Koror State Gov't v. M/V Pac. Falcon, 9 ROP 252 (Tr. Div. 2001)

KOROR STATE GOVERNMENT,
Plaintiff,

v.

M/V PACIFIC FALCON, RIGHT CARRIERS, S.A., KYOWA SHIPPING CO., THE BRITANNIA STEAM SHIP INSURANCE ASSOCIATION, SHOJI FUKUSHIMA, and, DOES I-X,
Defendants.

CIVIL ACTION NO. 01-55

Supreme Court, Trial Division
Republic of Palau

Decided: September 13, 2001

[1] **Civil Procedure:** Motion to Dismiss

The trial court's rulings on a motion to dismiss are interlocutory in nature and subject to revision.

[2] **Civil Procedure:** Service

To be effective, service must be made by delivering a copy of the summons and complaint to the defendant's place of abode or business, or by delivering it to an agent authorized to accept service on the defendant's behalf.

[3] **Civil Procedure:** Service

If a defendant was improperly served, the trial court lacks jurisdiction over that defendant whether or not the defendant had actual notice of the lawsuit.

[4] **Civil Procedure:** Service; Personal Jurisdiction

Service of process is an indispensable requisite of obtaining personal jurisdiction over a defendant.

[5] **Civil Procedure:** In Rem Jurisdiction

A letter of undertaking is sufficient to perfect *in rem* jurisdiction in the absence of a ship's arrest, even when a lawsuit was not pending, but was only threatened, when the letter was issued.

[6] **Civil Procedure:** In Rem Jurisdiction

It may be that the plaintiff must proceed to judgment against a vessel before it can seek

enforcement against its carrier as the issuer of the letter of undertaking.

[7] **Civil Procedure:** Service

A letter of undertaking that appoints a lawyer in the Republic to accept service of any proceeding combined with a letter requiring identification of counsel and counsel's identification of himself as party's counsel support the conclusion that the attorney was an agent authorized to receive service pursuant to Rule of Civil Procedure 4(d)(3).

LARRY W. MILLER, Associate Justice:

This action arises out of an incident last year in which the M/V Pacific Falcon allegedly ran aground on and damaged Koror State's reef. In addition to the Pacific Falcon, plaintiff Koror State Government has sued, according to the allegations of its complaint, its captain, Shoji Fukushima, its owner, Right Carriers, S.A., its operator, Kyowa Shipping Co., Ltd., and the Britannia Steam Ship Insurance Association Limited, of which Right Carriers is alleged to be a member.

[1] Before the Court are motions to ⊥253 dismiss filed by four of the defendants.[1] All four move under ROP Civ. Pro. R. 12(b)(5) for insufficiency of service of process; one moves additionally pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted.[2] The motions are granted in part and denied in part as discussed below.[3]

[2] The motions to dismiss by Captain Fukushima and Right Carriers, pursuant to Rule 12(b)(5) are granted. As to Captain Fukushima, service was made on Western Pacific Shipping Co. Given the unrebutted affidavit of Carolyn Nakamura that Western Pacific is not Captain Fukushima's place of abode or business, *see* ROP Civ. Pro. R. 4(d)(1), it is plain that service upon him was not sufficient.

As to Right Carriers, service was made on defendants' counsel, Kevin Kirk. Unlike Britannia, however, discussed below, there is no basis to contend – and plaintiff does not – that Mr. Kirk was authorized by Right Carriers to accept service on its behalf.

[3, 4] Plaintiff's only response to these motions is to argue that since both parties have actual notice of this action, it may proceed against them. The law is otherwise. *E.g.*, *Adams v. AlliedSignal Gen. Aviation Avionics*, 74 F.3d 882 (8th Cir. 1996) ("[I]f AlliedSignal, Inc., was improperly served, the district court lacked jurisdiction over that defendant whether or not it had

[1]The fifth, Kyowa, has already filed an answer to the complaint.

[2]Defendants' motion also claims that "[t]he Court lacks personal jurisdiction over [them]." The Court understands this assertion to flow from their arguments concerning service of process, and not as a separate argument – which does not appear in their brief – that, even with proper service, defendants are not subject to the jurisdiction of the Court.

[3]Defendants have requested oral argument of their motion. As the Court's rulings at this stage are interlocutory in nature and subject to revision, *see* ROP Civ. Pro. R. 54(b), the Court determined that it would be more expeditious to forego argument and to set down its views in writing, subject to further consideration or argument as either party sees fit to suggest.

actual notice of the lawsuit."). Although Palau has expanded the reach of its process, *see, e.g.*, *Kruger v. Dean Worldwide, Inc.*, 4 ROP Intrm. 282 (Tr. Div. 1994), it has not abandoned the notion that service of process is an indispensable requisite of obtaining personal jurisdiction over a defendant. *Compare* 14 PNC § 142 (defining the reach of Palau's long-arm jurisdiction) *with id.* § 143 (setting forth how service may be effected). If plaintiff wishes to proceed against these defendants, it must find a way to validly effect service upon them.

[5, 6] The motions by the Pacific Falcon and by Britannia are denied, on the other hand, at least insofar as they rely on insufficiency of service of process. As to the Pacific Falcon, the Court is persuaded that the May 31, 2000 letter of undertaking issued by Britannia provides a sufficient basis for plaintiff to pursue its claim against the vessel, even though the vessel was never seized nor any lawsuit commenced at the time of the incident now sued upon. There is ample authority for the proposition that a letter of undertaking "is sufficient to perfect in rem jurisdiction in the absence of the ship's arrest." *Chan v. Soc'y Expeditions, Inc.*, 123 F.3d 1287, 1294 n.4 (9th Cir. 1987); *see* T. Schoenbaun, Admiralty & Maritime Law (3d ed. 2001), § 19-3 at 1000-01 & n.22 ("a letter of undertaking on behalf of a vessel owner can perfect the *in rem* jurisdiction of the court, although the vessel is not actually seized"). Although defendants have argued that there must have ⊥254 been an action pending when the letter was issued, a leading treatise suggests that such letters have been considered effective – and should be – even when a lawsuit is only threatened:

> [A] claimant, in lieu of having process issued under his libel, may agree to let the vessel go free in return for a promise by the ship owner, his insurer or his bank that security will be posted (or judgment paid) up to specified amounts *if and when the threatened action is actually tried*. Such informal or extra-legal agreements save court costs and the Marshal's fees, avoid the annoyance of having the vessel even temporarily arrested and may well be cheaper than the usual surety bond.

G. Gilmore & C. Black, The Law of Admiralty (2d ed. 1975), § 9-89, at 800 (emphasis added). Defendants having "avoid[ed] . . . annoyance" by proffering the letter of undertaking to plaintiff, they should not now be heard to argue that plaintiff has no means to enforce it.[4]

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[4]Defendants' argument that the Pacific Falcon is not within the Court's jurisdiction, coupled with its argument that the letter of undertaking contemplates suit against Britannia or Right Carriers only after a judgment has been entered, raises the obvious conundrum of how plaintiff is to obtain a judgment without a defendant against which to proceed. *See Maritime Antares S.A. v. The Vessel Essi Camilla*, 633 F. Supp. 694, 696 (E.D. Va. 1986) (noting "the necessity of rendering a judgment against the ESSI CAMILLA, a named defendant, in order that the letter of undertaking be implemented"). Notwithstanding the conclusion below that Britannia is amenable to process now, it may well be that the usual practice in these situations is to proceed to judgment against the vessel, and only then to seek enforcement, if necessary, against the issuer of the letter of undertaking. The Court has come across at least one case in which Britannia issued the letter of undertaking, *see Cen. Hudson Gas & Elec. Corp. v. Empresa Naviera Santa S.A.*, 56 F.3d 359, 370 (2d Cir. 1995), and apparently honored it, *see id.* at 363, after a judgment was entered against the vessel. *See id.*; *see also Cen. Hudson Gas & Elec. Corp. v. M/V Lunamar II* , 797 F. Supp. 1244 (S.D.N.Y. 1992), *aff'd*, 993 F.2d 1534 (2d Cir. 1993). Proceeding in this fashion would obviate the need for plaintiff to fashion a claim against Britannia at this stage. *See* p. 255 *infra*.

[7] As for Britannia, the May 31, 2000 letter of undertaking, in which it "agree[d] to appoint lawyers in the Republic of Palau to accept service of any proceedings upon us," the letters requesting identification of its counsel, and the letter from Mr. Kirk identifying himself as that counsel, all support a conclusion that Mr. Kirk was an "agent authorized by appointment . . . to receive service of process" on its behalf. *See* ROP Civ. Pro. R. 4(d)(3).

It is argued that under the May 31, 2000 letter, Mr. Kirk was "only authorized to accept service of process upon . . . Britannia . . . and then only if proceedings to enforce a settlement with or judgment of the Palau Supreme Court against the 'M/V Pacific Falcon' or its owner have been instituted." The Court agrees, as it has already found, that the May 31, 2000 letter and subsequent correspondence appoint Mr. Kirk to accept process only on behalf of Britannia. But the scope of that appointment – at least on the ⊥255 face of the document – is not so limited.[5] While arguably the language of the undertaking restricts plaintiff from suing the owners of the Pacific Falcon except following a judgment or settlement[6] there is no such limitation apparent in Britannia's consent to jurisdiction and its appointment of counsel "to accept service of any proceedings."

There is a second aspect to Britannia's motion, however. It argues that the complaint does not state a claim against it. Plaintiff appears not to contest this point, noting that it intended by further motion to seek leave to amend its complaint. Rather than wait for that motion, which has not yet been filed, the Court will simply grant Britannia's motion to dismiss pursuant to Rule 12(b)(6), but give plaintiff leave to replead. So Ordered.

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[5]Although the language of the undertaking seems clear enough, the Court leaves open the possibility that Britannia could adduce extrinsic evidence, whether of the parties' intentions or of industry practice, *see* n.4 *supra*, supporting a narrower interpretation.

[6]Given the dismissal of the claim against Right Carriers, that issue is not before the Court.