UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

WAVERLY WALTON, SR., individually and as successor in interest to FRED WALTON, deceased,

Plaintiff,

v.

CHANNEL STAR EXCURSIONS, INC. AND BRIAN GERHART, individually and as principal of CHANNEL STAR EXCURSIONS and DOES One through One Hundred, Inclusive,

Defendants.

2:05-cv-1737-MCE-PAN

ORDER

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In this action, the children and heirs of Plaintiff Waverly Walton, Sr. ("Heirs") have moved the Court to substitute themselves as party plaintiffs in place of their now deceased father, Mr. Walton ("Plaintiff").[1] Fed. R. Civ. Proc. 25(a).

[1]Because oral argument will not be of material assistance, the Court orders this matter submitted on the briefs. E.D. Cal. (continued...)

AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO

Channel Star Excursions, Inc. and Brian Gerhart ("Defendants") oppose the Motion to Substitute on the following grounds: 1) this cause of action[2] does not survive the death of the original Plaintiff, Waverly Walton; 2) the Heirs are not the proper parties for substitution; and 3) the evidence on the record failed to properly identify the Heirs. For the reasons set forth below, finds substitution to be proper and, hereby, GRANTS the Motion to Substitute.

BACKGROUND

On or about August 27, 2004, Fred Walton ("Decedent") perished after falling into the Sacramento River while attempting to board the river boat Matthew McKinley by way of a gangplank affixed between the boat and the dock. Defendants owned and operated the Matthew McKinley on the date of the accident and were responsible for the safe passage of patrons from the dock to the boat. Nearly a year after the accident, the Decedent's father, Plaintiff Waverly Walton, filed the present action seeking compensation for the Decedent's wrongful death. Nine days after filing this action, Plaintiff died.

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[1](...continued)
Local Rule 78-230(h).

[2]The Court has construed the underlying Complaint as having stated claims for wrongful death and survival arising from the death of Plaintiff's son, Fred Walton. The Complaint provides that Waverly Walton, Senior, is suing Defendants in "his individual capacity" and as "the successor in interest" of his son, Fred Walton. Pl.'s Compl. ("Complaint"), filed Aug. 26, 2005, para. 1.

On October 20, 2006, Defendants filed a Notice of Suggestion of Death Upon the Record pursuant to Federal Rule of Civil Procedure 25(a)(2).[3] Presently before the Court is the Heir's Motion to Substitute parties pursuant to Rule 25(a).

STANDARD

1. Subject Matter Jurisdiction

Federal courts are presumptively without jurisdiction over civil actions, and the burden of establishing the contrary rests upon the party asserting jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994). Lack of subject matter jurisdiction is never waived and may be raised by either party or the court at any time. *Attorneys Trust v. Videotape Computer Prods., Inc.*, 93 F.3d. 593, 594-95 (9th Cir. 1996). Lack of subject matter jurisdiction may be raised by the district court *sua sponte*: "Nothing is to be more jealously guarded by a court than its jurisdiction." *In re Mooney*, 841 F.2d. 1003, 1006 (9th Cir. 1988).

If the motion constitutes a facial attack, the court must consider the factual allegations of the complaint to be true. *Williamson v. Tucker*, 645 F.2d 404, 412 (5th Cir. 1981).

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[3]All references to the "Rules" hereinafter shall mean the Federal Rules of Civil Procedure.

If the motion constitutes a factual attack, however, "no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." *Thornhill Publ'g Co. v. Gen. Tel. & Elect. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979).

2. Federal Rule of Civil Procedure 25

Rule 25(a)(1) provides that if "a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties." Fed. R. Civ. P. 25(a)(1). Therefore, before a party can substitute a new party pursuant to Rule 25(a)(1), the Court must establish that the substantive law controlling the suit permits survival of the cause of action. If the cause of action does not survive the death of a party, there can be no substitution.

ANALYSIS

I. Admiralty Jurisdiction.

Plaintiff bases this Court's jurisdiction in admiralty pursuant to 46 U.S.C. § 740 (current version at 46 U.S.C.S. § 30101 (2006)). Although Defendants did not raise the question of our jurisdiction, we have raised it, as we must. *WMX Techs. v. Miller*, 104 F.3d 1133, 1135 (9th Cir. 1997); (citing *Mackay v. Pfeil*, 827 F.2d 540, 542-43 (9th Cir. 1987).

The United States Supreme Court requires a party seeking to invoke admiralty jurisdiction pursuant to 28 U.S.C. § 1333(1) over a tort claim to satisfy conditions both of location and connection with maritime activity ("*Grubart Test*"). *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995). In order to satisfy the location test, a party must establish that the tort occurred on navigable water or that a vessel on navigable water caused the injury if the party suffered the injury on land. *Id.* The connection test raises two issues. First, a court must determine that the incident giving rise to the action has a potentially disruptive impact on maritime commerce. *Id.; Sisson v. Ruby*, 497 U.S. 358, 362 (1990) (jurisdiction over tort cases depends on whether the incident has "a potentially disruptive impact on maritime commerce"). Second, a court must determine that the general character of the activity giving rise to the incident bears a substantial relationship to traditional maritime activity. *Id.*

A. Location test.

Rivers are public navigable waterways if they are used or suspected of being used in their ordinary condition as highways for commerce over which trade and travel can be conducted. 46 U.S.C. § 30101. The Ninth Circuit holds that the location or "situs" test is satisfied when the injury occurs on or over navigable waters. *Taghadomi v. United States*, 401 F.3d. 1080 (9th Cir. 2005).

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Fred Walton suffered his injury in the Sacramento River, a navigable waterway, where he drowned. Therefore, the location test is satisfied in this case.

B. Connection test.

1. Potential Disruption of Maritime Commerce

The interest giving rise to maritime jurisdiction is the protection of maritime commerce. *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 675 (1982). This interest is protected when "all operators of vessels on navigable waters are subject to uniform rules of conduct." *Id.* This prong of the test does not require that the activity be commercial. *Id.*

The United States Supreme Court and the Ninth Circuit have addressed the potential disruption of maritime commerce in various situations involving injury on or in navigable waters. The Supreme Court has held that a fire aboard a ship that damaged a dock and could have damaged nearby ships was sufficient to satisfy this condition under the *Grubart Test* because damage to ships and docks could disrupt maritime shipping and navigation. *Sisson v. Ruby*, 497 U.S. 358, 362 (1990). Conversely, the Ninth Circuit has held that admiralty jurisdiction was not satisfied when woman fell from a defective ladder and was injured because there could have been no affect to any person or thing outside the ship, and therefore could not affect maritime commerce. *Peru v. USS Mo. Mem'l Ass'n*, 2006 U.S. App. LEXIS 28859 (9th Cir. 2006).

Similarly, the Ninth Circuit has held that an internal carbon monoxide incident occurring within a ship could not disrupt maritime commerce. *H2O Houseboat Vacations Inc. v. Hernandez*, 103 F.3d 914, 916-17 (9th Cir. 1996). The Ninth Circuit has held, however, that a United States Coast Guard rescue operation to recover victims thrown from a kayak by rough seas could disrupt maritime commerce. *Taghadomi v. United States*, 401 F.3d 1080, 1086 (9th Cir. 2005).

This Court must evaluate the actions of the alleged tortfeasor, not the injured party, in order to properly assess the potential for disruption of maritime commerce. *Taghadomi*, 401 F.3d. 1080 at 1087. The general activity in this case is the organization and the carrying out of a cruise for entertainment purposes. More precisely, the activity included providing safe passage from to and from the ship via a gangplank, and the performance of rescue efforts conducted upon the Decedent's falling into the Sacramento River.

To the extent this case encompasses the traverse of passengers to and from a boat, that certainly impacts maritime commerce as it is a central part of maritime activity. Similarly, the transport of passengers along a navigable waterway whether for entertainment purposes or not, likewise impacts maritime commerce. Furthermore, faulty rescue efforts conducted to retrieve a drowning passenger has the potential to disrupt maritime commerce. *Id.* Accordingly, the Court finds this prong of the connection test is satisfied.

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2. Traditional maritime activity.

According to the Ninth Circuit, as long as a potential tortfeasor "was engaged in traditional maritime activity [,] the allegedly wrongful activity will 'involve' such traditional maritime activity" and satisfy this condition. *Id.* Plaintiff originally claimed Defendants conducted the cruise negligently and are the proximate cause of the Decedent's passing. The alleged wrongful activity involves the securing of a gangway and the transport of patrons along a navigable waterway, which is clearly a traditional maritime activity. Therefore, the Court finds this condition easily met.

Given that the Court has found both location and maritime activity under the facts presented by this case, the Court also finds that federal subject matter jurisdiction in this matter exists.

II. Survivability and Substitution of Parties

Rule 25(a)(1) states that if "a party dies and the claims [are] not thereby extinguished, the court may order substitution of the proper parties." Fed. R. Civ. P. 25(a)(1). The foregoing Rule raises three issues in the present action. The first is whether a survival action under maritime law survives the death of the Plaintiff, Waverly Walton. The second is whether the action for wrongful death under maritime law survives the death of the Plaintiff.

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And finally, the third is whether the parties to be substituted in the survival and wrongful death actions are proper. Each issue shall be taken in turn below.

A. Survivability of Survival Claim.

The Defendants argue that the survival claim in this action cannot proceed as it does not survive the death of Plaintiff Waverly Walton. In order to assess the merits of Defendants' position, the Court must first determine whether maritime or state law gives rise to Plaintiff's survival claim and whether, under that body of law, this claim can survive the Plaintiff's death.

The Ninth Circuit recognized a general maritime survival action in *Evich v. Connelly*, 759 F.2d 1432, 1434 (9th Cir. 1985). Although the United States Supreme Court overruled that case, the Ninth Circuit nonetheless has held that *Evich*, for the purpose of bringing a survival action, remains good law. *Miles*, 498 U.S. 19 (1990); *Sutton*, 26 F.3d 903. Although it is clear a maritime action under maritime law does not survive the death of the Plaintiff, the Court has held that Congress and state statutes, where applicable, preserve a cause of action that would not otherwise survive. 45 U.S.C. § 59; *Gillespie*, 379 U.S. 148; *Miles*, 498 U.S. at 33. The incident giving rise to this cause of action occurred in the territorial waters of California. Therefore, this Court must look to California law to determine the survivability of the underlying survival claim.

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The California survival statute states that a "cause of action for or against a person is not lost by reason of the person's death, but survives ..." Cal. Code Civ. Proc. § 377.20. Consequently, this Court holds that the present survival action on behalf of the Decedent and brought by the Plaintiff survives and may be maintained by a proper party. 45 U.S.C. § 59; *Gillespie*, 379 U.S. 148; *Miles*, 498 U.S. 19 at 33; *Sutton*, 26 F.3d 903 at 919; Cal. Code Civ. Proc. § 377.20.

B. Survivability of Wrongful Death Claim

Like the foregoing argument, Defendants contend Plaintiff's wrongful death claim may not proceed as it does not survive. Again, the Court must first ascertain the body of law, maritime or state, that governs this action to determine whether this wrongful death claim survives the death of the Plaintiff.

With respect to wrongful death, the Supreme Court has held that there is no general provision under maritime law, however, "admiralty accommodation of state remedial statutes ... is constitutionally permissible." *Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811, 815 (2001) (issue of state remedial measure not addressed because petitioner sought remedies only under federal law). The Supreme Court has likewise held that state remedies have been applied in accident cases maritime wrongful death cases in which no federal statute specifies the appropriate relief and the decedent was not engaged in maritime trade. *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 202 (1996).

The Death on the High Seas Act ("Jones Act") does not apply to accidents occurring on rivers, therefore federal law does not preempt in the present case and state law, in fact, does apply. 46 U.S.C. § 688 (current version 46 U.S.C. § 30104); Cal. Code Civ. Proc. § 377.61.

While Plaintiff's counsel incorrectly identified California Code of Civil Procedure Section 377 as authority for wrongful death actions under California law, it is Section 376 that governs the issue. Specifically, Section 376 authorizes parents to assert a cause of action for wrongful death for the wrongful act or negligence causing the death of the parent's child provided the child is a minor. In light of the Court's conclusion that California law should govern this question, this Court necessarily finds that the California survival statute is controlling in determining whether the present action survives the death of Plaintiff, Waverly Walton. The statute provides that a "cause of action for or against a person is not lost by reason of the person's death, but survives ..." Cal. Code Civ. Proc. § 377.20. Consequently, it is clear that the present cause of action survives the death of Plaintiff Waverly Walton and can be maintained by a proper party.

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C. Proper Substitution

Defendants contend that the Heirs are not proper parties for substitution under Rule 25 given Plaintiff's counsel's failure to assure the Court they are, in fact, Plaintiff's heirs. In response to the foregoing, Plaintiff's counsel provided the Court with a Declaration asserting that, in fact, the Heirs are the beneficiaries to Plaintiff's estate.

California law states that, "'decedent's successor in interest' means the beneficiary of the decedent's estate or other successor in interest who succeeds to a cause of action ... that is the subject of a cause of action." Cal. Code Civ. Proc. § 377.11. In Plaintiff's Reply and Declaration, Plaintiff's assert that the children of Waverly Walton, (Waverly, Iris, Sharon, Wanda, Jerry, and Tammy) are the successors in interest to Waverly Walton and beneficiaries to his estate. *See* Doc. No. 34, January 4, 2007. Furthermore, the Heirs assert that no other person has a superior right to commence the action or proceeding or to be substituted for Plaintiff in the pending action or proceeding. *Id.*

Because the present action survives the death of Plaintiff Waverly Walton, and because the parties are proper parties to be substituted, the Court finds substitution of the Heirs in place of Plaintiff to be proper. Fed. Rule Civ. P. 25(a)(1); *Gillespie*, 379 U.S. 148; *Miles*, 498 U.S. 19 at 33; *Sutton*, 26 F.3d 903 at 919; Cal. Code Civ. Proc. § 377.20; Cal. Code Civ. Proc. § 376.

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III. Identity of parties to be substituted

Defendant's contend that the Heirs are not properly identified in the record and, therefore, may not be substituted. The Court is satisfied that the Declaration and Plaintiff's Reply establish that Waverly Walton is deceased, and that his children, (Waverly, Iris, Sharon, Wanda, Jerry, and Tammy) are the beneficiaries of his estate.

CONCLUSION

The Court finds it may properly maintain jurisdiction over this action as maritime jurisdiction exists. In addition, the Court finds that both claims survive the death of the original Plaintiff, Waverly Walton. The Court further finds that the Heirs have properly established themselves as successors in interest to Waverly Walton's estate. Therefore, the Heirs are hereby substituted as Plaintiffs in this proceeding.

IT IS SO ORDERED.

Dated: March 8, 2007

MORRISON C. ENGLAND, JR.
UNITED STATES DISTRICT JUDGE