

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

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|---|---|------------------------|
| BRATTEN SHIPPING S.A., <i>et al.</i> , | § | |
| <i>Plaintiff,</i> | § | |
| | § | |
| vs. | § | CIVIL ACTION H-05-3380 |
| | § | |
| UNITED STATES OF AMERICA, <i>et al.</i> , | § | |
| <i>Defendants.</i> | § | |

MEMORANDUM AND RECOMMENDATION

Defendant United States of America has filed a motion to dismiss plaintiffs' claims for lack of subject matter jurisdiction or alternatively failure to state a claim (Dkt. 14). Having considered the parties' submissions, arguments at the March 2, 2006 hearing, and applicable law, the court recommends that the United States' motion be granted in part and denied in part.

BACKGROUND

Bratten Shipping S.A. of Panama is the owner of the vessel M.V. Atlantic Trader. The individual plaintiffs were employed by Bratten Shipping and worked aboard the Atlantic Trader at the time of the events in question.

In September 2003, the Atlantic Trader was undergoing repairs in Cartegena, Colombia. Defendant John C. Louis, a freight broker, arranged with Mirza Baig of Bratten Shipping for the Atlantic Trader to haul a cargo of lumber to be picked up in Honduras. The Atlantic Trader left Colombia for Honduras on October 4, 2003. The ship arrived in Honduras on October 8, 2003 and loading of the lumber began on October 9. On October

10, 2003, Honduran officials boarded the ship and discovered 13 kilograms of cocaine in the cabin of a crew member, plaintiff Jesus Antonio Cuesta Cordoba (“Cuesta”). All members of the crew were initially detained, but after Cuesta acknowledged that the cocaine was his, the other members of the crew were provisionally released from custody. The ship itself was seized that day. A week later, on October 17, 2003, a second inspection of the ship yielded an additional kilogram of cocaine hidden in the same cabin by another crew member, plaintiff Jose Del Carmen Garcia (“Carmen”). Later that same night, police officers guarding the vessel observed two flaming barrels tossed overboard; one of the barrels contained 27 grams of heroin hidden within a necklace, a bracelet, and a set of earrings. The heroin belonged to a third crew member, plaintiff Aldo Alcala Lopez (“Alcala”). At that point all crew members were again detained, and remained in custody until trial before a Honduran tribunal in September 2004. Three crew members (plaintiffs Cuesta, Carmen, and Alcala) were convicted of drug smuggling crimes under Honduran law and are serving sentences of 15 years in Honduras. The remaining eight crew members (also plaintiffs here) were acquitted and released. The ship was declared properly seized under the Honduran Penal Code as an instrumentality of the crime.¹

¹ This factual narrative is taken from Plaintiffs’ First Amended Original Complaint, as well as the certified translation of the Honduran court judgment of January 11, 2005 submitted as a supplement to defendant’s motion (Dkt. 18). *See Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498-99 (5th Cir. 2000) (documents referred to in plaintiff’s complaint and central to its claim may properly be considered in deciding Rule 12(b)(6) motions).

Plaintiffs allege that the drugs were placed on board the Atlantic Trader by three crew members as part of a sting operation by the United States Drug Enforcement Agency facilitated by Louis. Plaintiffs complain that the United States did not inform Bratten Shipping in advance that it was planning to use the ship in a sting operation, and that the United States did not take sufficient steps to intervene with the Honduran government on the ship and crew's behalf.

Plaintiffs allege that this court has subject matter jurisdiction over this matter pursuant to the Suits in Admiralty Act (46 U.S.C. § 741, *et seq.*) and the Alien Tort Statute (28 U.S.C. § 1350). The United States denies that either statute confers subject matter jurisdiction, and argues for dismissal of all claims on grounds of sovereign immunity, comity, and non-justiciability.

RULE 12(b)(1) AND 12(b)(6) STANDARDS

Sovereign immunity implicates the subject matter jurisdiction of the court. *Chapa v. United States Dep't of Justice*, 339 F.3d 388, 389 (5th Cir. 2003). A challenge to the court's subject matter jurisdiction may be made pursuant to Federal Rule of Civil Procedure 12(b)(1). In examining a Rule 12(b)(1) motion, the court is empowered to consider matters of fact which may be in dispute. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001); *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981). A motion to dismiss for lack of subject matter jurisdiction should be granted only if it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle plaintiff to relief.

Home Builders Ass'n of Miss., Inc. v. City of Madison, Miss., 143 F.3d 1006, 1010 (5th Cir. 1998). “A case is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case.” *Id.*

A motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure is viewed with disfavor and is rarely granted. *Priester v. Lowndes County*, 354 F.3d 414, 418 (5th Cir. 2004) (citing *Lowrey v. Tex. A&M Univ. Sys.*, 117 F.3d 242, 247 (5th Cir. 1997)). The complaint must be liberally construed in favor of the plaintiff and all well-pleaded facts must be taken as true. *Id.* A claim may only be dismissed if the plaintiff is not entitled to relief under any set of facts or any possible theory of recovery that he could prove consistent with the allegations in his complaint. *Jones v. Greninger*, 188 F.3d 322, 324 (5th Cir. 1999); *ABC Arbitrage Plaintiffs Group v. Tchuruk*, 291 F.3d 336, 348 (5th Cir. 2002). In making this determination, the court should not strain to find inferences favorable to the plaintiff. *Southland Sec. Corp. v. INSpire Ins. Solutions, Inc.*, 365 F.3d 353, 361 (5th Cir. 2004). The plaintiff’s complaint must contain allegations of every material point necessary to sustain recovery. *Campbell v. City of San Antonio*, 43 F.3d 973, 975 (5th Cir. 1995). Legal conclusions, conclusory allegations, and unwarranted deductions of fact do not suffice to prevent dismissal. *Jones v. Alcoa, Inc.*, 339 F.3d 359, 362 (5th Cir. 2003).

ANALYSIS

Rule 12(b)(1) Motion

The United States has waived its sovereign immunity in admiralty cases through the Suits in Admiralty Act, which provides:

In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States.

46 U.S.C. § 762.

A federal court's jurisdiction to hear cases in admiralty flows initially from the Constitution, which extends federal jurisdiction to "all Cases of admiralty and maritime jurisdiction." U.S. Const. Art. III, § 2. Congress embodied that authority in 28 U.S.C. § 1333(1), which provides that federal district courts have original jurisdiction over any civil case of admiralty or maritime jurisdiction.

The traditional test for admiralty jurisdiction looked only at whether the tort wholly occurred on navigable waters. *Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995). Congress extended admiralty jurisdiction in 1948 to cover all cases of damage or injury to persons or property caused by a vessel on navigable water, even where the damage or injury occurred on land. *Id.* (citing the Extension of Admiralty Jurisdiction Act, 46 U.S.C. App. § 740). The Supreme Court has further refined the test for determining admiralty tort jurisdiction in a series of cases. In *Executive Jet Aviation, Inc. v. Cleveland*, 409 U.S. 249, 268 (1972), the Court held that admiralty jurisdiction does not extend to an

airplane crash in navigable waters unless the “wrong bears a significant relationship to traditional maritime activity.” In *Foremost Ins. Co. v Richardson*, 457 U.S. 668, 677 (1982), the Court held that admiralty jurisdiction extends to a collision between pleasure boats on navigable waters, even though the boats themselves had no involvement with maritime commerce, because such a collision has a potentially disruptive impact upon maritime commerce. Building on *Executive Jet* and *Foremost*, the Court in *Sisson v. Ruby*, 497 U.S. 358, 367 (1990), focused on two issues to determine the relationship of the claim to the objectives of maritime jurisdiction: 1) the potential to disrupt maritime commerce, and 2) the type of maritime activity from which the incident arose.

The Supreme Court in *Grubart* distilled the holdings of these cases into a two part test requiring the plaintiff to meet the conditions of location and connection to maritime activity. *Grubart, Inc.*, 513 U.S. at 534. The location condition requires that the tort occurred on navigable water or that an injury on land was caused by a vessel on navigable water. *Id.* The connection condition has two parts. First, the incident must have a potentially disruptive impact on maritime commerce. Second, the general character of the activity giving rise to the incident must have a substantial relationship to traditional maritime activity. *Id.*; *Coats v. Penrod Drilling Corp.*, 61 F.3d 1113, 1118-19 (5th Cir. 1995) (*en banc*).

This case readily satisfies both conditions for admiralty jurisdiction. The United States conceded at oral argument that the location condition has been met, because the alleged tort occurred on navigable waters. The United States has also conceded that the

impounding of the *Atlantic Trader* and arrest of its crew had an impact on maritime commerce. The ship was unable to pick up the cargo of lumber it was hired to deliver, and has been unable to engage in any commercial activity since October 2003 because it remains impounded in Honduras. However, the United States argues that the drug sting operation at the crux of plaintiffs' claims has no relationship to any traditional maritime activity. The court disagrees.

At the time of the events in question the ship was engaged in a traditional maritime activity, the transport of cargo. By itself, this fact would probably not be sufficient to sustain admiralty jurisdiction, because the proper focus is upon the general character of the *tortfeasor's* activity, rather than the plaintiffs'. *Grubart*, 513 U.S. at 539. The question is "whether a tortfeasor's activity, commercial or noncommercial, on navigable waters is so closely related to activity traditionally subject to admiralty law that the reasons for applying special admiralty rules would apply in the suit at hand." *Id.* at 539-40. The navigation of boats in navigable waters clearly falls within this relationship test, as does repair or maintenance work performed on a vessel in a navigable waterway. *Grubart*, 513 U.S. at 540; *See Executive Jet*, 409 U.S. at 269-70 (admiralty law deals with navigational rules that govern the manner and direction of vessels); *Coats*, 61 F.3d at 1119 (the repair and maintenance of a jack-up drilling rig on navigable waters is a traditional maritime activity and providing compensation for shipboard injuries is a traditional function of admiralty laws).

Ordinarily, a drug sting is a land-based operation that does not implicate traditional maritime activity. In this instance, however, defendant Louis, acting simultaneously as an undercover DEA agent and as a legitimate freight broker, is alleged to have brokered this Honduran cargo shipment as a cover for a drug sting in which the Atlantic Trader was chosen to play an integral role. “The substantial relationship test is satisfied when at least one alleged tortfeasor was engaging in activity substantially related to traditional maritime activity and such activity is claimed to have been a proximate cause of the incident.” *Grubart*, 513 U.S. at 541. Shipment of cargo freight is the quintessential traditional maritime activity, and when it is used as a cover to facilitate an undercover drug deal, a substantial relationship unquestionably arises. But for defendant Louis’s freight brokerage activity, the Atlantic Trader presumably would not have set sail for Honduras when it did, nor been seized by Honduran authorities on October 10, 2003. Under these circumstances, admiralty jurisdiction has been properly invoked under the *Grubart* standard.

Plaintiffs also assert jurisdiction under the Alien Tort Statute, which provides:

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

28 U.S.C. § 1350. This statute confers subject matter jurisdiction when: (1) an alien sues, (2) for a tort, (3) that was committed in violation of the law of nations or a treaty of the United States. *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 164-65 (5th Cir. 1999). But the United States has not waived its sovereign immunity for actions brought pursuant to

the Alien Tort Statute. *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 207 (D.C. Cir. 1985); *Canadian Transport Co. v. United States*, 663 F.2d 1081, 1092 (D.C. Cir. 1980). Nor have plaintiffs alleged any violation of a treaty of the United States or the law of nations. Thus there is no jurisdiction under the Alien Tort Statute.²

Rule 12(b)(6) Motion

The United States contends that even if admiralty jurisdiction exists, plaintiffs' claims should be dismissed pursuant to Rule 12(b)(6). The individuals were arrested and the vessel impounded in Honduras by Honduran authorities. The vessel and its crew were properly subject to the jurisdiction of Honduras, not the United States. *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 124 (1923). According to the government, principles of comity and non-justiciability would be violated if this court were to second guess the actions of Honduran officials acting under color of Honduran law.

In reply, the plaintiffs invoke *Coumou v. United States*, 107 F.3d 290 (5th Cir.), *as amended on denial of rehearing* 114 F.3d 64 (5th Cir. 1997). In *Coumou*, a ship was boarded by the U.S. Coast Guard and turned over to Haitian authorities after the ship's master informed the Coast Guard that drugs were on board. *Id.* at 292. The ship was towed to a Haitian port, where it was seized by Haitian authorities who also charged the ship master (Coumou) with violations of Haitian drug laws. Coumou spent six months in custody, where he was subjected to severe physical and mental abuse. He was eventually acquitted of all

² At the March 2, 2006 hearing, counsel for plaintiffs conceded that any attempt to amend the complaint to assert jurisdiction under the Alien Tort Statute would be futile.

charges at trial, but the Haitian government refused to return his ship, money, or passport. Coumou sued the United States on a theory of common law negligence. The court held that the United States had a duty to inform the Haitian government of the master's exculpatory conduct.³ On remand the trial court found the United States had breached its duty of reasonable care by failing to convey this information, and entered a \$4 million judgment against the United States. *Coumou v. United States*, No. Civ. A. 93-1465, 1997 WL 644091 *9-10 (E.D. La. 1997).

With respect to the plaintiff crew members, the United States correctly contends that *Coumou* is distinguishable because there was no exculpatory information that the United States could have communicated to the government of Honduras. With a single exception (plaintiff Cuesta), none of the crew members was detained as part of the drug sting operation. These crew members were released from custody after the initial search on October 10 found the sting-related cocaine in Cuesta's cabin. Their release was due to Cuesta's acknowledgment that the 13 kilograms of sting-related cocaine belonged to him. It was only a week later that these crew members were taken into custody, after another search revealed an additional kilogram of cocaine and police guards saw two flaming barrels tossed overboard, one of which contained heroin. Two crew members (Carmen and Alcala) were convicted of drug trafficking with respect to these drugs, neither of which were related to the

³ The United States conceded admiralty jurisdiction in that case because the U.S. Coast Guard boarded the ship at sea and the jurisdiction was provided by the Public Vessels Act, 45 U.S.C. App. § 781 *et seq.* *Coumou*, 107 F.3d 293-95.

sting. The other crew members were eventually acquitted, but their detention was clearly not attributable to the drug sting, but rather to suspicious activity surrounding the shipboard presence of drugs unrelated to the sting.⁴ The fact that DEA agents had initiated a sting operation involving other drugs and another crew member could not have been considered exculpatory evidence for these crew members in any meaningful sense.

Nor does it appear that acknowledgment of the drug sting could have helped Cuesta avoid his conviction. Cuesta quickly confessed to Honduran authorities that the 13 kilograms of cocaine found in his cabin belonged to him; this was the cocaine that was part of the original drug sting. It is difficult to imagine how the fact that he had been the target of a DEA drug sting would exonerate him for the criminal activity to which he had readily confessed. Plaintiffs' complaint at one point makes an unsupported accusation that the convicted crew members had somehow been "wrongfully entrapped" by the undercover operation, but no facts are alleged to warrant such a charge. As noted previously, vague and conclusory allegations such as this are insufficient to state a claim. For these reasons, none of the plaintiff crew members have successfully stated a claim upon which relief can be granted under Rule 12(b)(6).

By contrast, plaintiff Bratten Shipping's claim stands on much firmer ground. The Atlantic Trader was unknowingly selected by an undercover agent (Louis) to be the means of transportation for a drug sting sponsored by United States law enforcement. These are very

⁴ One of the crew is alleged to have explained the flaming barrels as merely an effort at garbage disposal.

salient exculpatory facts for Bratten. Unlike the three “dirty” crew members, there is nothing to suggest that the Atlantic Trader or its owners were targets of the sting or had knowingly participated in illicit drug trafficking. The potential exculpatory impact of such evidence is demonstrated by the judgment of the Honduran court itself:

LEGAL GROUNDS

* * *

Ninth:

Articles 55 and 64 of the Penal code refer to the seizure of objects from the crime or misdemeanor and of the instruments with which the same has been carried out, *unless they belong to a third party not responsible for the criminal action*. As there is evidence that a vessel was seized called Atlantic Trader Kingstown, registry number 7573, color: blue hull, green deck, white bridge, flying the flag of the country Saint Vincent and the Grenadines, in which the confiscated drugs were being transported, which constitutes evidence in this trial, it is legal to declare its seizure, unless a third party appears that is not responsible, and can prove to be the true owner of the vessel.

Dkt. 18, Exhibit 2 (emphasis supplied).

Under the italicized proviso of Honduran law, then, seizure of the vessel might have been avoided if its true owner could demonstrate that it was not “responsible” for the criminal action. Presumably, the circumstances under which the Atlantic Trader was “volunteered” by undercover DEA agents to assist in a drug sting operation would be indispensable evidence in establishing this lack-of-responsibility defense to vessel seizure. According to the complaint, Honduran authorities did in fact solicit such evidence in advance of the criminal

trial, but the defendants refused Bratten's repeated requests to provide the appropriate evidence of U.S. Customs and DEA involvement.

Unlike the crew members, the ship was immediately taken into custody on October 10, 2003, after the initial search turned up the sting-related cocaine. This search was itself the result of a tip provided to Honduran authorities by U.S. law enforcement. The government argues that the subsequent discovery, one week later, of heroin unrelated to the drug sting constitutes a superseding cause absolving the United States of any responsibility for the ship seizure. In effect, the government hypothesizes that the ship would have been seized the next week anyway, for reasons unrelated to the drug sting. While a finder of fact might eventually reach that conclusion after a trial on the merits, the court is constrained at this point to accept Bratten's version of proximate cause, which fits very comfortably within the *Coumou* negligence mold.

Bratten's claim also does not implicate any legitimate comity or justiciability concerns. The comity concerns raised by the government are no more substantial here than in *Coumou*. The doctrine of comity involves the degree of respect owed to a foreign judgment. *See International Transactions, Ltd. v. Embotelladora Agral Regiomontana*, 347 F.3d 589, 594 (5th Cir. 2003). Permitting Bratten's action to proceed in no way threatens a collateral attack upon the validity of the Honduran judgment. Bratten was not a party to that criminal proceeding, and was not formally accused of any wrongdoing by Honduran authorities. Its vessel (like *Coumou's* ship) was seized pursuant to lawful proceedings in a foreign country.

Like *Coumou*, Bratten is not seeking to overturn a foreign government's seizure order, but rather to hold the United States answerable in money damages for the foreseeable consequences of its own negligent conduct.

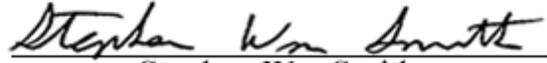
The government's nonjusticiability concerns are also unfounded. Nonjusticiability involves the inappropriateness of judicial rulings on political questions for which courts are ill-suited to devise proper standards. *See Baker v. Carr*, 369 U.S. 186, 217 (1962). The government does not explain how Bratten's claim implicates a policy of the United States. Instead, the government's position is essentially that there is no standard by which to measure whether any information provided by the United States would have changed the actions of Honduran authorities. As noted above, this issue of causation may well present a fact question, but that is no basis to dismiss Bratten's claim at this stage.

CONCLUSION AND RECOMMENDATION

The court finds that subject matter jurisdiction is proper under the Suits in Admiralty Act, but not the Alien Tort Statute. The plaintiff crew members have failed to state a claim against defendants, but plaintiff Bratten has properly pled a common law negligence claim under *Coumou*. Therefore, the court recommends that the United States' motion to dismiss be granted as to all plaintiff crew members' claims, but denied as to plaintiff Bratten's negligence cause of action against all defendants.

The parties have ten days from service of this Memorandum and Recommendation to file written objections. Failure to file timely objections will preclude appellate review of factual findings or legal conclusions, except for plain error. *See* FED. R. CIV. PRO. 72.

Signed at Houston, Texas on March 10, 2006.



Stephen Wm Smith
United States Magistrate Judge