

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
KEY WEST DIVISION

IN ADMIRALTY

CASE NO. 4:17-CV-10050-JLK

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

Petitioner,

vs.

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

Respondents/Claimants.

**CLAIMANT SANDRA STEWART'S REPLY IN SUPPORT OF MOTION FOR
PROTECTIVE ORDER CONCERNING NON-PARTY SUBPOENA TO SHARKWATER
PRODUCTIONS, INC.**

Claimant, Sandra Stewart, as Personal Representative of the Estate of Robert Stewart, ("STEWART") by and through undersigned counsel, hereby responds to Petitioner, HORIZON DIVE ADVENTURES, INC.'s ("HORIZON") Memorandum in Opposition to Claimant Sandra Stewart's Motion for Protective Order Concerning Non-Party Subpoena to Sharkwater Productions, Inc. [DE 70]. In support of her Motion for Protective Order [DE 61], STEWART states as follows:

Background

1. This limitation proceeding began on May 23, 2017, when HORIZON filed its Complaint for Exoneration From or Limitation of Liability pursuant to 46 U.S.C. Section 30501, et seq., which permits the petitioner to attempt to limit or seek exoneration from liability under certain circumstances. The action stems from the death of Robert Stewart on January 31, 2017.

2. Prior to HORIZON's filing of this action, STEWART filed her lawsuit in the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida, Case Number CACE-17-005915. HORIZON was a named defendant in the state court wrongful death suit, but was not the only named defendant. STEWART also named Peter Sotis, Claudia Sotis, and Add Helium as defendants in that action. That case remains pending in state court.

3. Peter Sotis, Claudia Sotis and Add Helium were involved in Mr. Stewart's prior dive training. None of those individuals or entities were formally affiliated with or had any contractual relationship with HORIZON. On the date in question, Peter Sotis and Claudia Sotis served as Mr. Stewart's safety divers. Claudia Sotis and Add Helium have not filed claims in this action and have not otherwise attempted to intervene or participate in this proceeding. Peter Sotis has recently attempted to file a claim against HORIZON in this case seeking contribution and damages for intentional infliction of emotional distress stemming from comments made about him by unknown individuals after Mr. Stewart's death¹

4. STEWART has moved for a protective order concerning HORIZON's proposed non-party subpoena to Sharkwater Productions, Inc., an entity that was involved in the creation of Mr. Stewart's *first* movie, Sharkwater [DE 61]. Upon information and belief, Sharkwater

¹ STEWART maintains that the Peter Sotis' amended claim fails to plead a claim and should be dismissed. Moreover, STEWART maintains that the amended claim was asserted solely to defeat STEWART's well-taken *Beiswenger* Motion to Stay Limitation Action and Stay Entry of Injunction Against State Court Action [DE 35], which sought to stay this action and proceed in STEWART's chosen forum because there was only one claimant in this action. Peter Sotis' amended claim was recently filed and STEWART will be moving to strike the amended claim for, *inter alia*, failure to state a claim.

Productions, Inc., had no role in the production or creation of Mr. Stewart's third film, Sharkwater: Extinction, which he was in the process of filming at the time of his death.

5. STEWART moves for a protective order on the basis that the discovery sought is not relevant to this action and that the requests are vastly overbroad, burdensome, and harassing in nature. In addition, the subpoena is not directed to the appropriate entity and HORIZON should be required to serve the subpoena properly.

Argument

Discovery Related to Survivors' Damages and Issues of Comparative Fault are Neither Relevant nor Discoverable

As set forth in STEWART's motion, damages and comparative fault are not discoverable in this action. In the alternative, should the Court find damages may be at issue in this case, the Court should stay any damages related discovery until it first rules on whether HORIZON is even entitled to limit its liability.

The law is clear and the *only* two things this Court can decide are (1) whether HORIZON's acts of negligence or conditions of unseaworthiness were a cause of Mr. Stewart's death and (2) whether HORIZON had knowledge or privity of those same acts of negligence or conditions of unseaworthiness. *See, e.g., Suzuki of Orange Park, Inc. v. Shubert*, 86 F.3d 1060 (11th Cir. 1996); *Beiswenger Enterprises Corp. v. Carletta*, 86 F.3d 1032 (11th Cir. 1996); *Farrell Lines, Inc. v. Jones*, 530 F.2d 7 (5th Cir. 1976).

HORIZON is unable to point to a single case holding that damages are at issue in a limitation proceeding. The only case HORIZON is able to cite that in any way addresses the discovery of damages in a limitation proceeding is *Petition of Trinidad Corp.*, 238 F. Supp. 928 (E.D. Va. 1965). However, *Petition of Trinidad Corp.* does not stand for the proposition that damages are discoverable or at issue in limitation, and in fact supports STEWART's contention

that damages should not be discoverable in this proceeding (at least not at this time).

In *Petition of Trinidad Corp.* the Court ruled that damages discovery should proceed *only as a matter of judicial economy*, and not because damages were at issue in limitation proceedings. *See id.* at 934-935. Here, however, judicial economy is not served by allowing damages discovery at this time. This is because not all defendants and potential defendants in the underlying state court case are involved in this action, and therefore, any damages discovery conducted in this proceeding will be duplicative and will be repeated once the stay of the state court case is lifted. *Petition of Trinidad Corp.* is distinguishable because in that case (unlike here) there was no pending action outside of the limitation proceeding where a claimant sought damages against defendants that were not parties to the limitation action (*i.e.*, the claimants had only asserted claims outside of limitation against the vessel owner, and not parties that were not represented in the limitation action). As a result, damages discovery could proceed among the parties without concern that their efforts would be duplicative. That is not the case here.

In further support of STEWART's contention that damages discovery should not proceed at this time, the Court in *Petition of Trinidad Corp.* confirmed that the Court presiding over a limitation action should first determine whether the vessel owner is entitled to limitation or exoneration from liability before reaching the question of damages. *See id.* at 934 ("It does appear that the orderly procedure in such instance is to initially determine the issue of fault and limitation, *and thereafter* consider the claims in the event liability is ascertained.") (emphasis added). In doing so, the Court recognized that if exoneration or limitation of liability is denied, it is up to the claimant to decide which forum to have its damages ruled upon:

Various authorities have interpreted the aforesaid two leading cases from the Supreme Court as affording an election to the claimants, if exoneration and limitation are denied, to pursue their claims to judgment in the admiralty court or pursue their rights under the Jones Act. *In re Wood's Petition*, 2 Cir., 230 F.2d

197; *Moore-McCormack Lines, Inc. v. Richardson*, 2 Cir., 295 F.2d 583; *Pershing Auto Rentals, Inc. v. Gaffney*, 5 Cir., 279 F.2d 546.

Id. at 933.² Accordingly, HORIZON should first be required to prove that its entitled to limit its liability before STEWART is required to undergo expensive and time consuming damages related discovery that will only be duplicated upon the conclusion of this limitation proceeding.

HORIZON's selected quotation from the hearing on STEWART's Motion to Stay Limitation Action and Stay Entry of Injunction Against State Court Action is taken out of context. As an initial matter, the scope of this action and the discoverability of damages was not at issue in that hearing. Those issues were not briefed or ruled upon. In fact, the Court has not yet issued its order Motion to Stay Limitation Action and Stay Entry of Injunction Against State Court Action. Notwithstanding the foregoing, the context of the hearing must be considered when considering the Court's brief remark. The hearing centered around whether Peter Sotis should be permitted to file an amended claim for intentional infliction of *emotional distress* and whether such claim could be properly pled. Taken in context, the full quote, which specifically references "emotional damage", simply indicates that the Court intended to determine the viability of any claim for emotional distress in admiralty if Peter Sotis is properly able to plead such a claim.

In summary, damages discovery should not proceed at this time. First, damages and comparative fault are not relevant in this proceeding, Second, judicial economy is not served by allowing damages discovery to proceed because it would need to be duplicated in state court when all defendants and potential defendants have an opportunity to particulate. Third, even if this court were to find that damages could be relevant in this proceeding, the Court should first rule on whether HORIZON is entitled to limitation of or exoneration from liability before

² See also *id.* ("If exoneration and limitation be denied, the claimants can, subject to the further ruling of this Court, pursue their common-law remedy under the Jones Act in New York and possibly Virginia.")

reaching this issue of damages and having the parties undergo damages related discovery that will need to be duplicated at a later date. If HORIZON is not entitled to limitation of or exoneration from liability (which STEWART is confident that it is not), STEWART will elect to pursue her remedy in the state court proceeding and not in this action.

The Requests Are Overbroad, Unduly Burdensome, Harassing and Not Calculated to Lead to the Discovery of Admissible Evidence

Contrary to HORIZON's contention, STEWART does not lack standing to challenge this proposed subpoena and has established that there is good cause to grant this motion for protective order.

Federal Rule of Civil Procedure 26(b)(1) provides the scope of discovery is limited to relevant evidence:

Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

In addition, a Court may issue protective orders to protect party's and non-parties from "annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c)(1). STEWART's moves to quash the subpoena and moves for protective order pursuant to Rule 26. *See Auto-Owners, Ins. Co. v. Southeast Floating Docks, Inc.*, 231 F.R.D. 426, 429 (M.D. Fla. 2005) (distinguishing between motion for protective order brought pursuant to Rule 45 and Rule 26).

In its response, HORIZON fails to provide any explanation as to why such expansive requests (*e.g.*, request number 5, which seeks all correspondence between the production company from Mr. Stewart's prior film and Mr. Stewart without any limitation as to subject matter) are necessary or how they are targeted towards discovery of evidence that may be

relevant to this case.³ HORIZON likewise fails to address why STEWART's objections as to, *inter alia*, relevance and burdensomeness are without merit. Instead, HORIZON only makes the blanket assertion that STEWART was not specific enough in her objections to warrant relief, but this is not the case. STEWART not only asserted her objections with specificity, but the objectionable nature of these requests are readily apparent on their face. Because HORIZON fails to address the objections to the specific requests, STEWART relies upon her original objections as asserted in her Motion for Protective Order Concerning Non-Party Subpoena to Sharkwater Productions, Inc. [DE 61].

The Subpoena is Not Directed to the Appropriate Entity

Warner Bros. Home Entertainment, Inc., is not authorized agent to receive service on behalf non-party Sharkwater Productions, Inc., and HORIZON does not argue that it is.

HORIZON argues that Warner Bros. Home Entertainment, Inc., is the appropriate entity to serve with this subpoena merely because "Warner Home Video" is listed on the website "www.sharkwater.com" as the regional entity to "contact for 'Sharkwater Regional Inquiries.'" [DE 70, at ¶ 10]. In doing so, HORIZON attempts to equate the listing of "Warner Home Video" on a website as the entity to direct "regional *inquiries*" with a designation that Warner Bros. Home Entertainment, Inc., has been authorized to accept service by Sharkwater Productions, Inc. (a foreign entity). This is not the case and HORIZON should be prohibited from attempting to serve this subpoena improperly.

Conclusion

This Court should grant STEWART's Motion for Protective Order Concerning Non-Party Subpoena to Sharkwater Productions, Inc.

³ It should be noted that the subpoena is issued pursuant to Rule 45, which requires the issuing attorney to "take reasonable steps to avoid imposing undue burden or expense on the person subject to the subpoena."

Statement Regarding Oral Argument

STEWART respectfully requests that the Court grant oral argument on this motion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 5, 2018, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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