

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

The Estate of AHMED ABDULLA UMAR a/k/a
AHMED A. UMAR, Deceased, and AMEERA
UMAR, Individually and as Executrix,

Plaintiff,

- vs -

CHRISTOPHER J. BENSCH and
WAIKIKI WATERCRAFT, LLC,

Defendants.

IN THE MATTER OF THE COMPLAINT,

- of -

CHRISTOPHER BENSCH, as Owner of the
M/V "LOCH LOMOND", A 2002 46' Sunseeker
Camargue 44, for Exoneration from or
Limitation of Liability,

Petitioner.

IN THE MATTER OF THE COMPLAINT,

- of -

WAIKIKI WATERCRAFT, LLC, as Owner
of a 2009 Yamaha Motor Co., Ltd.
Waverunner, a VX personal watercraft,
Ten feet, six inches long,

Petitioner,

**REPORT AND
RECOMMENDATION**

18-CV-01414-JLS-JJM

19-CV-00035-JLS-JJM

19-CV-00559-JLS-JJM

These actions arise from an August 26, 2018 boating accident on the Niagara
River, in which Ahmed Abdulla Umar was allegedly struck and killed by a boat owned and

operated by Christopher Bensch after Umar fell from a Jet Ski which he had rented from Waikiki Watercraft, LLC. On October 30, 2018 Ameera Umar, the executrix of Umar's estate, commenced a wrongful death action in State of New York Supreme Court, County of Erie against Bensch and Waikiki, alleging that Bensch was negligent in the operation of his boat, and that Waikiki negligently failed to train Umar in the proper operation of the Jet Ski. Umar, Complaint [1-1], ¶¶16, 17.¹

On December 5, 2018 Bensch removed Umar's wrongful death action to this court, alleging that "[t]he District Court has admiralty and maritime jurisdiction over this action pursuant to 28 U.S.C. §1333, because the Complaint alleges that the incident/injury involved a vessel while on navigable waters of the United States, on the Niagara River". Umar, Notice of Removal [1], ¶5.²

On January 4, 2019 Bensch commenced an action in this court pursuant to the Limitation Act (46 U.S.C. §§ 30501-30512) and Rule F of the Supplemental Rules for Certain Admiralty and Maritime Claims,³ seeking exoneration or limitation of liability for the August accident involving Umar. Bensch, Complaint [1], ¶1. On January 18, 2019, District Judge

¹ Bracketed references are to CM/ECF docket entries in these three actions. "Umar" refers to action 18-cv-01414; "Bensch" refers to action 19-cv-00035; and "Waikiki" refers to action 19-cv-00559. Unless otherwise indicated, page references are to numbers reflected on the documents themselves rather than to the CM/ECF pagination.

² See Brozyna v. Niagara Gorge Jetboating, Ltd., 2011 WL 4553100, *4 (W.D.N.Y. 2011) (concluding that admiralty jurisdiction exists over a Niagara River boating accident because "the entire Niagara River . . . is navigable as a matter of law" and "the operation of recreational boats on navigable waters bears a significant relationship to traditional maritime activity").

³ "The procedure for a limitation action is now found in Supplemental Admiralty and Maritime Claims Rule F." Lewis v. Lewis & Clark Marine, Inc., 531 U.S. 438, 448 (2001).

Lawrence J. Vilardo stayed the prosecution of actions against Bensch “until the hearing and determination of this action”. Bensch, [3], p. 3.⁴ On April 30, 2019, Waikiki filed a similar action (Waikiki, Complaint [1]), and on September 11, 2019 Judge Vilardo stayed further proceedings against Waikiki until the determination of that action. Waikiki, [3].

Pending before the court are Umar’s motion to remand the wrongful death action to state court, and for an award of costs and attorney’s fees (Umar, [4]); Umar’s motions to dismiss the exoneration/limitation actions commenced by Bensch and Waikiki for failure to state a claim (Bensch, [13]; Waikiki, [8]); and Bensch’s motion to for leave to amend its Complaint pursuant to Fed. R. Civ. P. (“Rule”) 15(a). Bensch, [19]. The motions have been referred to me for initial consideration. Umar, [9]; Bensch, [16]; Waikiki, [13]. Having reviewed the parties’ submissions, for the following reasons I recommend that Umar’s motion to remand the wrongful death action to state court and for costs and attorney’s fees be granted; that Umar’s motions to dismiss the actions commenced by Bensch and Waikiki be granted; and that Bensch’s motion for leave to amend his Complaint be denied.

DISCUSSION

A. Umar’s Motion to Remand

Bensch based his removal of Umar’s wrongful death action to this court upon 28 U.S.C. § 1333, which states that “[t]he district courts shall have original jurisdiction, exclusive of the courts of the States, of . . . [a]ny civil case of admiralty or maritime jurisdiction, saving to

⁴ On January 6, 2020 all three actions were reassigned to District Judge John L. Sinatra, Jr. Umar, [12]; Bensch, [25]; Waikiki, [20].

suitors in all cases all other remedies to which they are otherwise entitled.” However, it is well settled that “[c]ommon law maritime cases filed in state court are not removable to federal court, due to 28 U.S.C. §1333’s ‘saving to suitors’ clause. Dating back to the Judiciary Act of 1789, this clause preserves a plaintiff’s right to a state court forum in cases arising under the common law of the sea”. Pierpoint v. Barnes, 94 F.3d 813, 816 (2d Cir. 1996). *See also Lewis*, 531 U.S. at 455 (“[w]e have previously refused to hold that admiralty claims . . . fall within the scope of federal question jurisdiction out of concern that saving to suitors actions in state court would be removed to federal court and undermine the claimant’s choice of forum”). Since Bensch’s removal of the wrongful death action to this court was clearly improper, the action should be remanded to state court.

In addition to ordering remand, “courts may award attorney’s fees under [28 U.S.C.] §1447(c) . . . where the removing party lacked an objectively reasonable basis for seeking removal”. Martin v. Franklin Capital Corp., 546 U.S. 132, 141 (2005). As Umar points out (Umar, Memorandum of Law [4-6], p. 7), not only was the prohibition against removal clearly established in Pierpoint, but Bensch’s attorneys also represented the removing party in Stewart v. Atwood, 834 F. Supp. 2d 171 (W.D.N.Y. 2012), involving a boating accident on Lake Erie, a case in which this court, citing Pierpoint, ordered the action remanded to state court. Id. at 178, 179.

Therefore, whether or not Bensch himself realized that the removal of Umar’s wrongful death action was prohibited, his attorneys knew (or should have known) that it was. Having chosen these attorneys to represent him, Bensch “cannot now avoid the consequences of the[ir] acts or omissions Any other notion would be wholly inconsistent with our system of

representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have notice of all facts, notice of which can be charged upon the attorney”.

Link v. Wabash Railroad Co., 370 U.S. 626, 633-34 (1962).

Accordingly, I recommend that Bensch be required to pay Umar the costs and attorney’s fees necessitated by the improper removal of her wrongful death action, in an amount to be subsequently determined if this Report and Recommendation is adopted.

B. Umar’s Motions to Dismiss the Limitation Act Complaints

The Limitation Act “allows a vessel owner to limit liability for damage or injury, occasioned without the owner’s privity or knowledge, to the value of the vessel or the owner’s interest in the vessel”. Lewis, 531 U.S. at 446; 46 U.S.C. §30505. “The phrase ‘privity or knowledge’ is a term of art meaning complicity in the fault that caused the accident.” In re Complaint of Messina, 574 F.3d 119, 126 (2d Cir. 2009). “The effect of the Act . . . is to enable the vessel owner to limit his risk to his interest in the ship in respect to all claims arising out of the conduct of the master and crew, while leaving him liable for his own fault and neglect.” Id. Therefore, if the owner’s “action or inaction . . . may be a contributing cause even though not the immediate or proximate cause of a casualty, the right to limitation is properly denied”. Id. at 127.

Supplemental Admiralty and Maritime Claims Rule F(2), which governs the procedure for a limitation claim, “calls for a considerable degree of specificity”. 12 Wright & Miller, Federal Practice & Procedure (Civil), §3252 (3d ed.); Voytovich v. 1111 Fuhrman Blvd., Inc., 2003 WL 21919461, *1, n. 4 (W.D.N.Y. 2003). It requires the complaint to “set forth the facts on the basis of which the right to limit liability is asserted”. In other words, the complaint

must allege facts showing the vessel owner's lack of "complicity in the fault that caused the accident". Messina, supra. 574 F.3d 119, 126 (2d Cir. 2009).

1. **Bensch's Complaint**

Bensch alleges that "Ahmed Abdulla Umar was recklessly operating a personal watercraft ('Jet Ski') at a high rate of speed across the channel without regards to navigation rules, wakes, water conditions, and marine traffic. Ahmed Abdulla Umar struck the wake of another vessel, and fell off of the Jet Ski directly ahead of Petitioner's Vessel". Bensch, Complaint [1], ¶3. While these factual allegations indicate that Umar was negligent, the Complaint contains no factual allegations showing that Bensch was not *also* negligent. *See Mulberg v. Mason & Dixon Lines Inc.*, 157 F.2d 805, 806 (2d Cir. 1946) ("a defendant who find himself confronted with a dangerous situation created by the plaintiff's negligence must use such care as is open to him to avoid injuring the plaintiff").⁵

For example, an "important consideration in many collision cases is whether there was a failure to maintain safe speed and a proper lookout". 2 Schoenbaum, Admiralty & Maritime Law §14:3 (6th ed.). "The duty of the lookout is of the highest importance The rigor of the requirement rises according to the power and speed of the vessel in question." The Ariadne, 80 U.S. 475, 478-79 (1871). Bensch's Complaint contains no facts concerning the

⁵ Mulberg involved the doctrine of "last clear chance", which is now an aspect of comparative negligence. *See Prudential Lines, Inc. v. McAllister Brothers*, 801 F.2d 616, 621 (2d Cir. 1986) ("when two or more parties have contributed by their fault to the cause of a maritime accident, regardless of which party had the last clear chance to avoid that accident, liability for such damage is to be allocated among the parties proportionately to the comparative degree of their fault").

speed of his boat prior to the accident, or whether he observed Umar’s reckless conduct in time to take evasive action.

Instead, he alleges only that “[a]ny claim or claims, injuries, losses, damages or expenses arising from the accident were not due to any fault, neglect, or want of care of Petitioner and occurred without Petitioner’s privity or knowledge”. *Bensch*, Complaint [1], ¶6. These are legal conclusions, not facts. “Although for purposes of [a] motion to dismiss we must take all the factual allegations in the complaint as true, we are not bound to accept as true a legal conclusion couched as a factual allegation.” *Papasan v. Allain*, 478 U.S. 265, 286 (1986). *See also Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (“legal conclusions . . . must be supported by factual allegations”).

“Legal conclusions couched as factual allegations are not facts and cannot substitute for facts.” *Cornell v. Assicurazioni Generali S.p.A.*, 2000 WL 1099844, *1 (S.D.N.Y. 2000). Therefore, just as “conclusory references to ‘negligent’ behavior are mere legal conclusions that fail to plausibly state a claim for negligence”, *Rainey v. County of Jefferson*, 2019 WL 6768314, *1 (N.D.N.Y. 2019), *Bensch*’s conclusory allegation that the accident was not due to his “fault, neglect, or want of care” fails to plausibly allege a basis for limiting his liability. *See Voytovich*, *1 (“the petition . . . fails to allege facts that would permit this Court to find that petitioners are entitled to limited liability - *i.e.*, the Amended Petition failed to specify why petitioners lacked knowledge or privity of the event that caused Voytovich’s injuries”).⁶

⁶ Compare with *In re Yanicky*, 2011 WL 5523600, *2 (W.D.N.Y. 2011) (petitioner “alleges that the decedent’s drowning death was caused after he jumped out of the boat and into Lake Ontario ‘against the express orders of the Vessel’s captain Petitioner’s Complaint is sufficient to withstand dismissal at this stage”).

Not only does Bensch's Complaint fail to plausibly allege that he was not at least partially at fault for the accident, but it fails altogether satisfy Supplemental Rule F(2)'s additional requirement that it "shall state . . . the date and place of [the voyage's] termination [and] whether the vessel was damaged, lost, or abandoned". "The word 'shall' generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive", National Association of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 661 (2007), and "federal courts have no more discretion to disregard [a] Rule's mandate than they do to disregard constitutional or statutory provisions." Bank of Nova Scotia v. United States, 487 U.S. 250, 255 (1988).

Therefore, Umar's motion to dismiss Bensch's Complaint should be granted.

2. Waikiki's Complaint

Like Bensch's Complaint, Waikiki's Complaint alleges that "[a]ny claim or claims, injuries, losses, damages or expenses arising from the accident were not due to any fault, neglect, or want of care of Petitioner and occurred without Petitioner's privity or knowledge." Waikiki, Complaint [1], ¶6. Waikiki alleges no facts supporting that conclusion, and offers no facts rebutting Umar's allegation that it failed to properly train Ahmed Umar in the use of the Jet Ski (Umar, Complaint [1-1], ¶17). Moreover, like Bensch, Waikiki also fails to allege the date and place of the voyage's termination and whether the Jet Ski was damaged, lost, or abandoned, as required by Supplemental Rule F(2).

Waikiki argues that Umar's motion to dismiss "is untimely, as it was filed after [Umar] filed her responsive pleading". Waikiki, Memorandum of Law [17], p. 1. I disagree. "[A] motion to dismiss for failure to state a claim (or one of the other non-waivable defenses under

Rule 12(h)) that is styled as arising under Rule 12(b) but is filed after the close of pleadings, should be construed by the district court as a motion for judgment on the pleadings under Rule 12(c) The standard for granting a Rule 12(c) motion for judgment on the pleadings is identical to that of a Rule 12(b)(6) motion for failure to state a claim.” Patel v. Contemporary Classics of Beverly Hills, 259 F.3d 123, 126 (2d Cir. 2001). *See also* National Association of Pharmaceutical Manufacturers, Inc. v. Ayerst Laboratories, 850 F.2d 904, 910, n. 2 (2d Cir. 1988) (“technically the motion should have been styled as a Rule 12(c) motion for judgment on the pleadings, because the notice of motion was filed *after* Ayerst had filed its answer to the complaint Pursuant to Fed.R.Civ.P. 12(h)(2), however, a defense of failure to state a claim may be raised in a Rule 12(c) motion for judgment on the pleadings, and when this occurs the court simply treats the motion as if it were a motion to dismiss”).

For these reasons, Umar’s motion to dismiss Waikiki’s Complaint should be granted.

C. May the Complaints be Amended?

Contending that his Complaint “is sufficient under Supplemental Rule F and Rule 8 the Federal Rules of Civil Procedure and in accord with substantive admiralty law”, Bensch nevertheless “seeks leave to amend the complaint to address the argument that it doesn’t make enough allegations”. Bensch, Memorandum of Law [20], p. 6. He argues that “[p]ursuant to Rule 15(a), courts should freely give leave to amend pleadings when justice so requires”. Id. However, “there is no absolute or automatic right to amend one’s complaint”. Meehan v. United Consumers Club Franchising Corp., 312 F.3d 909, 913 (8th Cir. 2002). Instead, “the grant or

denial of an opportunity to amend is within the discretion of the District Court”. Foman v. Davis, 371 U.S. 178, 182 (1962).

The only change between Bensch’s current Complaint and his proposed Amended Complaint is the addition of the phrase “[t]he voyage was a recreational excursion to and from a dock located at 7619 Buffalo Ave, Niagara Falls, N.Y.”. Bensch, [21-6], ¶3. The proposed amendment adds no facts to support Bensch’s conclusory allegations that he was without fault for the accident, nor does it state whether his boat was damaged. Therefore, since Bensch’s proposed Amended Complaint still fails to satisfy Supplemental Rule 2(F)’s pleading requirements for exoneration or limitation of liability, I recommend that his motion for leave to amend be denied. *See Anderson News, L.L.C. v. American Media, Inc.*, 680 F.3d 162, 185 (2d Cir. 2012) (“[l]eave to amend may properly be denied if the amendment would be futile . . . as when the proposed new pleading fails to state a claim on which relief can be granted”); De Jesus v. Sears, Roebuck & Co., 87 F.3d 65, 72 (2d Cir. 1996) (“leave to replead [is] not required when [the] proposed amendment would not cure complaint’s deficiency”).

Unlike Bensch, Waikiki does not even bother moving for leave to amend, stating that its “Complaint is sufficient. To the extent the Court feels otherwise, we would be more than willing to provide such other specifics as the Court finds necessary”. Waikiki, Memorandum of Law [17], p. 3. For the reasons already discussed, Waikiki’s Complaint is clearly *not* sufficient under Supplemental Rule 2(F), and I need not invite a motion to amend which Waikiki has not seen fit to make. *See Meehan*, 312 F.3d at 913 (“[a] district court does not abuse its discretion in failing to invite an amended complaint when plaintiff has not moved to amend and submitted a proposed amended pleading”); Clayton v. White Hall School District, 778 F.2d 457, 460 (8th Cir. 1985) (“[a]ppellant . . . did not submit a motion for leave to amend but merely concluded her

response to the school district's motion to dismiss with a request for leave to amend. Moreover, appellant did not offer a proposed amended complaint or even the substance of the proposed amendment to the district court [T]he district court did not abuse its discretion in failing to grant leave to amend"); Loc. R. Civ. P. 15(a) ("[a] movant seeking to amend or supplement a pleading must attach an unsigned copy of the proposed amended pleading as an exhibit to the motion").

CONCLUSION

For these reasons, I recommend that this court: (1) grant Umar's motion to remand her wrongful death action to state court and for an award of costs and attorney's fees (Umar, [4]); (2) grant Umar's motions to dismiss the Bensch and Waikiki Complaints (Bensch, [13]; Waikiki, [8]); and (3) deny Bensch's motion for leave to amend his Complaint (Bensch, [19]).⁷ Unless otherwise ordered by District Judge Sinatra, any objections to this Report and Recommendation must be filed with the clerk of this court by January 23, 2020 (applying the time frames set forth in Rules 6(a)(1)(C), 6(d), and 72(b)(2)). Any requests for extension of this deadline must be made to Judge Sinatra.

A party who "fails to object timely . . . waives any right to further judicial review of [this] decision". Wesolek v. Canadair Ltd., 838 F. 2d 55, 58 (2d Cir. 1988); Thomas v. Arn, 474 U.S. 140, 155 (1985). Moreover, the district judge will ordinarily refuse to consider *de novo*

⁷ Although it has been suggested that "defendants may attempt to assert the limitation of liability defense in state court", Voytovich, *2, n. 10, that remains an open question. See 29 Moore's Federal Practice (3d ed.), §708.02. That question can be resolved in state court.

arguments, case law and/or evidentiary material which could have been, but were not, presented to the magistrate judge in the first instance. Patterson-Leitch Co. v. Massachusetts Municipal Wholesale Electric Co., 840 F. 2d 985, 990-91 (1st Cir. 1988).

The parties are reminded that, pursuant to Rule 72(b) and (c) of this Court's Local Rules of Civil Procedure, written objections shall "specifically identify the portions of the proposed findings and recommendations to which objection is made and the basis for each objection . . . supported by legal authority", and must include "a written statement either certifying that the objections do not raise new legal/factual arguments, or identifying the new arguments and explaining why they were not raised to the Magistrate Judge". Failure to comply with these provisions may result in the district judge's refusal to consider the objections.

Dated: January 9, 2020

/s/ Jeremiah J. McCarthy
JEREMIAH J. MCCARTHY
United States Magistrate Judge