IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 19-30418

United States Court of Appeals
Fifth Circuit
FILED
March 24, 2020
Lyle W. Cayce
Clerk

ING BANK N.V.,

Plaintiff–Appellee,

versus

BOMIN BUNKER OIL CORPORATION,

Plaintiff–Appellant,

versus

BULK FINLAND M/V, No. 9691577,
her engines, tackle, equipment, furniture, appurtenances, etc., in rem,

Defendant.

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BOMIN BUNKER OIL CORPORATION,

Plaintiff–Appellant,

versus

DRYLOG BULKCARRIERS LIMITED,
on behalf of the in rem defendant, Bulk Finland MV,

Defendant–Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana

No. 19-30418

Before SMITH, HO, and OLDHAM, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Bomin Bunker Oil Corporation ("Bomin") asserted an *in rem* claim for a maritime lien against the *Bulk Finland M/V* ("the Vessel"), a ship to which it supplied fuel bunkers under a contract with one of the affiliates of O.W. Bunker & Trading A/S's ("OW Bunker"). The district court granted summary judgment, holding that Bomin wasn't entitled to a maritime lien because it hadn't supplied the bunkers on the order of someone with authority to procure necessaries on behalf of the Vessel. We affirm.

I.

"This lawsuit is the latest round in the maritime litigation spawned by the collapse of OW Bunker, formerly the world's largest supplier of fuel for ships." *NuStar Energy Servs., Inc. v. M/V COSCO Auckland*, 760 F. App'x 245, 246 (5th Cir.), *cert. dismissed*, 140 S. Ct. 339 (2019). In those other cases, OW Bunker's fuel suppliers asserted *in rem* claims for maritime liens on the relevant ships, which, if successful, would allow them to recover the full costs of the fuel as opposed to "the pennies on the dollar they would likely receive in bankruptcy court." *Id*. We confront essentially that situation here.

A.

To ensure that the Vessel could refuel while at port in Balboa, Panama, three separate contracts were executed. First, Tatsuo Consulting Limited ("Tatsuo"), a charterer of the Vessel,[1] contracted with O.W. Bunker Malta Ltd. ("OW Malta") to arrange for a supply of fuel. As part of the contract, Tatsuo

[1] ING alleges that Tatsuo was acting as a charterer, which DryLog repeatedly disputes. Because whether Tatsuo was a charterer doesn't affect the outcome, we assume *arguendo* that it was.

agreed to incorporate "OW Bunker Group's Terms and Conditions of sale(s) for Marine Bunkers." Neither the contract nor its incorporated terms designated OW Malta as Tatsuo's agent. Nor did the contract direct OW Malta to use Bomin to supply the bunkers. The contract did, however, identify "BOMINFLOT" as the fuel supplier.

Next, OW Malta subcontracted with O.W. Bunker U.S.A. Inc. ("OW USA") to supply the bunkers that the Vessel required. Like the Tatsuo–OW Malta contract, the OW Malta–OW USA contract didn't direct OW USA to use Bomin to supply the fuel and didn't designate OW USA as an agent of either OW Malta or Tatsuo.

Finally, OW USA further subcontracted with Bomin to deliver the fuel. The OW USA–Bomin contract was addressed to OW USA, but it listed the account name as "Master a/o Owner a/o Charterer a/o Operator a/o Manager a/o M/V 'Bulk Finland' a/s 'O.W. Bunker USA Inc.'" That contract also specified that it would "be governed by [Bomin's] General Conditions of Sale and Delivery," which Bomin viewed as "an integral part" of the contract. Neither Tatsuo nor OW Malta was a party to that contract.

After Bomin physically delivered the fuel, it issued a Bunker Delivery Receipt. That receipt confirmed the types and quantities of fuel delivered, and it contained fine print stating that "[t]he vessel [was] ultimately responsible for the debt incurred through this transaction." The Vessel's chief engineer accepted delivery and signed the receipt.

Following delivery, OW Malta, OW USA, and Bomin each issued an invoice to its respective contractual counterparty. Before those invoices came due, OW Bunker—OW Malta and OW USA's corporate parent—went belly up. As a result, OW Malta and OW USA filed for bankruptcy. To date, none of the parties has been paid for its performance under the contracts.

B.

After OW Bunker collapsed, ING Bank N.V. ("ING")—one of OW Bunker's secured creditors—filed an *in rem* action against the Vessel under the Commercial Instruments and Maritime Liens Act ("CIMLA"), 46 U.S.C. §§ 31341 *et seq.* ING averred that it was entitled to a maritime lien because Tatsuo hadn't paid OW Malta for the full cost of the bunkers.[2] The Vessel was served with an arrest warrant the same day.

Bomin filed a separate complaint against the Vessel, also *in rem*, asserting its right to a maritime lien related to the same fuel bunkers. Bomin didn't assert any other claims, whether *in personam* or *in rem*, against any other party. The district court consolidated ING's and Bomin's cases.

DryLog Bulkcarriers Limited ("DryLog"), the Vessel's long-term charterer, made a restrictive appearance to defend the *in rem* actions. To avoid arrest of the Vessel, DryLog agreed to post a $1.08 million bond to serve as a substitute res. DryLog then answered ING's and Bomin's complaints. After realizing that both liens related to the same fuel bunkers, DryLog moved to amend its pleadings to assert an interpleader.

Before the district court held a hearing on DryLog's motion to amend, ING and DryLog moved for summary judgment on Bomin's complaint. Bomin moved shortly thereafter to stay resolution of those motions, asserting that our resolution of *NuStar* would be "issue-determinative," because that case "present[ed] a fact pattern that [wa]s in all relevant aspects identical to the fact pattern in the instant action." The district court granted the stay and denied

[2] ING asserted its lien "based on a $700 million revolving credit facility that a group of lenders provided OW Bunker and its affiliates almost a year before they went under." *NuStar*, 760 F. App'x at 246. To secure the credit, OW Bunker "assigned all of its rights, title and interests as of December 19, 2013, in certain assets, including customer accounts receivable for bunker deliveries, to ING."

ING's and DryLog's motions without prejudice.

Once the opinion in *NuStar* was issued, the district court ordered ING to file a joint supplemental brief in support of its summary judgment motion. ING did so, raising two principal positions: (1) Bomin didn't have a "maritime lien . . . because Bomin supplied the bunkers ordered by OW USA, a subcontractor of OW Malta"; and (2) Bomin didn't have a "breach of contract claim . . . because OW USA was not an agent of the BULK FINLAND."

Bomin opposed ING's motion on three grounds: (1) Bomin should be allowed to take discovery before the court ruled; (2) the court should hold a hearing on DryLog's motion to amend; and (3) three other decisions[3] supported that Bomin had a maritime lien on the Vessel. Bomin didn't address *NuStar*.

The district court granted summary judgment to ING and DryLog, deciding that Bomin didn't have a maritime lien because it didn't "furnish the fuel bunkers to BULK FINLAND on the order of the owner of the vessel or a person authorized by the owner . . . ." Bomin appeals.

II.

Bomin raises a single issue on appeal: whether the district court erred when it dismissed Bomin's *in rem* maritime lien claim against the Vessel.[4]

A.

CIMLA "governs the circumstances under which a party is entitled to a

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[3] Bomin cited (1) *Martin Energy Services, LLC v. M/V Bourbon Petrel*, No. CV 14-2986, 2018 WL 6104718 (E.D. La. Nov. 21, 2018), (2) *NCL (Bahamas) Ltd. v. O.W. Bunker USA, Inc.*, 745 F. App'x 416 (2d Cir. 2018) (per curiam), and (3) *Canpotex Shipping Services Limited v. Marine Petrobulk Ltd.*, 2018 F.C. 957 (Fed. Ct. of Canada 2018).

[4] Bomin has abandoned its contentions related to discovery and to DryLog's motion to amend. *See Cinel v. Connick*, 15 F.3d 1338, 1345 (5th Cir. 1994) ("An appellant abandons all issues not raised and argued in its *initial* brief on appeal.").

maritime lien." *Valero Mktg. & Supply Co. v. M/V Almi Sun*, 893 F.3d 290, 292 (5th Cir. 2018). Under CIMLA, a party supplying goods or services can assert a maritime lien if (1) the goods or services provided were "necessaries," (2) the party "provid[ed] [the] necessaries to a vessel," and (3) it did so "on the order of the owner or a person authorized by the owner."[5] "We apply the provisions of CIMLA *stricti juris* to ensure that maritime liens are not lightly extended by construction, analogy, or inference." *Id.* (quotation marks omitted). The parties don't dispute that the bunkers qualify as "necessaries" or that Bomin provided them to the Vessel. Instead, just as in *Valero* and *NuStar*, this case turns on the third element.

It's normal "for an entity supplying necessaries to a vessel to lack privity of contract with the owner of that vessel, and to instead contract with an intermediary." *Id.* at 293. The caselaw has branched into two competing lines to address those realities: (1) "the general/subcontractor line of cases" and (2) "the principal/agent, or 'middle-man,' line of cases." *Id.* When confronted with contractual chains similar to the one in this case, we have treated physical fuel suppliers (*e.g.*, Bomin) as subcontractors and fuel traders (*e.g.*, OW Malta) as general contractors.[6] As best we can tell, every other circuit has too.[7]

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[5] 46 U.S.C. § 31342(a); *see also Valero*, 893 F.3d at 292; *ING Bank N.V. v. M/V Temara*, 892 F.3d 511, 519 (2d Cir. 2018). CIMLA identifies the following parties who "are presumed to have authority to procure necessaries for a vessel: (1) the owner; (2) the master; (3) a person entrusted with the management of the vessel at the port of supply; or (4) an officer or agent appointed by–(A) the owner; (B) a charterer; (C) an owner pro hac vice; or (D) an agreed buyer in possession of the vessel." 46 U.S.C. § 31341(a).

[6] *See Valero*, 893 F.3d at 294 ("These facts are more akin to those in which general contractors have been engaged to supply a service and have called upon other firms to assist them in meeting their contractual obligations." (quotation marks omitted)); *NuStar*, 760 F. App'x at 248 ("As NuStar's counsel acknowledged at oral argument, our recent decision in [*Valero*] controls the first half of this one."). In *Valero,* 893 F.3d at 295, we considered applying the middleman line of cases—specifically, *Marine Fuel Supply & Towing, Inc. v. M/V Ken Lucky*, 869 F.2d 473 (9th Cir. 1988)—but declined to do so.

[7] *See, e.g.*, *Bunker Holdings Ltd. v. Yang Ming Liber. Corp.*, 906 F.3d 843, 846 (9th

That distinction between subcontractor and general contractor is crucial. "[G]eneral contractor[s] supplying necessaries on the order of an entity with authority to bind the vessel ha[ve] a maritime lien." *Lake Charles Stevedores, Inc. v. Professor Vladimir Popov MV*, 199 F.3d 220, 229 (5th Cir. 1999). But "subcontractors hired by those general contractors" aren't entitled to one unless they can show "that an entity authorized to bind the ship controlled the selection of the subcontractor and/or its performance." *Id.*

B.

Bomin provided the bunkers to the Vessel under a contract with OW USA into which OW USA entered so as to satisfy its obligations under its contract with OW Malta. And OW Malta contracted with OW USA so that it could fulfill its contract with Tatsuo. That places Bomin at the end of a three-linked chain: contractor-subcontractor-subcontractor. Accordingly, to be entitled to a maritime lien, Bomin must show "that an entity authorized to bind the ship controlled" its selection or its performance. *Id.* Bomin establishes neither.

1.

First, Bomin suggests that the OW USA–Bomin and Tatsuo–OW Malta contracts establish the requisite authority, quoting extensively from those

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Cir. 2018) ("The general rule stated in *Port of Portland* and *Farwest Steel* governs this case because OWB Far East occupied a position no different from that of a general contractor."); *Temara*, 892 F.3d at 515 ("We agree with the District Court that the subcontractor physical supplier was not entitled to a maritime lien because it did not provide the bunkers on the order of an entity specified in CIMLA."); *Barcliff, LLC v. M/V Deep Blue*, 876 F.3d 1063, 1071 (11th Cir. 2017) ("Where the owner directs a general contractor to provide necessaries to its vessel, a subcontractor retained by the general contractor to perform the work or provide the supplies is generally not entitled to a maritime lien."). The decision in *Bunker Holdings*, 906 F.3d at 846, is particularly important because it distinguished *Ken Lucky*, which was binding precedent, in favor of applying the general/subcontractor framework.

contracts and their corresponding terms. Bomin also repeatedly posits that it can enforce the terms governing the OW USA–Bomin contract up the contractual chain against OW Malta and Tatsuo.

Bomin's theory boils down to two steps. First, under Article 7.14 of the OW USA–Bomin contract's terms, Bomin reserved the right to assert a maritime lien.[8] And second, under Clause L.4 of the Tatsuo–OW Malta contract's conditions,[9] the terms of that contract were "varied" to comport with the terms that Bomin insisted upon in its contract with OW USA.

But that contention misses the point. It doesn't matter whether Article 7.14, or any contractual provision for that matter, states that Bomin has a right to a maritime lien. Maritime liens can't be created as a matter of contract; CIMLA provides the *only* means to obtain one.[10] The contractual terms

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[8] Article 7.14 provides that "Products and Services delivered under a Contract shall be made not only on the account of Buyer but also on the account of the receiving Vessel." Article 7.14 also indicates that OW USA, as "Buyer," warranted that (1) the Vessel's owner gave OW USA permission to purchase the bunkers, (2) Bomin had "the right to assert and enforce a lien" against the Vessel, and (3) the Vessel was "ultimately responsible for the debt incurred through the Contract."

For the first time on appeal, Bomin contends that Article 17 of those terms—in which Bomin purports to retain title to the bunkers until paid in full—also entitles it to a maritime lien. But because Bomin never raised that position before the district court, it can't assert it "for the first time on appeal." *Greenberg v. Crossroads Sys., Inc.*, 364 F.3d 657, 669 (5th Cir. 2004).

[9] Clause L.4 states,

> These Terms and Conditions are subject to variation in circumstances where the physical supply of the Bunkers is being undertaken by a third party which insists that the Buyer is also bound by its own terms and conditions. In such circumstances, these Terms and Conditions shall be varied accordingly, and the Buyer shall be deemed to have read and accepted the terms and conditions imposed by the said third party.

[10] *See, e.g.*, *Valero*, 893 F.3d at 292 ("We apply the provisions of CIMLA *stricti juris* . . . ."); *Temara*, 892 F.3d at 519 ("Maritime liens arise only by operation of law and not by contract."); *Bominflot, Inc. v. The M/V Henrich S*, 465 F.3d 144, 146 (4th Cir. 2006) ("[M]aritime liens are *stricti juris* and cannot be created by agreement between the parties.").

are relevant only to the extent that they show authorization by the Vessel's owners or their agents, *i.e.*, that Tatsuo controlled Bomin's selection as the fuel supplier or Bomin's performance under its contract with OW USA.

The provisions on which Bomin relies don't support any agency theory.[11] Nothing in the language that Bomin quotes establishes that Tatsuo required or instructed OW Malta or OW USA to contract with Bomin to supply the bunkers. Moreover, neither the Tatsuo–OW Malta contract nor the OW Malta–OW USA contract charged the OW Bunker entities with procuring necessaries for the Vessel on Tatsuo's behalf.[12] Those contracts are merely "a series of counterparty transactions," *Temara*, 892 F.3d at 522, and OW Malta and OW USA were free to complete performance by subcontracting *with anyone or no one at all.*[13] Bomin can't reverse-engineer CIMLA's required authorization by contractually reserving a right to a maritime lien or by insisting that OW USA warrant that it had vessel-owner permission to purchase the bunkers.

2.

Bomin alternatively avers that Tatsuo "controlled Bomin's performance" through "its contract with Bomin facilitated through OW's Terms." Bomin contends that it "would have never been able to perform" if the Vessel hadn't accepted its services. It points out that Tatsuo, not OW Bunker, "selected the

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[11] Bomin bears the burden to show that OW Malta and OW USA were Tatsuo's agents. *See Karl Rove & Co. v. Thornburgh*, 39 F.3d 1273, 1296 (5th Cir. 1994).

[12] And because OW Malta and OW USA aren't the Vessel's owners, masters, managers, officers, or agents, neither is an entity "presumed to have authority to procure necessaries" on the Vessel's behalf. 46 U.S.C. § 31341(a).

[13] Moreover, "[i]t is a settled principle of contract law that a contract requiring A to supply X to C is satisfied if B, hired by A, provides X to C." *Lake Charles*, 199 F.3d at 232. As a result, Bomin physically delivering the fuel constituted both OW USA's performance under the OW Malta–OW USA contract and OW Malta's performance under the Tatsuo–OW Malta contract. It didn't somehow create a *de facto* contract between Tatsuo and Bomin.

bunkers Bomin provided," and the Vessel's crew made all the necessary connections to permit delivery of the fuel. Furthermore, the Tatsuo–OW Malta contract specified that "BOMINFLOT" would supply the fuel; Bomin's invoice was addressed to "MASTER AND/OR OWNER AND/OR CHARTERER AND/OR OPERATOR AND/OR MANAGER OF MV BULK FINLAND"; and the Vessel's chief engineer signed the Bunker Delivery Receipt.

But the most that those facts can show is that Tatsuo and the Vessel's chief engineer were aware that Bomin was the physical supplier and that neither objected to its performance. That isn't enough. A vessel owner or charterer's "[m]ere awareness" of a subcontractor's involvement "does not constitute authorization under CIMLA." *Valero*, 893 F.3d at 295. Nor could it. "[H]olding that awareness that necessaries are being supplied [i]s sufficient, even though those necessaries were procured by an entity without authority to bind the vessel, would render [CIMLA's] authority requirement meaningless." *Lake Charles*, 199 F.3d at 232.

Valero is instructive. There, Almi Tankers (the vessel owner's authorized agent) contracted with OW Malta, who subcontracted with OW USA, who further subcontracted with Valero. *Valero*, 893 F.3d at 291. The record showed that (1) Almi Tankers knew that Valero was "the bunker fuel supplier" and "did not object to Valero's selection," (2) "the sales order confirmation listed Valero as the supplier," (3) "Valero provided the entire bunkering service . . . with no assistance from O.W. or its affiliates," and (4) "the Vessel's agents monitored and tested Valero's performance." *Id.* at 294. We held that those facts "prove[d] no more than the Vessel's awareness of Valero, not that the Vessel 'controlled' the selection or performance of Valero." *Id.* at 295. The panel in *NuStar*, 760 F. App'x at 248, confronted almost identical facts and reached the same conclusion. There is no reason the result here should be

different. Bomin's reliance on *Martin, NCL*, and *Canpotex* is misplaced.[14]

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Because Bomin wasn't acting on the orders of either the Vessel's owners or their authorized agent when it supplied the fuel, Bomin doesn't have a maritime lien. The summary judgments are AFFIRMED.

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[14] *Martin*'s facts are distinct from the ones we confront. There, the relevant vessel's charterer (CGG) contracted with OW USA for fuel, and OW USA then solicited bids from fuel suppliers like Martin and Stone Oil. *See Martin*, 2018 WL 6104718, at *1. OW USA then presented those bids to CGG, which always told OW USA "to choose Martin Energy's lower bid." *Id.* at *6. In other words, "unlike *Valero* [or *NuStar* or this case], an entity authorized to bind the vessel controlled the selection of Martin Energy as physical supplier." *Id.* Bomin relies on an inapposite section of *Martin* discussing whether Martin had waived its right to a maritime lien by refusing to extend credit to the vessel's charterer. *See id.* at *4–5.

NCL and *Canpotex* similarly provide no safe harbor. In *NCL*, 745 F. App'x at 420, though the court remanded "for the district court to consider whether EKO [(the fuel supplier)] insisted that its terms and conditions appl[ied] to NCL [(the vessel's charterer)]," it did so only as it related to a *contract dispute* between NCL and OW Bunker. The court didn't evaluate whether EKO—the party occupying the same relative position as Bomin—was entitled to a maritime lien. And in *Canpotex*, 2018 F.C. 957, at 15 ¶ 37, the court didn't consider whether a maritime lien existed under either CIMLA or Canadian law.