UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CAL DIVE OFFSHORE CONTRACTORS, INC., *et al.*, Plaintiffs, -v- M/V SAMPSON, *et al.*, Defendants.	15-CV-2788 (JPO) FINDINGS OF FACT AND CONCLUSIONS OF LAW

J. PAUL OETKEN, District Judge:

Plaintiffs Cal Dive Offshore Contractors, Inc., Cal Dive International, Inc., and Gulf Offshore Construction, Inc. (collectively "Cal Dive"), filed this action against Defendants M/V SAMPSON, her engines, tackle, appurtenances, equipment, etc. (the "SAMPSON"), *in rem*, and CVI Global Lux Oil and Gas 4 S.a.r.l. ("CVI") and CarVal Investors, LLC ("CarVal"), *in personam*, to enforce a maritime lien. (Dkt. No. 1.) On March 6, 2017, the Court decided the parties' motions for summary judgment, denying Plaintiffs' motion for summary judgment and granting in part and denying in part Defendants' motion for summary judgment. *See Cal Dive Offshore Contractors, Inc. v. M/V SAMPSON*, No. 15 Civ. 2788, 2017 WL 1157125 (S.D.N.Y. Mar. 27, 2017). On July 12, 2017, the Court held a bench trial on the remaining issues and now issues its findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

I. Findings of Fact

CVI is the owner of the SAMPSON, a Panamanian flagged motor vessel capable of laying pipe for the oil industry. In August 2012, Oceanografia, S.A. de C.V. ("OSA") entered into a Bid Cooperation Agreement with Cal Dive to secure pipelaying contracts in the Gulf of

Mexico from PEMEX Exploración y Producción ("Pemex"). Defendant CarVal was an investment manager on behalf of CVI and acted as an agent of CVI at all relevant times.

In furtherance of one of the jointly bid contracts, OSA chartered the SAMPSON from CVI pursuant to a charter party dated November 16, 2012, and amended on December 19, 2012. (Def.'s Ex. A; Def.'s Ex. B.) OSA was required to use Cal Dive for vessel management because of a Pemex requirement that only one company manage both the marine and pipelay operations onboard the SAMPSON. Accordingly, Cal Dive managed both the marine ("below-deck") and construction/pipelaying ("above-deck") aspects of the SAMPSON's operations. The charter party demarcated the responsibilities between CVI and OSA with regard to the SAMPSON's operations. CVI was responsible for procuring and paying for the marine/below-deck crew. (Def.'s Ex. A § 7.1.) OSA was responsible for the pipelaying/above-deck operations and for any additional personnel required. (*Id.* §§ 6.1, 8.)

Accordingly, CVI entered into a Ship Management Agreement with Cal Dive on January 15, 2013, for the provision of the below-deck crew. (Def.'s Ex. C.) The Ship Management Agreement specifically identified the crew members, by position, that were included within the scope of the agreement. Consistent with the division of responsibilities outlined in the charter party, the Ship Management Agreement did not cover the provision of the above-deck/pipelaying crew that is the subject of this lawsuit.

Cal Dive developed and submitted a proposal to OSA for Cal Dive to crew and support the SAMPSON. (Def.'s Ex. Q at CVI 540.) The proposal included a list of personnel to be provided to OSA for the above-deck/pipelaying operations. Ultimately, Cal Dive and OSA agreed on a subset of the proposed pipelaying personnel that Cal Dive would provide (*see* Def.'s Ex. E at Cal-Dive 0041), and OSA instructed the SAMPSON to proceed to the field with the approved personnel (*id.* at Cal-Dive 0039). Cal Dive invoiced CVI for the marine crew and

invoiced OSA for the pipelaying personnel. But while CVI paid Cal Dive all amounts due for the marine crew, OSA failed to fully pay Cal Dive for the pipelaying personnel, leaving a balance due to Cal Dive of $1,623,459.92. OSA filed for bankruptcy protection, prompting Cal Dive to bring the present action asserting *in rem* claims against the SAMPSON and *in personam* claims against CVI and CarVal.

The charter party between CVI and OSA contained a no-lien clause that prohibited OSA from incurring a lien against the M/V SAMPSON. (Def.'s Ex. A § 17.2.) CVI provided Cal Dive with a draft of the charter party, including the no-lien clause, for review prior to the execution of the charter party by CVI and OSA. (Def.'s Ex. Z.) Once executed, the charter party, including the no-lien clause was again provided to Cal Dive for review. (Def.'s Ex. X.) After execution, a representative at Cal Dive quoted sections 5.2 and 8.9 of the charter party[1] in e-mail communications with OSA. (Def.'s Ex. CC.)

At trial, Brett Anderson, Director of Investment Operations for CarVal, credibly testified that Cal Dive received copies of the charter party because, as ship manager, Cal Dive was responsible for running the day-to-day operations of the vessel. As such, it was necessary for Cal Dive to understand the terms of the charter party. Dennis Weirens, in-house counsel for CarVal, also credibly testified that Cal Dive would need to understand certain provisions in the charter party, including the insurance provisions, in order to carry out its duties as ship manager. Indeed, both Mr. Anderson and Mr. Weirens testified that if a third-party vendor were to supply necessaries or goods to the vessel, Cal Dive itself was responsible for communicating that there was a no-lien provision in the charter party to that vendor.

[1] The charter party consists of thirty-five primary sections and is only thirty-three pages long.

Considering this testimony—and the evidence that Cal Dive received copies of the charter party both before and after its execution, and explicitly relied on particular provisions of the charter party in e-mail communications with OSA—the Court finds by a preponderance of evidence that representatives at Cal Dive had actual knowledge of the no-lien provision in the charter party.[2]

II. Conclusions of Law

This Court dismissed Cal Dive's *in personam* claims against CVI on summary judgment. *Cal Dive*, 2017 WL 1157125 at *7–10. The discussion of the *in personam* claims in the Court's summary judgment opinion, however, applies to both CVI and CarVal since CarVal acted at all pertinent times on behalf of CVI, not itself. (*See* Dkt. No. 100 ¶ 8 (averring in Plaintiffs' Proposed Finding of Fact that "CarVal acted for CVI in all respects in dealing with Cal Dive").) *See also* Restatement (Second) of Agency §§ 320, 328.

This Court has already held that the Ship Management Agreement between Cal Dive and CVI—for the provision of the below-deck crew—governed the relationship between those parties. *Cal Dive*, 2017 WL 1157125, at *7–10. It is clear that this analysis applies to CarVal as well. The Ship Management Agreement can be modified only by a writing signed by or on behalf of the parties. *Id.* It cannot be modified orally. *Id.* There is no evidence that it was amended in writing to cover the provision of the above-deck crew and there is no other contract between the parties that covers the above–deck crew. Nor is there an enforceable guarantee from

[2] Moreover, Cal Dive has failed to adduce any evidence or testimony that meaningfully puts in dispute whether a representative at Cal Dive had actual knowledge of the no-lien provision. Indeed, "Cal Dive's primary witness, and a recipient of the charter party, Bill Breen, has refused to appear for depositions and has evaded service of a subpoena." *Cal Dive*, 2017 WL 1157125 at *6.

CVI or CarVal to pay for the above-deck crew if OSA failed to pay for them. *Id.* This analysis applies with equal force to CVI and CarVal.

Accordingly, the *in personam* claims against CarVal are dismissed.

Plaintiffs also pursue *in rem* claims based on the alleged creation of a maritime lien when the above-deck personnel were ordered to service the SAMPSON. Plaintiffs pursue two theories of liability: either (1) CarVal ordered the above-deck crew, giving rise to a maritime lien on the vessel; or (2) OSA ordered the above-deck crew and Cal Dive did not have actual knowledge of the existence of the no-lien provision in the charter party, giving rise to a maritime lien against the vessel.

First, as discussed, CarVal was at all relevant times acting as the agent of a disclosed principal, CVI. "Although an agent might be held liable if it acted outside the scope of its agency or negligently," *Seguros Banvenez, S.A. v. S/S Oliver Drescher*, 761 F.2d 855, 860 (2d Cir. 1985) (citations omitted), Cal Dive admits that it was aware that CarVal was acting as CVI's agent when dealing with Cal Dive. (Dkt. No. 100 ¶ 8.) Cal Dive does not argue that CarVal had the authority to order the above-deck crew on its own account or that CarVal acted negligently as an agent of CVI.

Moreover, under the charter party, OSA was responsible for the pipelaying/above-deck operations and Cal Dive expressly dealt with OSA regarding the provision of the above-deck crew to the SAMPSON. As described above, Cal Dive submitted a proposal to OSA to crew and support the ship, including a list of above-deck crew that was partially approved by OSA, and sent invoices to OSA for the above-deck crew. Accordingly, Cal Dive is not entitled to a maritime lien on the vessel as the above-deck crew was ordered by OSA, not CarVal.

Second, OSA was prohibited from incurring a lien against the SAMPSON pursuant to the no-lien provision in the governing charter party. (Def.'s Ex. A § 17.2.) Thus, OSA's actions

cannot give rise to a lien on the vessel if Cal Dive had knowledge of the no-lien clause in the charter between OSA and CVI. *See Belcher Oil Co. v. M/V Gardenia*, 766 F.2d 1508, 1513 (11th Cir. 1985). Actual knowledge "defeats a maritime lien because '[t]he supplier is then in a position to make an informed business decision, and may refuse to supply the vessel, make other arrangements for payment, or assume the risk.'" *Am. Oil Trading, Inc. v. M/V SAVA*, 47 F. Supp. 2d 348, 352 (E.D.N.Y. 1999) (quoting *Gulf Oil Trading Co. v. M/V CARIBE MAR*, 757 F.2d 743, 749 (5th Cir. 1985)). As discussed above, the Court finds that Cal Dive had actual knowledge of the no-lien provision.

Accordingly, the *in rem* claims fail.

III. Conclusion

For the foregoing reasons, the Court finds that Plaintiffs have not proven any of their claims by a preponderance of the evidence and Defendants are entitled to judgment on all claims. The Clerk of Court is directed to enter final judgment for Defendants and to close this case.

SO ORDERED.

Dated: July 17, 2017
New York, New York

J. PAUL OETKEN
United States District Judge