

IN RE: HAWAIIAN WATERSPORTS, LLC

United States District Court, District of Hawaii, February 29, 2008
No. 07-00617

LIMITATION OF SHIPOWNER'S LIABILITY — 141. Time for Petition.

Even if a kayak could be considered a vessel subject to the Limitation of Liability Act, the owner cannot limit liability because it filed its complaint after the mandatory six-month period that began on its receipt of a claimant's letter asking the owner for the name and address of its insurance company "so I can make a claim." This letter meets the three tests for a claim set forth by the Second Cir. in *Doxsee*, 1994 AMC 305.

Kevin P. H. Sumida and Anthony Wong *for Hawaiian Watersports*
Howard G. McPherson and Patrick F. McTernan *for Yu*

ALAN C. KAY, Senior D.J.:

On December 5, 2005, at approximately 1:45 p.m., Air Force Reservist Johnny Yu ("Decedent") and his co-worker, Grace Gann, went on a guided kayak excursion operated by Hawaiian Watersports, LLC ("Hawaiian Watersports" or "Plaintiff"). During the excursion, a wave hit the kayak and it was overturned. The Decedent was briefly observed with his head above water, but failed to return to the kayak.

On December 6, 2005, Decedent's body was discovered in a small cave approximately one-half mile from the shores of the Mokulua islands.

On January 23, 2007, Laine Yu ("Mrs. Yu"), Decedent's widow, wrote a letter to Hawaiian Watersports ("the Letter") requesting its insurance provider's contact information so she could "make a claim." The Letter reads as follows:

Dear Sir,

My husband, Johnny Yu, drowned in December 2005 while you and your kayak tour guide were supposed to be looking after him. Please give me the name and address of your insurance company, so I can make a claim.

thank you,
Laine Yu

On February 20, 2007, Hawaiian Watersports submitted an incident report to its insurance company, Marine Underwriters Ltd.

On September 4, 2007, Mrs. Yu, individually and as the personal representative for the estate of Decedent, Jilaine Urnberg, Alice Yu and Michael Yu (collectively "Defendants" or "Claimants") filed a complaint in state court.

On December 20, 2007, Plaintiff filed a Complaint for Exoneration From or Limitation of Liability (“the Complaint”).

On January 17, 2008, Defendants filed a Motion to Dismiss for lack of subject matter jurisdiction (“the Motion”). Plaintiff filed a Memorandum in Opposition to the Motion on February 5, 2008. Defendants filed a Reply to the Memorandum in Opposition to the Motion on February 14, 2008.

STANDARD OF REVIEW

A court’s subject matter jurisdiction may be challenged under Federal Rule of Civil Procedure 12(b)(1) (“Rule 12(b)(1)”). “A party invoking the federal court’s jurisdiction has the burden of proving the actual existence of subject matter jurisdiction.” *See Thompson v. McCombe*, 99 F.3d 352, 353 (9 Cir. 1996).

On a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, the court is not “restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction.” *McCarthy v. United States*, 850 F.2d 558, 560 (9 Cir. 1988). “Once the moving party [converts] the motion to dismiss into a factual motion by presenting affidavits or other evidence properly brought before the court, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction.” *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1040 n.2 (9 Cir. 2003).

“The requirement that the nonmoving party present evidence outside his pleadings in opposition to a motion to dismiss for lack of subject matter jurisdiction is the same as that required under Rule 56(e) that the nonmoving party to a motion for summary judgment must set forth specific facts, beyond his pleadings, to show that a genuine issue of material fact exists.” *Trentacosta v. Frontier Pac. Aircraft Indus., Inc.*, 1998 AMC 45, 51, 813 F.2d 1553, 1559 (9 Cir. 1987). When ruling on a jurisdictional motion involving factual issues which also go to the merits, the moving party “should prevail only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law.” *Casumpang v. Int’l Longshoremen’s & Warehousemen’s Union*, 1988 AMC 45, 51, 269 F.3d 1042, 1060-61 (9 Cir. 2001).

DISCUSSION

The only issue raised by the Motion is whether the Letter to Hawaiian Watersports constitutes written notice of claim under the Limitation of

Liability Act of 1851 (“the Act”).¹ The parties do not dispute that the timeliness of the Complaint hinges on whether the Letter establishes written notice of claim.² See *Doxsee Sea Clam Co. v. Brown*, 1994 AMC 305, 310, 13 F.3d 550, 553 (2 Cir. 1994).

A. Purpose of the Act

The Act was passed “in an effort to provide American shipowners with benefits equal to those of their foreign competitors.” *Vatican Shrimp Co., Inc. v. Solis*, 1987 AMC 2426, 2429, 820 F.2d 674, 677 (5 Cir. 1987), *cert. denied*, 484 U.S. 953, 1988 AMC 2403 (1987); see also *Grant v. Etoile Le Blanc*, Nos. 96-CV-582, 95-CV-1417, 1996 WL 679730, *1 (N.D.N.Y. Sept. 25, 1996). With these interests at heart, the Act was designed to limit the financial liability of a shipowner to the value of the vessel and her freight. See *Vatican Shrimp Co.*, 1987 AMC at 2429, 820 F.2d at 677; *In re UFO Chuting of Hawaii, Inc.*, 2002 AMC 954, 956, 233 F. Supp.2d 1254, 1256-57 (D. Haw. 2001). In its first encounter with the Act, the Supreme Court explained that “[t]he great object of the law was to encourage shipbuilding and to induce capitalists to invest money in this branch of industry.” See *Norwich & N.Y. Transp. Co. v. Wright*, 80 U.S. 104, 121, 1988 AMC 2061, 2071 (1871). The Supreme Court noted that, unless shipowners can be induced to invest money, the shipping interest in the United States will “flag and decline.” *Id.*

Many cases have criticized the Act as “hopelessly anachronistic.” *Keys Jet Ski, Inc. v. Kays*, 1990 AMC 609, 614, 893 F.2d 1225, 1228 (11 Cir. 1990) (quoting *Univ. of Texas Med. Branch at Galveston v. United States*, 1977 AMC 2607, 2608, 557 F.2d 438, 441 (5 Cir. 1977), *cert. denied*, 439 U.S. 820, 1979 AMC 2019 (1978)); see also *Esta Later Charters, Inc. v. Ignacio*, 1989 AMC 1480, 1482, 875 F.2d 234, 235-37 (9 Cir. 1989) (“[n]o one who has had occasion to study the Limitation of Liability Act has been struck by its lucidity.”); *In re United States Dredging Corp.*, 1959 AMC 1110, 1112, 264 F.2d 339, 341 (2 Cir.) *cert. denied*, 360 U.S. 932, 1959 AMC 2664 (1959) (suggesting that the Act, a relic of an earlier era, provides

1. Codified as Title 46 U.S.C. §§30501-12 (2006) (previously codified as 46 U.S.C. app. §§181-96 (1958)). In relevant part, §30511 of the Act provides “The owner of a vessel may bring a civil action in a district court of the United States for limitation of liability under this chapter. The action must be brought within 6 months after a claimant gives the owner written notice of a claim.”
2. While neither party raises this issue, the Court has serious concerns about whether a kayak is considered a vessel under the Act. However, since neither party addressed the issue in their papers, the Court finds it unnecessary to address it in this Order.

unwarranted protections inconsistent with current reality); *Lewis Charters, Inc. v. Huckins Yacht Corp.*, 1989 AMC 1521, 1533, 871 F.2d 1046, 1054 (11 Cir 1989) (“owners of pleasure vessels may limit their liability under the Limitation Act [although] . . . there is little reason for such a rule”). Despite vast criticism, the Court is bound to apply the Act. It is for Congress to determine whether the Act should be repealed or limited to fit the current needs of the maritime industry.

B. Claimant Sufficiently Provided Notice of Claim

A court may consider a petition to limit liability only if it is filed within six months of the owner’s receipt of a “written notice of claim.” *See* 46 U.S.C. §30511. According to Claimants, the Letter—sent on January 23, 2007—serves as written notice of claim to Hawaiian Watersports. Plaintiff does not deny receiving the Letter. If, as Claimants argue, the Letter provided Plaintiff with sufficient notice to trigger the running of the six-month period, the Complaint is untimely and must be dismissed. If, however, written notice of claim was not received until suit was filed on September 4, 2007, as Plaintiff argues, then the Complaint is timely.

Unfortunately, the Act is not clear as to what constitutes “written notice of claim” sufficient to trigger the start of the six-month period. *See Doxsee Sea Clam Co.*, 1994 AMC at 310, 13 F.3d at 554; *see also UFO Chuting of Hawaii, Inc.*, 2002 AMC at 956, 233 F. Supp.2d at 1257.

It is well settled that letters sent by claimants to vessel owners may, in some circumstances, constitute notice sufficient to trigger the six-month rule under the Act. *Doxsee Sea Clam Co.*, 1994 AMC at 311-12, 13 F.3d at 554; *In re Beesley’s Point Sea-Doo, Inc.*; 1997 AMC 2692, 2694, 956 F. Supp. 538, 540 (D.N.J. 1997). To determine whether a letter is sufficient to constitute written notice of a claim and trigger the six-month statute of limitations, the Court must consider whether the letter: (1) informs the shipowner of an actual or potential claim (2) which may exceed the value of the vessel (3) and is subject to limitation. *See Doxsee Sea Clam Co.*, 1994 AMC at 312, 13 F.3d at 554; *see also In re McCarthy Bros. Co./ Clark Bridge*, 1996 AMC 2153, 2161, 83 F.3d 821, 829 (7 Cir. 1996); *In re Darin Alan, Inc.*, 2005 AMC 328, 2004 WL 3310574 (N.D. Cal. 2004). The last requirement must reveal a “reasonable possibility” that the claim made is one subject to limitation. *See In re Tom-Mac, Inc.*, 1996 AMC 1244, 1250-51, 76 F.3d 678, 683 (5 Cir. 1996). A letter purporting to give sufficient notice to a vessel owner must be read in its entirety and the

“whole tenor” of the letter must be considered. *Doxsee Sea Clam Co.*, 1994 AMC at 312, 13 F.3d at 554.

When doubt exists as to whether a claim will exceed the value of the vessel, the owner “will not be excused from complying with the six-month time bar.” See *Van Le v. Five Fathoms, Inc.*, 1992 AMC 2563, 2566, 792 F. Supp. 372, 374 (D.N.J. 1992). It is the vessel owner’s burden “to seek clarification” regarding the amount of damages sought. *Doxsee Sea Clam Co.*, 1994 AMC at 312, 13 F.3d at 554-555. The six-month period gives vessel owners time to investigate whether the amount of the claim or other claims likely to be the subject of litigation may exceed the value of the vessel. See *UFO Chuting of Hawaii, Inc.*, 2002 AMC at 956, 233 F. Supp.2d at 1257 (citing *In re Morania Barge No. 190, Inc.*, 1982 AMC 2679, 2682, 690 F.2d 32, 33-34 (2 Cir. 1982)).

The Court concludes that the Letter satisfied the elements set forth in *Doxsee* and is thus sufficient to trigger the six month limitation period under the Act. The first element is met because the Letter explicitly requested the name and address of Plaintiff’s insurance company so that Mrs. Yu could make a claim. See *In re Bayview Charter Boats, Inc.*, 1989 AMC 1289, 1297, 692 F. Supp. 1480, 1485 (E.D.N.Y. 1988) (holding that written notice to vessel owner was sufficient where claimant’s letter stated in part, “[p]lease refer this letter to your insurance and/or legal representative and have them contact the undersigned at their earliest convenience”); see also *In re Spex Cal-Star, Ltd.*, 2002 WL 31426255 (S.D.N.Y. 2002) (written notice of claim was sufficient where claimant’s letter merely threatened litigation and sought damages for non-physical injuries).

The second and third elements of the *Doxsee* test are also satisfied. Decedent died as a result of his kayaking trip. Hawaiian Watersports should have been on notice that any potential claim relating to the death of Decedent would obviously exceed the value of the \$750 kayak at issue and therefore require affirmative steps to limit its liability. See *UFO Chuting of Hawaii, Inc.*, 2002 AMC at 960, 233 F. Supp.2d at 1259-60 (citing *In re Southcoast Watersport Rentals, Inc.*, 954 F. Supp. 260 (S.D. Fla. 1996) (“One might argue that almost any notice of any injury might be sufficient to put a jet ski owner on notice that the value of the jet ski was in issue.”)).

In its opposition to the Motion, Plaintiff argues that the Letter does not give Hawaiian Watersports notice of the amount of the claim and thus cannot be viewed as a potential claim. Plaintiff attempts to analogize this case to *UFO Chuting* in arguing that the Letter did not give notice of the amount of the claim. In *UFO Chuting*, the Court found that the claimants’ letters were insufficient to put UFO on notice that claimants were making

a claim for more than the value of the boat. 2002 AMC at 958-59, 233 F. Supp.2d. at 1258. The Court stated that, “[g]iven UFO’s knowledge that both [claimants] immediately went back up for another parasailing ride, UFO could justifiably conclude that any alleged injuries were minor [and did not exceed the value of the boat].” *Id.* While persuasive, *UFO Chuting* is distinguishable from the case at hand. In this case Decedent died as a result of his kayaking excursion. There could be no doubt that the wrongful death claims in this case exceed the value of the kayak.

Even if the Court were to conclude that the Letter was ambiguous to the damages sought by Claimants, Plaintiff had the burden to seek clarification. *See Tom-Mac, Inc.*, 1996 AMC at 1251, 76 F.3d at 683; *see also Doxsee Sea Clam Co.*, 1994 AMC at 311-12, 13 F.3d at 554-555 (citing *In re Allen N. Spooner and Sons, Inc.*, 1958 AMC 1050, 1053, 253 F.2d 554, 586 (2 Cir. 1958) (Hand, J., concurring) (“it is indeed reasonable to require [plaintiff] to make the claimant define his position . . . If the claimant refuses to do so, it may be that the period does not begin to run until he does’’)).

Plaintiff additionally argues that if the Court views the Letter as making a liability claim, the claim is not against Hawaiian Watersports because the Letter is addressed to some unknown “sir” and a limited liability company is not normally addressed as sir.

The Court finds it implausible that Hawaiian Watersports was not on notice of a claim because the Letter it received was addressed to some unknown “sir.” Hawaiian Watersports does not dispute receiving the Letter. Moreover, the Letter refers to the drowning death of her husband “while you and your kayak tour guide were supposed to be looking after him.” Because the Court must look at the “whole tenor” of the Letter, it is clear that the “you” refers to Hawaiian Watersports. *See Doxsee Sea Clam Co.*, 1994 AMC at 312, 13 F.3d at 554. To find that the Letter did not inform Hawaiian Watersports of a potential tort claim would strain common sense and elevate form over substance.

Finally, Plaintiff suggests that because the Decedent signed a pre-participation waiver, it somehow had no knowledge that it was going to be sued and was therefore not on notice of claim when it received the Letter. However, Plaintiff has not submitted any authority to support this proposition. Similarly, Plaintiff would not be excused from being on notice if it believed it had some other compelling defense to the claim, such as no negligence on its part.

The Court notes that the potential for a claim against Hawaiian Watersports was evident to Plaintiff. On February 20, 2007, less than one

month after Mrs. Yu sent the Letter, Hawaiian Watersports filed an incident report with the claims department of its insurance company with a letter detailing Decedent's death.

CONCLUSION

Thus, the Court concludes that the Letter provided Hawaiian Watersports with sufficient notice to trigger the six-month limitation period. Hawaiian Watersports had six months from January 23, 2007 to file a complaint to limit its liability, but failed to do so. For the foregoing reasons, the Claimants Motion to Dismiss should be granted.

