



HIBERNIA NATIONAL BANK v. M/V MR. NIC

2005 | Cited 0 times | E.D. Louisiana. | May 6, 2005

ORDER AND REASONS

Before the Court is the Motion for Summary Judgment filed by Intervenor Superior Shipyard & Fabrication, Inc. (Rec. Doc. No.37). For the reasons that follow, Intervenor's motion is GRANTED IN PART and DENIED IN PART.

I. BACKGROUND

On May 14, 2004, Hibernia National Bank ("Hibernia") filed this in rem action against the M/V MR. NIC, a documented tugboat owned by N.J. Collins, Inc., a Louisiana corporation. See generally Verified Complaint (Rec. Doc. No. 1). In its Verified Complaint, Hibernia alleged that, on September 21, 1998, in order to secure payment of any and all indebtedness, N.J. Collins granted a preferred ship mortgage in favor of Hibernia in the maximum amount of \$50 million, including, among other items, principal, interest, costs, expenses and attorney's fees. Id. at ¶ 7. On September 28, 1998, the U.S. Coast Guard recorded the aforementioned preferred ship mortgage. Id. at ¶ 8. Hibernia further alleged that on January 24, 2003, in conjunction with various financing agreements extending back over a period of years between the Bank and N.J. Collins, N.J. Collins signed a promissory note in the amount of \$422,306.22. Id. at ¶ 6. According to Hibernia, N.J. Collins later failed to make timely payments of the amounts due on the promissory note, and thus was in default under the terms of the preferred ship mortgage. Id. at ¶ 10. Hibernia alleged that it therefore has a preferred maritime lien against the defendant tugboat in an amount exceeding \$418,145.13 in principal and interest. Id. at ¶ 11. In its Complaint, Hibernia prayed for the seizure of the M/V MR. NIC; that Hibernia's maritime lien be recognized and enforced with preference and priority over all other claims; that there be judgment in favor of Hibernia with interest, attorney's fees, costs and all other items proved; and that the M/V MR. NIC be sold free and clear of all liens and encumbrance.

On or about June 7, 2004, the M/V MR. NIC was arrested by the U.S. Marshal pursuant to the Warrant of Arrest authorized by this Court. (Rec. Doc. Nos. 2, 4 and 8). The vessel thereafter remained in the custody of Bollinger Larose, L.L.C., whom the Court had earlier appointed Substitute Custodian. (Rec. Doc. Nos. 3 and 5).

On June 7, 2004, Theriot, Duet & Theriot, Inc. ("Theriot"), filed a Verified Complaint in Intervention against the M/V MR. NIC, in which Theriot sought to have an alleged maritime lien recognized and enforced against the vessel. See generally Verified Complaint in Intervention (Rec. Doc. No. 7). In support of its claim, Theriot alleged that, on or about October 26, 1999 through November of 1999, it



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loaned or advanced to N.J. Collins funds used to satisfy the payment of insurance premiums for coverage on the M/V MR. NIC. Id. at ¶ V. Theriot further alleged that, despite repeated demands, it had not received full payment of those funds advanced, and \$27,997.52 plus interest and costs remained due. Id. at ¶ VL. On July 27, 2004, Superior Shipyard & Fabrication, Inc. ("Superior") filed its Intervention, in which Superior prayed that the Court enter judgment recognizing and enforcing its maritime lien against the M/V MR. NIC. See generally Verified Intervention (Rec. Doc. No. 11). Superior's lien allegedly arises out of Superior's performance of work on the M/V MR. NIC in July of 1998 through September of 1998. Id. at ¶ V. Because N.J. Collins did not fully pay the invoice for the aforementioned work, on December 10, 1998, N.J. Collins executed a \$200,000 Preferred Ship Mortgage in favor of Superior. Id. at ¶ VI. On December 15, 1998, that mortgage was duly recorded by the Coast Guard's National Vessel Documentation Center. Id. Based on the foregoing, Superior alleges that it has a preferred maritime lien in an amount exceeding \$200,000 in principal, interest, reasonable attorney's fees, expenses and other damages. Id. at ¶ VII.

Thereafter, on August 20, 2004, Hibernia moved the Court for the Interlocutory Sale of the M/V MR. NIC.¹ (Rec. Doc. No. 13). On August 26, 2004, the Court ordered a September 9, 2004 sale of the vessel at public auction conducted by the U.S. Marshal, and further ordered that a default judgment be entered against all potential claimants who had not intervened in the action, with the exception of the Internal Revenue Service ("IRS"). See id. A dispute subsequently arose over the IRS's lien: whether the lien could survive the Marshal's "free and clear" sale, and whether the notice provided the IRS was sufficient. The sale of the vessel was continued pending resolution of those issues. On November 3, 2004, the Court issued a Minute Entry ordering that the sale of the vessel would be free and clear of all liens and encumbrances pursuant to 46 U.S.C. § 31326, provided that Hibernia give notice to the Secretary of the IRS, in accordance with regulations prescribed by the Secretary, at any time prior to the sale of the vessel. (Rec. Doc. No. 28).

On December 9, 2004, following due publication of the Notice of the Sale, the U.S. Marshal held the public auction sale of the M/V MR. NIC. See Proces Verbal by U.S. Marshal (Rec. Doc. No. 30). The auction yielded a high bid of \$495,000.00. See id. On December 22, 2004, the sale was confirmed by order of this Court. (Rec. Doc. No. 33).

In the meantime, Hibernia had filed a Motion for Partial Summary Judgment and Partial Distribution of Sale Proceeds. (Rec. Doc. No. 32). Specifically, Hibernia moved the Court for a partial summary judgment declaring Hibernia to be the first-priority claimant of the proceeds of the sale of the M/V MR. NIC, after payment of commissions and expenses to the U.S. Marshal, and ordering a partial distribution of the sale proceeds in the amount of \$436,678.02, said sum representing the total outstanding principal, a late charge, and interest as of the date of the Marshal's sale. On January 25, 2005, the motion was granted as unopposed. (Rec. Doc. No. 35). On February 9, 2005, the Court directed the Clerk of Court to draw a check on the funds deposited in the Registry in the Court in the amount of \$436,678.02 payable to the order of Hibernia. (Rec. Doc. No. 36). After the latter disbursement was made on February 17, 2005, \$48,321.98 remained in the Registry of the Court.



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On March 29, 2005, Superior filed the motion for summary judgment now before the Court. In its motion, Superior requests a judgment in its favor enforcing its maritime lien against the proceeds of the sale the M/V MR. NIC, and ordering that the remaining funds be disbursed to Superior in partial satisfaction of its lien.

Plaintiff Hibernia joins in Superior's motion insofar as Superior suggests to the Court that it is now appropriate to enter an order distributing the remaining funds, and to enter a final judgment dismissing the action. On the other hand, Hibernia opposes Superior's motion to the extent that Superior seeks an order disbursing the remaining funds to Superior in partial satisfaction of its lien. Hibernia reasons that its earlier motion only sought partial distribution of funds for the outstanding principal and interest accrued through the date of the auction, and that it is still entitled to a judgment awarding it (i) custodia legis expenses in the amount of \$18,240.66, (ii) interest from the date of the sale of the vessel through the date the funds were actually released to Hibernia in the amount of \$7,282.91, and (iii) reasonable attorneys fees and costs in the amount of \$35,426.56.

The two other parties to this action, the IRS and Theriot, have filed responses to Superior's motion. The IRS does not dispute that Superior's lien is maritime in nature and therefore superior in rank to the federal tax lien. Theriot also has concluded that its claim is inferior to the liens asserted by both Superior and Hibernia, and that it could recover only if the proceeds of the sale exceeded the claims of Hibernia and Superior. II. LAW AND ANALYSIS

A. Summary Judgment Standard

"Summary judgment is proper `if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" Kee v. City of Rowlett, Texas, 247 F.3d 206, 210 (5th Cir.), (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) (quoting Fed.R.Civ.P.56(c))), cert. denied, 122 S. Ct. 210 (2001). "The moving party bears the burden of showing . . . that there is an absence of evidence to support the nonmoving party's case." Id. at 210. If the moving party meets this burden, "the nonmovant must go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial." Id. "A dispute over a material fact is genuine if the evidence is such that a jury reasonably could return a verdict for the nonmoving party." Id. (internal quotations omitted). "The substantive law determines which facts are material." Id. at 211.

B. The Competing Maritime Liens

The Ship Mortgage Act, 46 U.S.C. § 31301, et seq., governs the priority of claims. Particularly, under 46 U.S.C. § 31326, when a vessel is sold at a judicial sale, all claims against the vessel are terminated and subsequently attach to the proceeds of the sale. Competing maritime liens are ranked according to class and top-ranked claims are paid out first. Cargill, Inc. v. M/TPACIFIC DAWN, 876 F.Supp. 508, 510 (S.D.N.Y. 1995). The classes in rank of priority are as follows: 1. Expenses of justice during



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custodia legis;

2. Seaman's liens;

3. Salvage and general average liens;

4. Tort liens, including personal injuries;

5. Preferred mortgage liens (U.S. Flag Vessels);

6. Liens for necessities under the Maritime Lien Act of 1920; 7. State-created liens of a maritime nature; 8. Maritime liens for penalties and forfeitures; 9. Perfected non-maritime liens, including tax liens; 10. Attaching liens in causes of action within the admiralty and maritime jurisdiction (foreign attachment); and 11. Maritime liens in bankruptcy. *Id.* at 510-511, n. 2 (citations omitted).

In the instant matter, both Hibernia and Superior assert a "preferred mortgage" against the M/V MR. NIC. A preferred mortgage is one that includes the hull of the vessel, is filed in substantial compliance with 46 U.S.C. § 31321, and covers a documented vessel. See 46 U.S.C. § 31322(a). Under section 31326, a preferred mortgage lien has priority over all other claims against the vessel, except that for expenses and fees allowed by the court, costs imposed by the court and preferred maritime liens.

It is not disputed by the parties that Hibernia has a valid preferred mortgage against the M/V MR. NIC. Nor is it disputed that Superior has a valid preferred mortgage against the tugboat. Indeed, the record supports the conclusion that both Hibernia and Superior have properly executed mortgages against the M/V MR. NIC, securing the indebtedness owed each entity by the debtor, N.J. Collins. See Hibernia's Mot. for Partial Summ. J., Aff. of Stephen F. Damore, Ex. "A" (Preferred Ship Mortgage); see also Superior's Mot. for Summ. J., Aff. of Jennifer R. Duet, Ex. "A" (Marine Collateral Mortgage). The record further demonstrates that Hibernia's mortgage was duly recorded on September 28, 1998, at 7:19 a.m., see Damore Aff., Ex. "A", and that Superior's mortgage was duly recorded on December 15, 1998, at 9:35 a.m. See Duet Aff., Ex. "A", p. 8. Based on the foregoing, Hibernia's preferred mortgage ranks ahead of Superior's mortgage. See *Westinghouse Credit Corp. v. O/S Dorothy Claire*, 732 F.Supp. 59, 62 (E.D.Tex. 1989) (stating that the ranking between competing preferred mortgages is determined by the earliest filing of the mortgage with the Coast Guard). Indeed, in granting Hibernia's motion for partial summary judgment, this Court has already ruled that, with the exception of certain costs and expenses associated with the sale, Hibernia is the first priority claimant to the proceeds of the sale by virtue of its earlier recorded preferred mortgage.

Following Hibernia and Superior in the priority line are (i) Theriot, who has asserted a maritime lien for advances of funds made to N.J. Collins in October and November of 1999 used to satisfy the payment of insurance coverage premiums on the tugboat, and which remain unpaid, and (ii) the IRS, who has a federal tax lien against the tugboat. Based on the dearth of evidence presented to the Court



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with respect to Theriot's advances and the federal tax lien, the Court finds that it cannot properly determine the exact rank of these two claims. Stated otherwise, the Court finds that there exists no genuine issue of material fact (and the parties do not dispute) that these two claims rank behind the preferred mortgages of Hibernia and Superior. See 46 U.S.C. § 31326 (with few exceptions, a preferred mortgage lien has priority over all other claims against the vessel). See also *United States v. Jane B. Corp.*, 167 F.Supp. 352, 356 (D.Mass. 1958) ("[A] tax lien is given no priority. . . . Hence, it is not entitled to priority over a subsequently recorded ship mortgage"). The Court, however, is unable to determine the relative position of the two claims, i.e., whether Theriot is a higher priority claimant than the IRS, or vice versa.² Moreover, because the combined claims of Hibernia and Superior far exceed the proceeds of the sale of the M/V MR. NIC, the Court declines to order further briefing on this issue.

Having determined the general priorities of the claims at issue here, the final issue which must be resolved before the remainder of the proceeds can be distributed is whether Hibernia's preferred mortgage was completely satisfied by the partial distribution of funds. In its motion for summary judgment, Superior contends that Hibernia's mortgage has been completely satisfied. In response, Hibernia argues that the earlier distribution encompassed only the outstanding principal and interest accrued as of the date of the Marshal's sale. According to Hibernia, before any payment can be made to any other claimant, it must be paid the expenses incurred while the vessel was in custodia legis, the attorney's fees and costs due under the mortgage, and the interest which accrued from the date of the sale to the date of the initial partial distribution.

A review of the record and the applicable law compels the conclusion that Superior is not entitled to summary judgment ordering a distribution of the remaining proceeds in its favor. Rather, because the items sought by Hibernia rank ahead of Superior's lien (as well as Theriot's claim and the federal tax lien), Hibernia is entitled to the funds that remain in the Registry of the Court.

Specifically, the Court finds as a matter of law that the custodia legis expenses incurred by Hibernia have the highest priority of all the claims, including the two preferred ship mortgages. See 46 U.S.C. § 31326(b)(1) (highest priority in distribution goes for "expenses and fees allowed by the court"). In reaching this conclusion, the Court finds that those expenses are properly classified as "expenses of Justice," which (i) were authorized by this Court, (ii) incurred for the preservation and maintenance of the M/V MR. NIC, and (iii) inured to the benefit of all the parties. Moreover, the mortgage in favor of Hibernia secures all out-of-pocket costs of Hibernia specifically for insurance and also in connection with the arrest, seizure and custody of the vessel and for such other purposes "as Lender may deem necessary and proper within Lender's sole discretion, to cure and rectify any actions or inactions on Guarantor's part. . . ." See Hibernia Mot. for Partial Summ. J., Damore Aff., Ex. "A", p. 3, "Additional Advances for Specific Purposes." Hibernia is therefore entitled to an award of \$18,240.66, which represents the full amount of those expenses. See Damore Aff., ¶ 6 and Ex. "E". No party has filed any objection to that amount.

Hibernia is also entitled to an award of \$7,282.91, which represents the interest which accrued on the



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full principal between December 9, 2004 (the date of the action sale) and February 17, 2004 (the date that the partial distribution was made to Hibernia).³ See, e.g., *Parcel Tankers, Inc. v. MIT Stolt-Louisiana Pardo*, 787 F.Supp. 614, 623-24 (E.D.La. 1992), *aff'd*, *Banco de Credito Indus. v. Tessorria General*, 990 F.2d 827 (5th Cir. 1993). No party has filed any objection to that amount.

Finally, the Court finds that Hibernia, as the first preferred mortgagee, is entitled to an award of reasonable attorneys' fees out of the remaining proceeds from the sale of the M/V MR. NIC. See *Hibernia Mot. for Partial Summ. J., Damore Aff., Ex. "A"*, p. 6, "Miscellaneous Provisions — Attorneys' Fees; Expenses"; *Ex. "C"*, p. 1 "Attorneys' Fees, Expenses". The inclusion of the mortgagee's attorney's fees as an item under the lien of the mortgage is well-established. See *The JOHN JAY*, 15 F.Supp. 937 (E.D.Pa. 1936); *The HOME*, 65 F.Supp. 94 (W.D.Wash. 1946); *Nova Univ. of Advanced Tech., Inc. v. M/V GYPSY*, 331 F.Supp. 721 (S.D.Fla. 1971). Counsel for Hibernia has submitted a summary of fees and expenses totaling \$35,426.56 from April 12, 2004 through February 16, 2005. See *Hibernia's Opp'n to Superior Mot. for Summ. J., Ex. 1*; see also *Damore Aff., Ex. "F"*. Having reviewed the summary of attorney's fees and expenses, the Court is of the opinion that the amounts sought are fair and reasonable. In addition, the record reflects that no party has traversed the fees and costs submitted by Hibernia. Accordingly, the Court finds that Hibernia is entitled to an award of attorney's fees and expenses from April 12, 2004 through February 16, 2005, totaling \$35,426.56.

It therefore follows that Superior cannot receive any Registry Funds until after satisfaction of Hibernia's claims, which exceed the sum remaining in the Registry of the Court. Considering the foregoing, it is the further opinion of this Court that a judgment be entered in conformance with this Order directing the Clerk of Court to distribute the remaining funds in the Registry of the Court to Hibernia National Bank, and to thereafter administratively close the above-captioned action.

III. CONCLUSION

For all the foregoing reasons, IT IS ORDERED that:

- (1) The Motion for Summary Judgment filed by Intervenor Superior Shipyard & Fabrication, Inc. is GRANTED IN PART insofar as Superior sought a determination of the priorities of claims in this matter;
- (2) The Motion for Summary Judgment filed by Intervenor Superior Shipyard & Fabrication, Inc. is DENIED in all other respects;
- (3) Plaintiff Hibernia National Bank is entitled to a Judgment directing the Clerk of Court to distribute the remaining funds in the Registry of the Court to Hibernia; and
- (4) The Clerk of Court shall be directed to administratively close the above-captioned action following



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entry of the Judgment ordering distribution of the remaining Registry funds.

1. The Court earlier had established a July 26, 2004 deadline for the filing of answers and complaints in intervention. (Rec.Doc. No. 9). As of the date of Hibernia's Motion for Interlocutory Sale, only two parties (Superior and Theriot) had filed interventions in the action instituted by Hibernia. Also, the tugboat's owner, N.J. Collins, has never made an appearance in this Court or otherwise challenged the arrest of the vessel.

2. In responding to Superior's motion, Theriot avers that its claim is properly classified as a "maritime lien." A maritime lien is a privileged claim on a vessel arising from the provision of necessities, such as repairs, supplies or towage, to the vessel upon the order of the owner or an authorized person. See 46 U.S.C. §§ 31301(4) and 31342. The Fifth Circuit has recognized that marine insurance on vessels is a "necessary" provision and that "unpaid insurance premiums may give rise to a federal maritime lien." *Equilease Corp. v. M/V SAMPSON*, 793 F.2d 598, 607 (5th Cir. 1986) (emphasis added). At least one district court has extended the *Equilease* holding to include a claim for advances made to a vessel owner for payment of insurance premiums. See *Flagship Group Ltd. v. Peninsula Cruise, Inc.*, 771 F.Supp. 756 (E.D.Va. 1991). While there is a presumption in favor of finding a maritime lien here, the Court declines to do so for the reasons stated above.

3. During the time that the outstanding principal remained unpaid, interest continued to accrue at a per diem rate of \$104.04. See *Hibernia Mot. for Partial Summ. J.*, *Damore Aff.*, ¶5 and Ex. "C" (Promissory Note).

