UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 10-22909-CIV-UNGARO

SYLVIA NELSON JOHNSON,

Plaintiff,

v.

LUZON STRAIT SCHIFFAHRTSGELLSCHAFT MBH & CO., et al.,

Defendants.

SYLVIA NELSON JOHNSON,

Garnishor,

v.

DEL MONTE FRESH P PRODUCE COMPANY, et al.,

Garnishees.

ORDER ON MOTION TO VACATE AND CANCELLING HEARING

THIS CAUSE is before the Court upon Defendants' Motion to Vacate Process of Maritime Attachment and Garnishment. (D.E. 19.)

THE COURT has reviewed the Motion and the pertinent portions of the record and is otherwise fully advised in the premises.

I. Background

On August 12, 2008, Edwin Cook died as a result of injuries suffered in Costa Rica while performing longshoreman's work for the M/V Luzon Strait. Plaintiff Sylvia Nelson Johnson, the personal representative of Cook's estate, has pursued several claims in this Court seeking damages from the foreign and domestic entities she claims are responsible.

A. The Initial Lawsuit in Personam

On August 17, 2009, Johnson filed a three-count Complaint against Luzon Strait Schiffahrtsgellschaft MBH & Co. (Luzon Strait), Seatrade Group N.V. (Seatrade Group), Del Monte Fresh Produce Company (Del Monte Fresh), and Network Shipping Ltd. Inc. (Network Shipping). (Case No. 09-22425, D.E. 1.) In that Complaint, Johnson alleged that this Court had in personam jurisdiction over foreign defendants Luzon Strait and Seatrade Group; this Court, however, disagreed and ultimately dismissed both Luzon Strait and Seatrade Group for lack of personal jurisdiction. (Case No. 09-22425, D.E. 85.) The Court held that the specific and general jurisdictional requirements of the Due Process Clause were not met as to either party. *Id.*

Johnson has since filed a Notice of Interlocutory Appeal from this Court's order dismissing Luzon Strait and Seatrade Group. (Case No. 09-22425, D.E. 105.) Johnson has also voluntarily dismissed Del Monte Fresh from the initial lawsuit, leaving only Network Shipping as a defendant, and Network Shipping has filed Motion for Summary Judgment which remains pending. (Case No. 09-22425, D.E. 86 & 106.)

B. The Instant Lawsuit Quasi in Rem

On August 11, 2010, Johnson filed the instant five-count Complaint against Luzon Strait and Seatrade Group seeking to attach the property of these Defendants in the possession of now-Garnishees Del Monte Fresh and Network Shipping. (D.E. 1.)

On September 3, 2010, this Court directed the Clerk of Court to issue processes of attachment and garnishment. And Processes of Attachment were later executed upon Del Monte Fresh and Network Shipping for the sum of $1,000,000. The Processes describe the attached property as follows:

> the past, present and future proceeds from the chartering of vessels owned and/or operated by Luzon Strait... and/or Seatrade Group ... by Garnishees Del Monte Fresh ... and/or Network Shipping ... up the amount sued for, to-wit $1,000,000. ... This includes but is not limited to, all moneys owing under the charter agreement between Seatrade Group ... and Network Shipping ..., either directly or indirectly from any Del Monte entity, affiliate or agent, including but not limited to, Network Shipping ... and/or Del Monte Fresh ... to either Luzon Strait ... or Seatrade Group ..., acting as agent or collecting moneys for Luzon Strait.

(D.E. 9 & 10.)

On September 28, 2010, Del Monte Fresh and Network Shipping filed Answers to the Processes as Garnishees. (D.E. 14 & 15.) Del Monte Fresh denied possession of any property described, and Network Shipping denied possession of any property described from the date of service through the date of its Answer. *Id.* And both Defendants have appeared and filed claims of interest in the attached property. (D.E. 18.)

Defendants Luzon Strait and Seatrade now move to vacate the Processes of Attachment. Defendants put forth two arguments in support of their Motion. First, Defendants argue that Garnishees are not in possession of any of Defendants' property in this District which is subject to attachment. And second, Defendants argue that Plaintiffs are improperly invoking quasi in rem jurisdiction to avoid this Court's previous dismissal of the Defendants from the initial lawsuit in personam. Defendants do not move to substitute the attachment with a bond.

II. Burden & Standard of Review

Admiralty Supplemental Rule E(4)(f) of the Federal Rules of Civil Procedure (Supplemental Rule) states: "Whenever property is arrested or attached, any person claiming an interest in it shall be entitled to a prompt hearing at which the plaintiff shall be required to show why the arrest or attachment should not be vacated or other relief granted consistent with these

rules." Similarly, Southern District of Florida Local Admiralty Rule 2(e)(2) states, with respect to post attachment review proceedings, that a "claimant may be heard before a judicial officer not less than seven (7) days after the answer and claim has been filed and service has been perfected upon the plaintiff."

The form of the post-arrest hearing is not specified under Supplemental Rule E(4)(f). "Consequently, the type of proceeding is left to the discretion of the district court ... depend[ing] on the nature of the issues in controversy." *Salazar v. Atlantic Sun*, 881 F.2d 73, 79 (3d Cir. 1989). And the same is true of Local Admiralty Rule 2(e)(2). As discussed below, the issues raised by Defendants are overwhelmingly of a legal nature, and therefore, the Court has concluded that resolution of the issues based on the written memoranda and filings complies with the Supplemental and Local Rules. (D.E. 19 & 30–32.)

III. Discussion

The Supplemental Rules provide for a special process of attachment in maritime cases whereby a plaintiff can obtain quasi in rem personal jurisdiction over a person whose property is found within a district but who "is not found within the district."

> If a defendant is not found within the district when a verified complaint praying for attachment and the affidavit required by Rule B(1)(b) are filed, a verified complaint may contain a prayer for process to attach the defendant's tangible or intangible personal property—up to the amount sued for—in the hands of the garnishees named in the process.

Fed. R. Civ. P. Supp. B(1)(a). This Court having previously found cause for the issuance of the Processes of Attachment, now addresses Defendants' arguments made in support of their Motion to Vacate the attachment.

A. Lack of Attachable Res in this District

Defendants argue that the attachments must be vacated because Johnson cannot demonstrate through competent evidence that there was any property of the Defendants in the possession of the Garnishees, in this District, at the time of attachment. The Court agrees with respect to Del Monte Fresh, but disagrees with respect to Network Shipping.

Johnson claims that the Garnishees are in possession of monies owed to Defendants under a Timer Charter Agreement. In support, Johnson submits the Time Charter Agreement and other evidence of the monies owed thereunder. (D.E. 30-7 & 30-8.) Under the Time Charter Agreement, only Network Shipping—and not Del Monte Fresh—agreed to charter certain vessels from Seatrade at a rate of $20,000 per day, payable in advance every 30 days, for three years beginning in November 2007.[1] (D.E. 31-1.) Because Del Monte Fresh is not a party to the agreement and no other evidence has been submitted that it otherwise is in possession of any of Defendants' property, the Court will vacate the attachment as to Del Monte Fresh.

Turning to Network Shipping, Defendants do not dispute that it is obligated to remit approximately $600,000 per month ($20,000 × 30 days) to Seatrade under the Time Charter Agreement. Nevertheless, Defendants argue Network Shipping was not in possession of their property, in this District, at the time of attachment. Defendants argue that a $600,000 monthly payment was made prior to service of the Processes of Attachment and that at the time of

[1] Defendant Luzon Strait is also not a party to the Time Charter Agreement. Luzon Strait, nonetheless, has appeared in this action and claims an interest in the attached property. (D.E. 18.)

Garnishees' Answers, the next monthly payment was not yet due[2]; accordingly, Defendants argue, Network Shipping was not *during the relevant time* in possession of any of Defendants' property. The Court disagrees.

Johnson submits ample case law supporting maritime attachment of future payments owed under an executed contract regardless of whether the debts have matured. *See Iran Express Lines v. Sumatrop, AG*, 563 F.2d 648, 650 (4th Cir. 1977) ("[M]aturity of the debt is not a prerequisite for garnishment. An unmatured debt may be garnished provided it arises from an executed contract."); *see also Schirmer Stevedoring Co. Ltd. v. Seaboard Stevedoring Corp.*, 306 F.2d 188, 193 (9th Cir. 1962) (noting that attachable property may include unmatured debts, but not those under an executory contract); *Robinson v. O.F. Shearer & Sons, Inc.*, 429 F.2d 83, 85 (3d Cir. 1970) (similar).

Defendants do not dispute that the Time Charter Agreement is an executed (not an executory) contract. Nonetheless, Defendants dispute that any debts were owing under the agreement from the time of service of the attachment through the time of Network Shipping's Answer. Defendants' position is untenable. The agreement explicitly contemplates a period of hire commencing on November 26, 2007 and continuing "for 3 years in direct continuation" at a rate of $20,000 per day—thus, until the period of hire expires the payments are due unless the agreement is otherwise terminated.[3] (D.E. 31-1.) Since the contract has not expired or been

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[2] Specifically, Defendants submit an invoice issued to Network Shipping demonstrating that the next payment of $620,000 was not due until October 10, 2010.

[3] And the agreement provides for termination only in limited circumstances. (D.E. 30-8, p. 3.)

terminated, payment is due periodically at thirty-day intervals,[4] and presumably, if these payments are not made, Seatrade can enforce the contract against Network Shipping by bringing a collection lawsuit.[5] Indeed, the Time Charter Agreement explicitly provides that in the event payments are "not being made on the due date," after certain notice, [Seatrade] "shall have the right to withdraw the vessel from the service of [Network Shipping] *without prejudice* to any claim [Seatrade] may have otherwise on [Network Shipping]"—*e.g.*, a claim for payments owed. (D.E. 31-2, p. 40) (emphasis added.)

Thus, the Court holds that the payments owed under the executed Time Charter Agreement are property subject to maritime attachment under Supplemental Rule B. In so holding, the Court finds the few cases cited by Defendants wholly inapposite and unpersuasive. *See Oceanfocus Shipping Ltd. v. Naviera Humboldt, S.A.*, 962 F. Supp. 1481 (S.D. Fla. 1996) (holding that an undrawn line of credit is an option to incur a debt, not an asset subject to attachment); *Suncoast Autobuilders, Inc. v. Britt*, 696 So. 2d 840 (Fla. 2d DCA 1997) (holding, under Florida law, that future payment of insurance proceeds was far too aleatory to constitute an asset of the insured subject to garnishment).

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[4] Defendants make much of the thirty-day payment term, but it is nowhere to be found in the Time Charter Agreement. The only clause regarding payment states: "Payment of hire to be made in cash ... without discount, in advance after delivery." (D.E. 31-1.) Moreover, in its response to Johnson's interrogatories, Network Shipping states that the Time Charter Agreement has been renewed and that it expects to continue to make payments in the amount of $20,000 per day until December 30, 2013. In any event, the thirty-day payment interval goes to the maturity, not the existence of the indebtedness.

[5] This is not a contingent debt (*i.e.*, a debt requiring some thing be done before it becomes fixed) like those involved in the Florida cases Defendants cite. *See, e.g.*, *Tomlin v. Anderson,* 413 So.2d 79 (Fla. 5th DCA 1982) (existence of debt dependent upon judicial determination); *Chaachou v. Kulhanijan*, 104 So.2d 3 (1958) (future salary payments dependent on future performance of employee).

Defendants also argue that, to the extent the payments owed are property subject to attachment, their attachment in this case is improper because they are not located in this District. This argument is based on the unrebutted evidence that all prior payments under the Time Charter Agreement have been wired from Network Shipping's bank in New York. Defendants cite to no case law in support of their argument. Johnson responds by arguing that Network Shipping is located in this District, that Network Shipping owns and controls the attached funds, and that the location of the intermediaries it has used in the past to remit the funds is irrelevant.

Although Johnson also cites no case law in support of her argument, the Court agrees that the funds are located in this District. Network Shipping's presence in this District and its ownership and control of the funds at the very least puts it in constructive possession of the funds in this District, and under the law, actual physical possession and constructive possession are usually equivalent. *See generally, e.g.*, *Admin. Comm. of Wal-Mart Assocs. v. Willard,* 393 F.3d 119 (10th Cir. 1119) (allowing placement of an equitable lien against party's funds held in court registry, where party exercised sufficient control over the funds such that they were in his constructive possession). Additionally, it does not necessarily follow that, because prior payments to Seatrade were wired from New York, the attached future payments would be located—at the time of attachment—in a New York bank.

The situation might be different if Johnson had attempted to garnish, for example, an intermediary bank. But by garnishing the entity with the power to draw on the funds, the funds can be deemed to be located in the same district as the entity.[6] *See Eng'g Equip. Co. v. S.S.*

[6] The cases Defendants cite to the contrary are inapposite. *See Det Bergenske Dampskibsselskab v. Sabre Shipping Corp.,* 341 F.2d 50, 53 (2d Cir. 1965) ("[A] warrant of foreign attachment, served on a branch office located in the Eastern District of New York, is

Selene, 446 F. Supp. 706, 708–09 (S.D.N.Y. 1978) (holding that attached charter hire proceeds were deemed to have their situs within the Southern District of New York because the garnishees where subject to in personam jurisdiction in the Souther District of New York).

B. Improper Use of Supplemental Rule B

Defendants argue that this Court should use its inherent equitable authority to vacate the attachments because "Plaintiff is merely abusing the rule as a vehicle to obtain jurisdiction over the Defendants where this Court has already determined that none exists." (D.E. 19, p. 11.) Without addressing whether this Court has any such equitable authority, the Court summarily rejects the basis of Defendants' argument. One of the obvious effects of Supplemental Rule B is to provide for quasi in rem jurisdiction over Defendants in some maritime cases where in personam jurisdiction may otherwise be lacking. The Court finds nothing improper in Johnson employing the tools provided her to seek relief. This Court has previously held that in personam jurisdiction was lacking, but has not previously addressed quasi in rem jurisdiction.[7]

For the same reason, the Court rejects Defendants' requests for equitable relief from wrongful attachment.

Accordingly, it is

ORDERED AND ADJUDGED that the Motion to Vacate (D.E. 19) is GRANTED IN

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ineffective to garnishee [sic] a bank account at a branch office of the same bank located in the Southern District of New York."); *Blueye Navigation v. Oltenia Navigation, Inc.*, 1995 WL 66654 (S.D.N.Y. Feb. 17, 1995) (holding garnished banks were not in possession of defendant's funds).

[7] That an interlocutory appeal is pending regarding the issue of in personam jurisdiction does not change this Court's analysis. Of course, if the appeal is granted and in personam jurisdiction then exists, Supplemental Rule B jurisdiction may no longer be available.

PART AND DENIED IN PART as follows. The Process of Attachment executed on Garnishee Del Monte Fresh (D.E. 10) is VACATED. The remainder of the Motion is DENIED. It is further

ORDERED AND ADJUDGED that the Hearing previously set for October 22, 2010 at 4:00 p.m. is CANCELLED. It is further

ORDERED AND ADJUDGED that the Planning and Scheduling Conference is reset for October 8, 2010 at 10:30 a.m.

DONE AND ORDERED in Miami, Florida this 21st day of October, 2010.

URSULA UNGARO
UNITED STATES DISTRICT JUDGE

copies provided: counsel of record