

FILED

NOV 15 2018

amail

ASST. CLERK OF COURTS
REPUBLIC OF THE MARSHALL ISLANDS

IN THE HIGH COURT
OF THE
REPUBLIC OF THE MARSHALL ISLANDS

VIRGILIO T. DIERON, JR.,)	CIVIL ACTION NO. 2017-245
)	
plaintiff,)	
)	
v.)	
)	ORDER GRANTING SBSC'S MOTION TO
STAR TRIDENT XII, LLC,)	INTERVENE
)	
defendant.)	
)	
)	
)	

TO: Tatyana Cerullo, counsel for plaintiff Virgilio T. Dieron, Jr.
Dennis J. Reeder, counsel for defendant Star Trident XII, LLC, and Proposed Intervening
defendant Star Bulk Shipmanagement Company (Cyprus) Limited

I. INTRODUCTION

This case is a maritime personal injury action brought by a seafarer, plaintiff Virgilio T. Dieron, Jr. ("Dieron"), a citizen of the Republic of the Phillippines, who signed an employment contract with the Proposed Intervening Defendant Star Bulk Shipmanagement Company (Cyprus) Limited ("SBSC") to work on a vessel registered in the Republic of the Marshall Islands ("RMI"), the M/V Star Markella (the "Vessel"). The contract included an arbitration clause and a choice of law clause. The Vessel was, and is, owned by Defendant Star Trident XII, LLC ("Trident"). Trident was not a signatory to the contract.

In its Motion for Leave to Intervene and to Compel Arbitration filed on December 6, 2017 ("Motion to Intervene and to Compel Arbitration"), SBSC moved for leave to intervene

under MIRCP 24(a)(2) and to compel Dieron to arbitrate all claims alleged in the Complaint with both SBSC and Trident. For the reasons set forth below, the Court grants SBSC leave to intervene. The Court will address SBSC's motion to compel arbitration in a separate order along with Trident's motion to compel arbitration.

II. BACKGROUND

A. Dieron's Claims

In his Complaint, filed on October 16, 2017, Dieron sued Trident alleging claims for unseaworthiness, negligence, and maintenance and cure, arising from a personal injury he suffered on June 19, 2016, while serving as an employee on board the Vessel. At the time of the accident the Vessel was at port at Itacostisasra, Brazil. Dieron's injuries resulted in the amputation of his left arm, the amputation of his left leg, the fracture of his right wrist, the loss of vision in his right eye, disfiguring damage to his face, and brain injury. Compl. ¶ 8.

With respect to the accident, Dieron alleges that Trident "had the absolute duty to provide [him] with a safe and seaworthy vessel," that "this duty was breached and violated by" Trident, and that the "unseaworthiness was a direct and proximate cause of the accident [that] caused the severe injuries to [him]." Compl. ¶¶ 10-11. Further, Dieron claims that his injuries were "both directly and proximately caused by the direct and vicarious acts of negligence of [Trident]," including failing to provide a safe workplace, appropriate safety equipment, supervision of crew members, and a properly staffed vessel.

As a result of Trident's breach of duty and Dieron's resulting injuries, Dieron seeks compensatory and punitive damages.

B. The POEA Contract

In order to be employed on board the Vessel, Dieron on April 21, 2016, signed with SBSC a standard Philippine Overseas Employment Administration contract for employment on board the Vessel (the "POEA Contract"). SBSC is an affiliate company of Trident, and the ship manager of the Vessel. In the POEA Contract, Dieron agreed to arbitrate disputes arising from his employment, including claims related to personal injury.

Section 1.A.4. of the POEA Contract requires the "Principal/Employer/Master/Company" to provide "a seaworthy ship for the seafarer and take all reasonable precautions to prevent accident and injury to the crew including provision of safety equipment, fire prevention, safe and proper navigation of the ship and such other precautions necessary to avoid accident, injury or sickness to the seafarer."

Section 20.J. of the POEA Contract provides for employer liability when a seafarer suffers work-related injuries:

The seafarer or his successor in interest acknowledges that payment for injury, illness, incapacity, disability or death and other benefits of the seafarer under this contract . . . shall cover all claims in relation with or in the course of the seafarer's employment, including but not limited to damages arising from the contract, tort, fault or negligence under the laws of the Philippines or any other country.

Section 29 of the POEA Contract includes a mandatory arbitration clause:

In cases of claims and disputes arising from this employment, the parties covered by a collective bargaining agreement shall submit the claim or dispute to the original and exclusive jurisdiction of the voluntary arbitrator or panel of voluntary arbitrators. If the parties are not covered by a collective bargaining agreement, the parties may at their option submit the claim or dispute to either the original and exclusive jurisdiction of the National Labor Relations Commission (NLRC), pursuant to Republic Act (RA) 8042 otherwise known as the Migrant Workers and Overseas Filipinos Act of 1995, as amended, or to the original and exclusive jurisdiction of the voluntary arbitrator or panel of arbitrators. If there is no

provision as to the voluntary arbitrators to be appointed by the parties, the same shall be appointed from the accredited voluntary arbitrators of the National Conciliation and Mediation Board of the Department of Labor and Employment.

Section 31 of the POEA Contract includes a choice of law clause:

Any unresolved dispute, claim or grievance arising out of or in connection with this contract including the annexes thereof, shall be governed by the laws of the Republic of the Philippines, international conventions, treaties and covenants to which the Philippines is a signatory.

III. DISCUSSION

A. Intervention under MIRCP, Rule 24(a)

Under the Marshall Island Rules of Civil Procedure ("MIRCP"), Rule 24(a) provides in relevant part as follows:

(a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:

* * *

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the moving party's ability to protect its interest, unless existing parties adequately represent that interest.

As MIRC, Rule 24(a), is the same or substantially similar to Rule 24(a) under both United States federal and state rules of civil procedure, this Court can look to United States federal and state court decisions that interpret and apply MIRC, Rule 24(a).¹

With respect rule 24(a), the United States Ninth Circuit Court of Appeals applies a four-part test under Rule 24(a), which it construes liberally in favor of potential intervenors.

We apply a four-part test under Rule 24(a): (1) the application for intervention

¹*Kabua v. Kabua, et al.*, 1 MILR 96, 104 (1988) ("MIR CivP Rule 19 mirrors Rule 19 of Federal Rules of Civil Procedure and as such MIR CivP Rule 19 carries the construction placed upon it by the Federal Courts.")

must be timely; (2) the applicant must have a “significantly protectable” interest relating to the property or transaction that is the subject of the action; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect that interest; and (4) the applicant's interest must not be adequately represented by the existing parties in the lawsuit.

In general, we construe Rule 24(a) liberally in favor of potential intervenors. In addition to mandating broad construction, our review is guided primarily by practical considerations, not technical distinctions.

Southwest Center for Biological Diversity v. Berg (“*Berg*”), 268 F.3d 810, 817-8 (9th Cir. 2001) (citations and additional punctuation omitted).

With respect to arbitration, both federal and state courts allow intervention as of right to preserve a party's right to arbitrate a dispute. *See, e.g., Technology & Intellectual Property Strategies Group PC v. Insperity, Inc.*, 2012 WL 6001098, No. 12-CV-03163-LHK (N.D.Cal., Nov. 29, 2012) (“*Insperity*”) (granting intervention as of right under Rule 24(a)(2)); *CBS Inc. v. Snyder*, 136 F.R.D. 364 (S.D.N.Y. 1991) (“*Snyder*”) (same); *Matson v. Lamb*, 947 S.W.2d 324 (Ark. 1997) (same).

1. SBSC's Motion is timely

As noted above, the *Berg* test requires that “the application for intervention [under MIRCP, Rule 24(a)] must be timely.” Similarly, the *See generally*, § 1916 Timeliness of Motion, 7C Fed. Prac. & Proc. Civ. § 1916 (3d ed.).

In the present case, SBSC on December 7, 2017, filed its Motion to Intervene and to Compel Arbitration in response to Dieron's Complaint filed October 14, 2017. SBSC did not unduly delay filing its motion. Memorandum in Support of Motion to Intervene and to Compel Arbitration (“Memo in Support”), at 6. Dieron does not dispute that the motion to intervene was

timely. *See* Opposition to SBSC's Motion to Intervene and to Compel Arbitration ("Opposition"), at 3.

2. SBSC has a significant protectable interest

Not only must the Motion to Intervene be timely, but under MIRCPC, Rule 24(a)(2), and the *Berg* test, "the applicant must [also] have a "significantly protectable" interest relating to the property or transaction that is the subject of the action."

In its Memo in Support, SBSC asserts that its right to enforce the POEA Contract's arbitration provision, and the right to have the contract it has signed properly interpreted, are significant protectable interests that support intervention as of right. *Id.*, at 6, citing *Insperty, supra*, at *7; *Snyder, supra*, at 368. In response, Dieron claims that because his claims arise under general maritime law, and not under the POEA Contract, they are not subject to the POEA Contract's arbitration clause; therefore, SBSC does not have a significant protectable interest. Opposition, at 6-7. Further, *Insperty* is not applicable as the claims in that case arose out of the contract. Plaintiff's Surreply . . . ("Pltf's Surreply"), at 2.

Even if Dieron's assertions regarding the source of his claims are true (*i.e.*, general maritime law versus the POEA Contract), SBSC still has a significant protectable interest in litigating the applicability of the arbitration clause set forth in Section 29 of the POEA Contract. This is so because under Section 20.J. of the POEA Contract, SBSC's liability covers not just claims arising under the contract, but "all claims in relation with or in the course of the seafarer's employment, including but not limited to damages arising from the contract, tort, fault or negligence under the laws of the Philippines or any other country." Under Section 20.J., SBSC, as the employer, is liable not just for claims arising under the POEA Contract but for all claims

arising under "contract, tort, fault or negligence." These claims include Dieron's claims under general maritime law for unseaworthiness, negligence and maintenance and cure, arising from a personal injury in suffered while serving as an employee on board the Vessel.

Further, as SBSC urges in its Reply, at 4, it "has a legally protected interest because the [POEA] Contract includes terms and conditions, including an arbitration clause, which SBSC interprets as covering Trident, and SBSC perceives that a different interpretation would prejudice its business model [as the manager Vessel manager for Trident]. This perceived harm to SBSC's business model from an adverse interpretation of its Contact with Dieron gives it the right to be heard by this Court when it interprets the Contract."

In response, Dieron counters that SBSC did not negotiation^{e.g.} the POEA Contract, but is just a party to it, and that Dieron claims do not arise under the POEA Contract. Plt's Surreply, at 3. Dieron's argument that SBSC merely signed by^{BUT} did not negotiate the POEA Contract, does not change the fact that SBSC has an interest in protecting its rights under the contract. Further, as noted earlier, the fact that Dieron's claims do not arise under the POEA Contract does not alter the fact that their resolution by arbitration is covered by the contract.

3. Disposing of the action may practically impair SBSC's interest

In addition to a timely motion and a significant protectable interest, MIRCP, Rule 24(a)(2), and the *Berg* test, require that the moving party's interest "is so situated that disposing of the action may as a practical matter impair or impede the moving party's ability to protect its interest." In this regard, SBSC asserts that its right to enforce the POEA Contract's arbitration provision would be impaired if Dieron, without SBSC present in this case, can avoid Trident's demand for arbitration under the contract. As a practical matter, SBSC would have lost its right

to enforce the arbitration provision. Memo in Support, at 6.

In response, Dieron argues that "a decision that plaintiff is not required to arbitrate his claims against Trident has no effect on the arbitrability of any claims he bring[s] against SBSC." Opposition, at 9-10. However, the relevant interest is not SBSC's ability to arbitrate any claims Dieron asserts against SBSC, but SBSC's ability to be heard in this action on the issue whether the arbitration clause in the POEA Contract with Dieron also includes Trident. As the court in *Insperty* noted: "If Plaintiff prevails in this lawsuit without [the intervenor], [the intervenor] will, as a practical matter, be denied the right to enforce the provisions in the [contract] requiring mandatory arbitration." *Id.* at *7. Reply in Support of Motion . . . ("Reply"), at 4.

4. SBSC is not adequately represented

Finally, MIRCP, Rule 24(a)(2), and the *Berg* test do not allow the moving party to intervene to protect its interest if "existing parties adequately represent that interest." SBSC asserts it can only be deemed to be adequately represented by Trident if Dieron concedes that Trident has the right to enforce the arbitration clause in the Contract. Otherwise, if Dieron contests Trident's right to compel arbitration because Trident is a non-signatory of the Contract, Trident may not adequately represent SBSC's interest as a signatory. *See Insperty, supra*, at *8 (holding that the signatory seeking intervention was not adequately represented by its non-signatory corporate parent, because the plaintiff contested the corporate parent's right to enforce the arbitration agreement as a non-signatory).

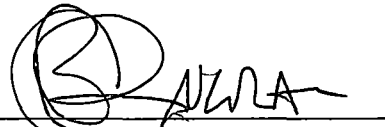
In response, Dieron argues that SBSC's interest is adequately represent by Trident because Trident makes substantially the same argument as SBSC to compel arbitration. Opposition, at 10. However, at the same time Dieron argues that Trident, as a non-signatory to

the POEA Contract, does not have the right to compel arbitration. Reply, at 4-5; Plaintiff's Opposition to [Trident's] Motion to Compel Arbitration ("Opposition to Trident's Motion"), at 5-6. Dieron cannot have it both ways. As the party opposing intervention, Dieron has not met the burden of establishing adequate representation.²

IV. CONCLUSION

For the reasons set forth above, the Court grants SBSC leave to intervene as a defendant.

Ordered and Entered: November 15, 2018.

A handwritten signature in black ink, appearing to read 'C. B. Ingram', written over a horizontal line.

Carl B. Ingram
Chief Justice, High Court

²*Matson, Inc. v. Lamb & Associates Packaging, Inc.*, 947 S.W.2d 324, 326 (Ark. 1997) citing *SEC v. Dresser Indus., Inc.*, 628 F.2d 1368 (C.A.D.C.1980); *Liz Claiborne, Inc. v. Mademoiselle Knitware, Inc.*, 1996 WL 346352 (S.D.N.Y.1996); *CBS, Inc. v. Snyder*, 136 F.R.D. 364 (S.D.N.Y.1991); 7C Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, *Federal Practice and Procedure*, Civil 2d § 909 (1986).