on the face of the agreement." 1991 Opinion and Order, at 12. The *Gulf Oil* standard is inconsistent with the above-referenced *Trans–Orient* and *Restatement* standard, and the court finds that the latter standard governs this case.

In *Gulf Oil,* the court restricted its consideration to the face of the written contract because the contract at issue, a comprehensive and lengthy merger agreement, contained an integration clause to the effect that the "agreement" constituted "the entire agreement." 725 F.Supp at 733. In this case, however, there is no integrated document constituting the parties' agreement. An initially oral agreement between the Banks and Avon was subsequently recorded in a two-page letter of December 13, 1983. See Stapleton Aff., Exh. A. Subsequent oral agreements with Apex, SteamCo and Ocean Repair were never recorded. *See* Def. Br. at 8; Stapleton Tr. at 27, 52. The lack of an integrated document (or indeed any written contract memorializing the Apex, Steamco and Ocean Repair agreements) renders the *Gulf Oil* standard inapplicable to this case and makes necessary the resort to extrinsic evidence to ascertain the parties' intention. *See United States v. Ogden Technologies Laboratories,* 406 F.Supp, 1090, 1092 (S.D.N.Y., 1973). Indeed, it was for this very reason that this court ordered that the parties could conduct limited discovery on the issue of intent pursuant to Rule 56(f). *See* 1991 Opinion and Order, at 14.

5 The Memorandum of Agreement memorializing the terms of the sale to plaintiff provides:

> delivery shall be *STRICTLY "AS IS, WHERE IS" WITHOUT ANY WARRANTY EXPRESSED OR IMPLIED INCLUDING WITHOUT LIMITATION ANY WARRANTY AS TO THE VESSEL'S PHYSICAL CONDITION OR CLASSIFICATION OR THE STATUS OF ANY INSPECTION CERTIFICATION OR AS TO ITS EQUIPMENT, SEAWORTHINESS, MERCHANTABILITY, OR FITNESS OR SUITABILITY FOR ANY USE OR FOR ANY PROPOSED WHATSOEVER.*

Memorandum of Agreement, Additional Clause No. 16, dated October 15, 1985, (Exh. K to Stapleton Aff.) (emphasis in original). This disclaimer was reiterated in the Bill of Sale dated October 23, 1985:

> *THE VESSEL IS SOLD STRICTLY "AS IS, WHERE IS" WITHOUT ANY WARRANTY EXPRESSED OR IMPLIED INCLUDING WITHOUT LIMITATION ANY WARRANTY AS TO THE VESSEL'S PHYSICAL CONDITION OR CLASSIFICATION OR THE STATUS OF ANY INSPECTION CERTIFICATION OR AS TO ITS EQUIPMENT, SEAWORTHINESS, MERCHANTABILITY, OR FITNESS OR SUITABILITY FOR ANY USE OR FOR ANY PURPOSE WHATSOEVER.*

Exh. L to Stapleton Aff. (emphasis in original).

6 Defendants assert in the alternative that even if the "as is/where is" clause is not a complete bar to plaintiff's claims, then "it is the best available evidence of the Bank's intent not to benefit a third party, particularly the ultimate purchaser" Def. repl. br, at 2, n. 1. The court declines to decide this question on summary judgment.