

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-10050-CIV-KING/SIMONTON

THE MATTER OF:
THE COMPLAINT OF HORIZON DIVE
ADVENTURES, INC., AS OWNER OF
THE M/V OISCES (HIN FVL31002F707)
ITS ENGINES, TACKLE,
APPURTENANCES, EQUIPMENT, ETC.,
IN A CAUSE FOR EXONERATION FROM
OR LIMITATION OF LIABILITY,

Petitioner,

v.

PETER SOTIS, SANDRA STEWART, AS
PERSONAL REPRESENTATIVE OF THE
ESTATE OF ROBERT STEWART,

Respondents/Claimants.

REPORT AND RECOMMENDATION ON CLAIMANT SANDRA STEWART'S MOTION TO
STRIKE OR DISMISS CLAIMANT PETER SOTIS' CLAIMS FOR INTENTIONAL INFLICTION
OF EMOTIONAL DISTRESS AND NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

This matter is before the Court pursuant to Claimant Sandra Stewart's Motion to Strike or Dismiss Claimant Peter Sotis' Claims for Intentional Infliction of Emotional Distress and Negligent Infliction of Emotional Distress, ECF No. [78] (the "Claimant's Motion"). The Defendant has filed a Response in Opposition, ECF Nos. [85], and the Plaintiff has filed a Reply in Support of his Motion, ECF Nos. [95]. The Honorable James Lawrence King, United States District Judge, has referred the matter to the undersigned Magistrate Judge to take all necessary and proper action as required by law, ECF No. [80]. The undersigned held a hearing on the matter on November 8, 2018. For the reasons stated herein, the undersigned RECOMMENDS that the Claimant's Motion be GRANTED.

I. BACKGROUND

Petitioner Horizon Dive filed its Complaint for Exoneration from or Limitation of Liability on May 23, 2017, in connection with the tragic death of Robert Stewart on January 31, 2017, during the course of a dive boat excursion offshore of Key Largo, Florida, ECF No. [1]. The Limitation Act, 46 U.S.C. § 30501 *et seq.*, 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. The central provision of the Act provides:

Except as provided in Section 30506 of this title, the liability of the owner of a vessel for any claim, debt, or liability described in subsection (b) shall not exceed the value of the vessel and pending freight. If the vessel has more than one owner, the proportionate share of the liability of any one owner shall not exceed that owner's proportionate interest in the vessel and pending freight.

46 U.S.C. § 30505. See *also* § 30506 (requiring supplemental fund for some vessels for personal injury and death claimants). When faced with liability for a maritime accident, a vessel owner may file a petition in federal court seeking protection under the Limitation Act. If the vessel owner can establish that the accident in question occurred without the vessel owner's "privity or knowledge," the Act limits the owner's liability to the value of his or her interest in the vessel and its pending freight. 46 U.S.C. § 30505. Once the vessel owner deposits an amount representing the value of the vessel and its freight (the "limitation fund") with the court, the district court stays all related claims against the vessel owner pending in any other forum, and directs all potential claimants to file their claims against the vessel owner in the district court within a specified period of time. 46 U.S.C. § 30511; Fed. R. Civ. P. Supplemental Rules F(3), F(4).

On June 1, 2017, this Court entered an Order requiring all claimants to appear and make proof of their claims on or before August 18, 2017, ECF No. [10]. Claimant Sandra Stewart filed her Claim, Answer and Affirmative Defenses on August 17, 2017, ECF No.

[12]; claimant Peter Sotis filed his Claim, Answer and Affirmative Defenses on August 18, 2017. Therein, Claimant Sotis presented his “claim” only by reference to an attached copy of the state-court action filed by Claimant Stewart against Claimant Sotis and Petitioner Horizon Dive, among others.

On May 11, 2018, Claimant Sotis, without first seeking leave, filed his Amended Answer, Affirmative Defenses, and Claim. Therein, in addition to referencing the again-attached state-court complaint and explicitly noting a potential contribution or indemnity action against Petitioner Horizon Dive, Claimant Sotis for the first time alleged a claim against Petitioner for Intentional Infliction of Emotional Distress, “which resulted from the death of Robert Stewart arising from the post death suspension of his personal and his company, Add Helium’s teaching credential due to the innuendo surrounding Mr. Stewart’s death which was and has been intentionally and wrongfully been directed against Sotis,” ECF No. [46].

On June 12, 2018, the Honorable James Lawrence King held a hearing on Claimant Stewart’s Motion to Stay Limitation Action and Stay Entry of injunction Against State Court, ECF No. [35]. At that hearing, much of the discussion turned on Claimant Sotis’ late-filed claim against Petitioner Horizon Dive,¹ and the Court ultimately granted Claimant Sotis’ ore tenus motion for leave to amend his Amended Answer, Affirmative

¹ In balancing a petitioner’s right to a limitation proceeding against the “savings to suitors” clause of 28 U.S.C. § 1333, federal courts have identified two sets of circumstances under which the damages’ claimants will be allowed to proceed in the forum of their choosing: (1) when the value of the limitation fund exceeds the combined total potential claims; and (2) when there is only one claimant, or when adequate stipulations have been entered into by the parties to protect the Petitioner’s right to a limitation proceeding while effectively transforming a multiple-claims-inadequate-fund case into the functional equivalent of a single claim case. The Eleventh Circuit has held that, under certain circumstances, the parties can stipulate around contribution claims such that a multiple claimant action can effectively be treated as a single claimant action. *Beiswenger Enterprises Corp. v. Carletta*, 86 F.3d 1032, 1038-39 (11th Cir. 1996). Thus, the late-filed claim against Petitioner Horizon Dive for Intentional Infliction of Emotional Distress could have a significant impact on whether it is appropriate to stay the Limitation Action and allow Claimant Stewart to proceed with her damages action in state court, or whether the state-court case must remain stayed pending determination of the Limitation Action.

Defenses, and Counterclaim to present his claim in greater detail. The Court required Claimant Sotis to file a Second Amended Answer, Affirmative Defenses, and Counterclaim by June 22, 2018, and set a briefing schedule so that the Second Amended Counterclaim could then be challenged by the parties, ECF No. [67] at 49:14 – 50:15. The instant Motion to Strike or Dismiss was filed in accordance with the briefing schedule set by the Court at that hearing.

Claimant Sotis' Second Amended Answer, Affirmative Defenses, and Counterclaim alleges a cause of action for intentional and/or negligent infliction of emotional distress against Petitioner Horizon Dive and the Limitation Fund, and a potential claim for indemnity and contribution, ECF No. [68]. Claimant Sandra Stewart has moved to dismiss Claimant Sotis' claim for intentional and/or negligent infliction of emotional distress, ECF No. [78]. Petitioner Horizon Dive has not challenged Claimant Sotis' claim against it in a separate Motion, but in its Answer denied that Claimant Sotis' allegations are sufficient to state a claim, ECF No. [69] at ¶¶ 28-29.

II. NOVEMBER 8, 2018, HEARING ON MOTION

On November 8, 2018, Petitioner Horizon Dive, Claimant Sandra Stewart, and Claimant Peter Sotis appeared before the court for a hearing on Claimant Sandra Stewart's Motion to Strike or Dismiss Claimant Peter Sotis' Claims for Intentional Infliction of Emotional Distress and Negligent Infliction of Emotional Distress, ECF No. [78]. At the hearing, counsel for Claimant Peter Sotis clarified that Claimant Sotis was proceeding only on a claim for Intentional Infliction of Emotional Distress, despite the single reference to a negligence-based claim within his pleading.

As previously noted, Petitioner Horizon Dive has not filed a motion to dismiss Claimant Sotis' counterclaim against it. In its Answer, however, Petitioner Horizon Dive has asserted that Claimant Sotis' claim is insufficient to state a claim. At the hearing, Petitioner Horizon Dive clarified that it does not believe that Claimant Sotis' claim is

factually sufficient, but did not file a separate motion to dismiss because, in its counsel's experience, emotional distress claims are often resolved at the summary judgment stage, rather than on a pre-answer motion. Thus, the Petitioner was permitted to provide argument as to the Claimant Sandra Stewart's Motion to Strike or Dismiss.

Claimant Stewart argued that Claimant Sotis' claim is insufficient because (1) the Petitioner was under no legal duty to ensure that Sotis was not vilified and/or demonized in the dive community by virtue of his participation in the fatal dive, and Claimant Sotis has failed to allege from where such alleged duty arose; (2) Claimant Sotis has failed to allege any specific comments or actions attributed to the Petitioner regarding Claimant Sotis' involvement with the fatal dive; and (3) Claimant Sotis has failed to allege conduct that rises to the level of "outrageousness" necessary to support his claim. Claimant Stewart also noted that Claimant Sotis has already had three opportunities to plead his claim and argued that he should not be allowed a fourth.

In addition to the arguments raised by Claimant Stewart, Petitioner Horizon Dive emphasized that Claimant Sotis' counterclaim fails to allege conduct or wrongdoing on its part with the requisite specificity to satisfy the *Twombly*² standard.

In response, Claimant Sotis argued that through discovery he is obtaining information to support his claim related specifically to the involvement of an individual, Craig Jenne, who, according to Claimant Sotis, is a consulting expert for Petitioner Horizon Dive, an investigator and the general counsel for the International Association of Nitrox and Technical Divers, an investigator for Petitioner Horizon Dive's insurer, and who was present on the dive boat that responded to the fatal dive and recovered the body. Claimant Sotis was unable to provide any detailed description of the facts underlying his claim, but argued that actions have been taken by or at the behest of or with the knowledge of Petitioner Horizon Dive, through Craig Jenne, that have been

² *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

harmful to the reputation of Claimant Sotis.

Counsel for Claimant Sotis conceded several times that he may not be able to prove his alleged claim, but would not concede it was insufficient as pled, and argued that he should be allowed to continue taking discovery and have his claim evaluated at the summary judgment stage, rather than determined on the present motion.³

III. LEGAL STANDARD

Supplemental Rule F(5), Supplemental Rules for Admiralty or Maritime Claims, which governs the claim at issue, states: “Each claim shall specify the facts upon which the claimant relies in support of the claim, the items thereof, and the dates on which the same accrued.” Pursuant to Rule A(2), Supplemental Rules for Admiralty or Maritime

³ Additionally of note, at the hearing the Court raised the issue of whether its jurisdiction reached Claimant Sotis’ claim for intentional infliction of emotional distress. The Eleventh Circuit has held that the Limitation Act is not an independent source of jurisdiction. *Lewis Charters, Inc. v. Huckins Yacht Corp.*, 871 F.2d 1046 (11th Cir. 1989) (“In light of the evolution of the Limitation Act and of the principles of admiralty jurisdiction, we conclude that appellant may not base admiralty jurisdiction solely upon the Limitation Act, in the absence of a significant relationship between its claim and traditional notions of maritime activity.”). Thus, it cannot be used to extend federal jurisdiction to a claim not otherwise subject to such jurisdiction. “A permissive counterclaim must have an independent jurisdictional basis, *Diamond v. Terminal Ry. Alabama State Docks*, 421 F.2d 228 (5th Cir. 1970), while it is generally accepted that a compulsory counterclaim falls within the ancillary jurisdiction of the federal courts even if it would ordinarily be a matter for state court consideration.” *Plant v. Blazer Fin. Servs., Inc. of Georgia*, 598 F.2d 1357, 1359–60 (5th Cir. 1979) citing *Baker v. Gold Seal Liquors, Inc.*, 417 U.S. 467, 469 n. 1 (1974); *Revere Copper & Brass, Inc. v. Aetna Casualty & Surety Co.*, 426 F.2d 709 (5th Cir. 1970). Section 1367 provides for supplemental federal jurisdiction, but only for compulsory counterclaims. Thus, if Sotis’ counterclaim is compulsory, the court can exercise supplemental federal jurisdiction over the claim. If Sotis’ counterclaim is merely permissive, however, then this Court lacks subject matter jurisdiction over it.

When prompted by the Court, Claimant Stewart noted that she had argued that Claimant Sotis’ claim was not appropriately joined herein, without mentioning jurisdiction explicitly, in her Reply, ECF No. [95] at ¶ 1 (“[T]he allegations contained in [Claimant Sotis’] claim for intentional infliction of emotional distress do not stem directly from what occurred on January 31, 2017, aboard the [Petitioner’s] vessel. They relate to matters which occurred thereafter. Accordingly, they are not an appropriate “claim” to be submitted in this limitation of liability action.”), but conceded that she had not raised the jurisdictional issue as a basis for dismissal. Because the claim as pled is wholly insufficient and subject to dismissal for failure to state a claim, and because the jurisdictional issue was not raised by any of the parties in their initial briefs, the undersigned has not addressed that issue herein.

Claims, the Federal Rules of Civil Procedure apply to Supplemental Rules for Admiralty or Maritime Claims “except to the extent that they are inconsistent with [the] Supplemental Rules.” In the case at bar, the parties have used the standards applicable under Federal Rules of Civil Procedure 8(a) and 12(b)(6) and the undersigned agrees that this is the appropriate standard.⁴

Federal Rule of Civil Procedure 8(a) requires “a short and plain statement of the claims” that “will give the defendant fair notice of what the plaintiff's claim is and the ground upon which it rests.” Fed. R. Civ. P. 8(a). The Supreme Court has held that “[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the ‘grounds’ of his ‘entitlement to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)(internal citations omitted).

“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (quotations and citations omitted). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the

⁴ Few cases have explicitly addressed the proper standard of review governing a challenge to the sufficiency of a claim under Supplemental Rule F(5), but those that have have concluded that Rule 12(b)(6) and Rule 8 of the Federal Rules of Civil Procedure apply. *Walker v. Mead*, No. 6:13-cv-1894-ORL, 2014 WL 2968405, *4 (June 30, 2014) (“The undersigned [] finds that the Motion is appropriately b[r]ought under Rule 12(b)(6) and the general pleading requirements of Rule 8, Federal Rules of Civil Procedure, are the proper standard of review.”); *Euromin, Inc. v. Coastal Cargo Co., Inc.*, 1996 WL 109291 (E.D. La. Mar. 11, 1996) (“[T]he pleading requirements of Rule F(5) are not unlike those of Fed. R. Civ. Pro. 8(a), which requires a short plain statement of the claim sufficient to give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.”). Other cases have applied Rule 12(b)(6) and the general pleading requirements of Rule 8 in determining the sufficiency of such claims without addressing whether that standard was appropriately applied in such context. See, e.g., *In Re The Complaint of J.A.R. Barge Lines, L.P.*, 307 F.Supp.2d 668, 669–670 n. 1 (W.D. Penn. 2004); *In Re Triple Screw Marine Towing, Inc.*, 1994 WL 151101, at * 1–2 (E.D. La. Mar. 31, 1994).

reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* Thus, “only a complaint that states a plausible claim for relief survives a motion to dismiss.” *Id.* at 1950. When considering a motion to dismiss, the Court must accept all of the plaintiff’s allegations as true in determining whether a plaintiff has stated a claim for which relief could be granted. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

IV. ANALYSIS

The Supreme Court of Florida first recognized the tort of intentional infliction of emotional distress in 1985 and, in so doing, adopted section 46 of the Restatement (Second) of Torts (Am. Law Inst. 1965) to define the cause of action. *Metro. Life Ins. Co. v. McCarson*, 467 So.2d 277, 278–79 (Fla. 1985); see also *E. Airlines, Inc. v. King*, 557 So.2d 574, 575 (Fla. 1990) (“In *McCarson* we approved the adoption of section 46, Restatement (Second) of Torts”). Section 46 states that “[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.” Restatement (Second) of Torts § 46 (Am. Law Inst. 1965). Breaking that statement into its parts, courts have held that the elements of intentional infliction of emotional distress are (1) intentional or reckless conduct; (2) that is “outrageous” in that it is “beyond all bounds of decency” and “utterly intolerable in a civilized community;” (3) that causes the victim emotional distress; and, (4) the emotional distress is “severe.” *Winter Haven Hosp., Inc. v. Liles*, 148 So.3d 507, 515 (Fla. 2d DCA 2014); see also *Liberty Mut. Ins. Co. v. Steadman*, 968 So.2d 592, 594 (Fla. 2d DCA 2007). The cause of action for intentional infliction of emotional distress is “sparingly recognized by the Florida courts.” *Vamper v. United Parcel Service, Inc.*, 14 F. Supp. 2d 1301, 1306 (S.D. Fla. 1998). “A plaintiff alleging [intentional infliction of emotional distress] faces an extremely high burden, as Florida courts have repeatedly

found a wide spectrum of behavior insufficiently ‘outrageous.’” *Brown v. Royal Caribbean Cruises, Ltd.*, No. 16-cv-24209, 2017 WL 3773709 (S.D. Fla. Mar. 17, 2017).⁵

Claimant Sotis’ claim against Petitioner Horizon Dive alleges that Petitioner had “a duty and obligation to insure that [Claimant Sotis] was not vilified and/or demonized in the dive community by virtue of his participation in Stewart’s fatal dive in the capacity of safety diver.” Answer, Aff. Defenses, and Claim, ECF No. [68] at ¶ 40, and that he breached this duty by “st[anding] silent and in a calculated manner allow[ing] blame to be shifted to [Claimant Sotis],” causing reputational damage to Claimant Sotis and leading to the suspension of Claimant Sotis and his company’s credentials with the International Association of Nitrox and Technical Divers. Claimant Sotis alleges that “the Petitioner’s extreme and outrageous perpetuation of falsehoods and malicious inferences was intentional and done for the purpose of obliterating Claimant Sotis’ credibility as a leading rebreather instructor and destroying his hard-earned professional reputation in order to perpetuate suppositions that [Claimant Sotis] and Add Helium, as opposed to Vessel’s owners and operators, were culpable in the death of Robert Stewart.” Compl. ¶ 43. Sotis alleges that he has suffered “severe humiliation, mental anguish, and emotional and physical distress.” Compl. ¶ 46.

Given the type of situations that courts in this District have found failed to demonstrate the type of outrageous conduct required to sustain this claim, the allegations put forth by Claimant Sotis fall far short. For example, in *Rubio v. Lopez*, 445 Fed. App’x 170, 175 (11th Cir. 2011), the Eleventh Circuit found that the plaintiff had failed

⁵ Courts sitting in admiralty typically look to the standards set out in the Restatement (Second) of Torts § 46 (1965) as well as state law to evaluate claims for intentional infliction of emotional distress (“IIED”). See, e.g., *Wallis v. Princess Cruises, Inc.*, 306 F.3d 827, 841 (9th Cir. 2002) (citations omitted) (noting that since there is no maritime law concerning IIED claims, courts regularly employ the Restatement (Second) of Torts to evaluate IIED claims in federal maritime cases); *Stires v. Carnival Corp.*, 243 F.Supp.2d 1313, 1319 (M.D. Fla. 2002) (citing to both the Restatement (Second) of Torts and Florida state law in case asserting claim for IIED for tort that occurred on a cruise ship). Thus, whether the claim is considered under the court’s admiralty or supplemental jurisdiction, the elements of the claim and analysis are virtually identical.

to allege sufficient outrageous conduct where a Deputy Sheriff hobble-tied him on black asphalt pavement in the sun, resulting in second degree burns to his face and chest. In *Garcia v. Carnival Corp.*, 838 F. Supp. 2d 1334, 1339 (S.D. Fla. 2012), the plaintiff's intentional infliction of emotional distress claim was dismissed even though the defendant's crew members had committed an assault against her. The plaintiff alleged that she was approached by seven of the defendant's crew members, several of which grabbed her. At that point she had a panic attack which made it difficult for her to breath and caused her chest pains. She further alleged that the crew members kicked and punched her, threw her to the ground multiple times, handcuffed her in a harmful manner, dragged her across the floor while she was handcuffed, and then confined her to a cabin by placing a crew member immediately outside of her cabin door and preventing her from leaving her cabin until the following day. *Id.* at 1336. The court held that nothing alleged by the plaintiff was "so outrageous in character, and so extreme in degree," as to state an intentional infliction of emotional distress claim. *Id.* at 1339. Finally, in *Brown v. Royal Caribbean Cruises, Ltd.*, No. 16-cv-24209, 2017 WL 3773709 (S.D. Fla. Mar. 17, 2017), the court dismissed a claim for intentional infliction of emotional distress in which the plaintiff alleged that Royal Caribbean knew of the presence of Legionnaire's disease prior to the plaintiff's cruise and acted with deliberate and wanton recklessness in choosing not to advise passengers of the presence of the disease prior to the ship's departure from port. The plaintiff alleged that she suffered severe and extreme fright anxiety over potentially contracting Legionnaire's disease, as well as other mental and emotional harm, in addition to actually contracting Legionnaire's disease.

The court therein dismissed the claim, explaining that:

Even construing the facts in the light most favorable to the Plaintiff, Royal Caribbean's alleged conduct is not such that it "goes beyond all possible bounds of decency and is regarded as atrocious and utterly intolerable in a civilized community." See *Rubio*, 445 Fed. App'x at 175. While the Plaintiff's allegations describe truly objectionable behavior, the allegations

simply do not rise to the level of outrageousness required by the applicable case law.

Id. at *3.

Claimant Sotis' allegations as to Horizon Dive's conduct fall far short of what the Florida Supreme Court has said is required to establish such a claim. As noted by Claimant Stewart, Claimant Sotis nowhere alleges from where the Petitioner's duty to protect Claimant Sotis from "vilification" in the diving industry derives, and the undersigned is aware of no such duty that would apply herein. Furthermore, Claimant Sotis has alleged no specific words or actions directly attributable to Petitioner Horizon Dive. The most that Sotis alleges is that Horizon Dive stood silent as others placed blame on Sotis. This conduct simply does not rise to the level of outrageous conduct necessary to support his claim. Thus, Claimant Sotis has failed to state a claim for intentional infliction of emotional distress against Petitioner Horizon Dive and his claim is subject to dismissal.

V. CONCLUSION

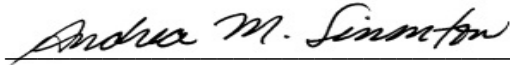
Therefore, in accordance with the above, it is hereby

RECOMMENDED that Claimant Sandra Stewart's Motion to Strike or Dismiss Claimant Peter Sotis' Claims for Intentional Infliction of Emotional Distress and Negligent Infliction of Emotional Distress, ECF No. [78] be GRANTED.

The parties will have fourteen calendar days from the date of this Report and Recommendation within which to file written objections for consideration by the United States District Judge to whom this case is assigned. Any response to objections must be filed within seven days from the date any objections are filed. Any request for an extension of these deadlines must be made within seven calendar days from the date of this Report and Recommendation. Pursuant to Eleventh Circuit Rule 3-1, and accompanying Internal Operating Procedure 3, the parties are hereby notified that failure

to object in accordance with 28 U.S.C. § 636(b)(1) waives the right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions.

DONE AND SUBMITTED in chambers in Miami, Florida, on November 28, 2018.

A handwritten signature in cursive script, reading "Andrea M. Simonton", written in black ink.

ANDREA M. SIMONTON
CHIEF UNITED STATES MAGISTRATE JUDGE

Copies furnished via CM/ECF to:
The Honorable James Lawrence King, United States District Judge
All counsel of record