UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 1:15-cv-21769-UU

ADVENTURE SHIPPING COMPANY,

Plaintiff/Counterclaim Defendant,

v.

TRANS-TEC INTERNATIONAL, S.R.L.
d/b/a/ TRANS-TEC,

Defendant/Counterclaim Plaintiff.
_____/

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS CAUSE was tried before the Court on Monday, March, 21, 2016.

THE COURT, having heard the testimony of witnesses, the argument of counsel and having examined the record, and being otherwise fully advised in the premises, hereby makes the following findings of fact and conclusions of law.

I. Introduction

Plaintiff/Counterclaim Defendant, Adventure Shipping Company ("Plaintiff"), filed the instant action on May 11, 2015, seeking a declaration that it is not a party to the contract between Copenship Bulkers A/S ("Copenship") and Defendant/Counterclaim Plaintiff, Trans-Tec International, S.R.L. ("Defendant"), for fuel and gas supplied to the 190-meter oceangoing cargo vessel, *GEORGIOS P* (the "Vessel"), on November 6, 2015, as well as a declaration that Plaintiff is not liable to Defendant *in personam* for the amounts due for the fuel and gas oil delivered to the Vessel on that date. On June 15, 2015, after being granted an extension to respond to the Complaint, Defendant filed an Answer to Plaintiff's Complaint, a Counterclaim against Plaintiff, and a Third-Party Claim against Copenship. Defendant's Counterclaim alleged breach of a

maritime contract based on the theory that Copenship, Plaintiff's charterer, had actual or apparent authority to enter into the fuel contract on Plaintiff's behalf, and also alleged a Cross-Claim against Copenship for breach of the same fuel contract. D.E. 10 pp. 5, 8-9. The Court subsequently dismissed Defendant's Third-Party Claim against Copenship. D.E. 16; D.E. 18.

On March 11, 2014, the Court held a pretrial conference and adopted the parties' Pretrial Stipulation. D.E. 38. On March 21, 2016, the Court held a one-day Bench Trial. On this same date, the Court also permitted Defendant to file a Notice of Supplemental Authority, to which Plaintiff responded. D.E. 48, 51. The following are the Court's findings of fact and conclusions of law.

II. Findings of Fact

The Court makes the following findings of fact based upon the evidence presented in the record:

1. Plaintiff is the registered owner of the Vessel, which is a 190-meter oceangoing cargo vessel, *GEORGIOS P*.

2. Defendant is a subsidiary of World Fuel Services Corporation and/or World Fuel Services, Inc., whose principal place of business is at 9800 N.W. 41 Street, Miami, FL, 33178. Defendant sells and supplies fuel oil to ocean-going cargo vessels.

3. Common Progress, S.A. ("Common Progress") manages the Vessel for Plaintiff.

4. Dromon Maritime Agency, Ltd. ("Dromon") is the chartering broker for the Vessel.

5. Copenship was the charterer of the Vessel at all times relevant hereto.

6. Clarksons was the broker for the fuel transaction at issue in this action.

7. On or about October 21, 2014, Plaintiff, as owner of the Vessel, entered into a Time Charter with Copenship whereafter the Vessel was put at the disposal of Copenship.

8. Pursuant to the terms of the Time Charter, Copenship was responsible to supply and pay for all fuel oil consumed by the Vessel during the term of the Time Charter.

9. On or about November 3, 2014, Copenship entered into a contract with Defendant to supply 365 metric tons of fuel oil and 25 metric tons of gas oil to the Vessel offshore of the island of Trinidad (the "Fuel Contract").

10. Prior to entering into the contract, Copenship obtained Plaintiff's agreement that at the conclusion of the charter Plaintiff would credit it for 15 tons of the gas oil. Defendant was not privy to this understanding and had no communications with Plaintiff, Common Progress or Dromon prior to arranging the delivery of the fuel.

11. On or about November 6, 2014, on the order of Copenship, Defendant caused Aegean Bunkering (Trinidad), Ltd. ("Aegean") to deliver 357.600 metric tons of fuel oil and 24.200 metric tons of gas oil to the Vessel. The price of the fuel and gas oil was $219,831.20 with a credit term of 30 days.

12. On or about February 3, 2015, Copenship filed for bankruptcy in the Bankruptcy Division of the Danish Maritime and Commercial Court.

13. At the time of filing bankruptcy, Copenship had not paid Defendant for the fuel and gas oil delivered to the Vessel and was indebted to Defendant in the principal amount of $219,831.20.

14. Having not been paid for the fuel and gas oil supplied to the vessel on the orders of Copenship, Defendant filed an action for the arrest of the Vessel in Belgium, alleging a maritime claim pursuant to the 1952 Brussels Arrest Convention, and the Vessel was arrested in Ghent, Belgium on March 28, 2015.

15. Plaintiff, as owner of the Vessel, thereafter posted security in the amount of $296,332.45 to respond to any final decision against Plaintiff or Copenship by a court of competent jurisdiction enforceable in Belgium, and the vessel was subsequently released from arrest.

III. Conclusions of Law

This is an admiralty case in which the Plaintiff alleges one Count for declaratory judgment and Defendant alleges one counterclaim Count for breach of a maritime contract. The issue of law before the Court, under both Counts, is whether Plaintiff is bound by the Fuel Contract entered into between Defendant and Copenship based on the doctrines of actual authority or apparent authority, such that Plaintiff is liable *in personam* for the amounts due for the fuel and gas oil delivered to the Vessel.[1]

[1] At trial, both parties conceded that there is no maritime lien at issue in this action, as a lien has already been asserted against the Vessel as part of the Vessel's arrest in Belgium. The ultimate issue is whether Plaintiff has *in personam* liability for the delivery made pursuant to the Fuel Contract.

A. General Principles of Admiralty Law

"In admiralty, whether one party has actual or apparent authority to bind another party to a maritime contract is a question of general maritime law." *Garanti Finansal Kiralama A.S. v. Aqua Marine and Trading, Inc.*, 697 F.3d 59, 71 (2d Cir. 2012); *Atl. & Gulf Stevedores, Inc. v. Revelle Shipping Agency, Inc.*, 750 F.2d 457, 459 (5th Cir. 1985). The existence of either "actual or apparent authority is a question of fact, revolving as it does around the actions by, and relationships between, principal, agent, and third parties." *Aqua Marine*, 697 F.3d at 71; *see also Nat'l Football Scouting Inc. v. Cont'l Assur. Co.*, 931 F.2d 646, 649 (10th Cir. 1991). Where a plaintiff seeks declaratory judgment to assert that it is not bound by a contract, the defendant alleging an agency relationship bears the burden of proof on its affirmative defense that an agency relationship exists. *Aqua Marine*, 697 F.3d at 72. This is the rare case where agency is an affirmative defense. *Id.* In the absence of an agent entering into a contract on a shipowner's behalf based on actual or apparent authority, a shipowner who is not a party to a contract entered into by a charterer is not liable *in personam* for fuel bunkers ordered by the charterer. *Aqua Marine*, 697 F.3d at 71 n.14; *see Cockett Marine Oil Ltd. v. M/V LION, et al.*, No. 11-464, 2011 WL 1833286, at *1733-34 (E.D. La. May 12, 2011); *see also Kristensons-Petroleum, Inc. v. Sealock Tanker Co., Ltd., et al.*, No. 02 Civ. 9222, 2005 WL 735940 (S.D.N.Y. Mar. 30, 2005).

B. Actual Authority

Defendant seeks to recover from Plaintiff based on actual authority. To establish actual authority, Defendant must prove that: (1) the principal acknowledged that the agent would act for it; (2) the agent accepted the undertaking; and (3) the principal controlled the actions of the agent. *Ins. Co. of N. Am. v. Am. Marine Holdings, Inc.*, No. 504CV860C10GRJ, 2005 WL 3158049, at *6 (M.D. Fla. Nov. 28, 2005). In Defendant's Answer and Counterclaim, Defendant

alleges that Copenship had actual authority to bind Plaintiff when it entered into the Fuel Contract.[2] D.E. 10 pp. 3-5. At trial, Defendant relied primarily on four email communications to show actual authority. Def.'s Exs. F, G, H, I. Two of these emails are from Dromon, the chartering broker for the Vessel, and Common Progress, the manager for the Vessel. Def.'s Exs. F, H. The remaining two emails are from Dromon to Clarksons, the broker for the fuel transaction at issue in this case. Def.'s Exs. G, I. Defendant contends that these emails, which discuss only the 25 tons of gas oil, constitute sufficient evidence to show that Copenship had Plaintiff's actual authority to contract with Defendant on Plaintiff's behalf.

In response, Plaintiff presented evidence through the testimony of its corporate representative, Marianna Rigka, that the four emails are operational messages sent to ensure that the Vessel had adequate fuel to avoid being stranded at sea. Ms. Rigka further testified that the fuel provided to the Vessel was provided pursuant to the terms of the Time Charter agreement entered into between Plaintiff and Copenship, which provides, in relevant part, that the "Captain (although appointed by the Owners), shall be under the orders and directions of the Charterers

[2] At trial, Defendant's counsel argued for the first time that Defendant is entitled to partial recovery for the 24.200 metric tons of gas oil based solely on actual authority, whereas Defendant is entitled to recover for the remaining 357.600 metric tons of fuel oil based solely on apparent authority. Because these alternative theories of liability were not pled in Defendant's Answer and Counterclaim, D.E. 10, or otherwise disclosed in the parties' Pretrial Stipulation, D.E. 35, and Plaintiff did not expressly or impliedly consent at trial to Defendant's new theories of liability, the Court will not permit Defendant to amend its pleadings to conform to these alternative theories of liability. Fed. R. Civ. P. 15(b); *Int'l Harvester Credit Corp. v. E. Coast Truck*, 547 F.2d 888, 890 (5th Cir. 1977) ("While Fed.R.Civ.P. 15(b) does permit amendment of the pleadings to bring them in line with the evidence adduced at trial, the pleadings may not be amended without the express or implied consent of the parties."); *see also Cioffe v. Morris*, 676 F.2d 539, 542 (11th Cir. 1982).

[Copenship] as regards employment and agency"[3] and that "whilst on hire the Charterers shall provide and pay for all the fuel except as otherwise agreed." Pl.'s Ex. A, Lines 39, 77-78.

The Court finds that Defendant failed to meet its burden of proof to establish actual authority. The evidence submitted at trial, including the four emails relied on by Defendant and the remaining exhibits submitted by both parties, is insufficient to prove by a preponderance of the evidence that Copenship had the actual authority of Plaintiff to enter into the contract for either the 24.200 metric tons of gas oil or the remaining 357.600 metric tons of fuel oil. The four emails referred to by Defendant are, as Mr. Rigka testified to, "operational in nature." In other words, the emails, to which Defendant was not a party, show that Copenship, among others, merely sought to keep Plaintiff informed, through its agents, of its efforts to supply fuel bunkers to the Vessel in accordance with the Time Charter by communicating with the Vessel's manager, Common Progress, and the Vessel's chartering broker, Dromon. These emails do not prove by a preponderance of the evidence that Plaintiff "acknowledge[d] that [Copenship] will act for it," that Copenship "accept[ed] the undertaking," and that Plaintiff "controls the actions of [Copenship]." *Am. Marine Holdings, Inc.*, 2005 WL 3158049, at *6. Defendant has therefore failed to meet its burden to demonstrate the existence of an actual agency relationship between Plaintiff and Copenship sufficient to bind Plaintiff to the November 3, 2014 Fuel Contract.

[3] Defendant objected to Ms. Rigka's testimony that the Captain acted as the charterer's agent during the currency of the Time Charter on grounds that her testimony contradicted the parties Pretrial Stipulation, which stipulated that all crew members, including the Captain, "remained employees of the Record Owner Adventure Shipping throughout the term of the charter." D.E. 35 p. 3. Defendant's objection is immaterial to the Court's Findings of Fact and Conclusions of Law, as the Court does not rely on this portion of Ms. Rigka's testimony to conclude that Copenship lacked actual authority to enter into the Fuel Contract on Plaintiff's behalf.

C. Apparent Authority

Defendant also seeks to recover from Plaintiff under a theory of apparent authority. To establish apparent authority in this case, Defendant must prove that: (1) the principal allowed or caused others to believe that a putative agent had the authority to conduct the act in question; and (2) a third party was aware of and relied on this authority to his detriment. *Am. Marine Holdings, Inc.*, 2005 WL 3158049, at *8. Just as under common law, "under maritime law, apparent authority cannot be evidenced by statements of an agent alone." *Aqua Marine*, 697 F.3d at 73; *Coastal Drilling Co., L.L.C. v. Shinn Enters., Inc.*, No. 05-4007, 2008 WL 907520, at *2 (E.D. La. Mar. 31, 2008). Though apparent agency can arise in the face of silence where such silence creates a reasonable appearance of authority, it cannot arise strictly from the subjective understanding of the person dealing with the purported agent. *Am. Marine Holdings, Inc.*, 2005 WL 3158049, at *8.

In Defendant's Answer and Counterclaim, Defendant alleges that Copenship acted with apparent authority when it entered into the Fuel Contract. D.E. 10 pp. 3, 5. In support of these allegations, Defendant primarily relied at trial on: (1) email communications between Copenship and the Vessel's Captain (Def.'s Exs. P-R); (2) two bunker delivery receipts (Def.'s Exs. K-L); (3) Common Progress, S.A. Ship's Commercial Operations Manual (the "Operations Manual") (Def.'s Ex. O); and (4) the testimony of Plaintiff's corporate representative, Marianna Rigka. Defendant argues that the two bunker delivery receipts bound Plaintiff to the Fuel Contract based on the doctrine of apparent authority because the receipts were stamped by the Captain of the Vessel who, according to Defendant, was authorized to bind Plaintiff. Defendant further contends that Ms. Rigka testified that the custom in the industry was such that charterers can bind owners of vessels to fuel contracts. Lastly, Defendant argues that the Operations Manual

required the Captain of the Vessel to place a stamp on the Aegean receipts expressly stating that the fuel was ordered solely for the account of the charterer or to issue a letter of protest to express that the fuel was solely for the charterer's account. Because the Captain failed to do so, Defendant argues that Plaintiff is bound by the Fuel Contract.

In response, Plaintiff presented evidence, through the testimony of Defendant's corporate representative, Jos Heijmen, and the testimony of Plaintiff's corporate representative, Ms. Rigka, to establish that there was no direct communication between Plaintiff and Defendant which could give rise to apparent authority and, further, that Plaintiff did not even know of Defendant's existence until the Vessel was arrested in Ghent, Belgium on March 28, 2015. Plaintiff also relied on Ms. Rigka's testimony that she had no reason to believe that Defendant had possession of the Common Progress Operations Manual and, in any event, that the Captain did not provide a letter of protest because the quantity and quality of the fuel was appropriate and there were no other reasons to protest. As for custom and practice, Plaintiff argued that Defendant misconstrued Ms. Rigka's testimony and that her testimony actually was that the charterer does not customarily have the authority to bind the owner of a vessel to a fuel contract in the cargo industry.

The Court concludes that Defendant did not prove that Copenship acted with apparent authority when entering into the Fuel Contract for three main reasons. First, the Captain was "under the orders and direction of the Charterers as regards employment and agency" per paragraph 8 of the Time Charter. Pl.'s Ex. A. And there was no evidence presented which would permit the conclusion that Plaintiff said or did anything (or failed to do anything) that altered his status as agent of Copenship. Second, the two bunker delivery receipts do not show apparent authority, as they were stamped by the Vessel's Captain after Defendant and Copenship

entered into the November 3, 2016 Fuel Contract; therefore, they could not give rise to a reasonable belief that Copenship had apparent authority to enter into the Fuel Contract on Plaintiff's behalf. Third, contrary to Defendant's position that Ms. Rigka testified that, as a matter of custom, charterers can bind owners of vessels to fuel contracts, she actually testified that charterers customarily bind vessels to maritime liens, but denied that charterers customarily bind vessel owners *in personam* in instances of fuel contracts.

As to industry custom, Defendant introduced no other evidence. The only evidence that might refer to any custom at all was the Common Progress Operations Manual, which requires the Captain to provide a letter of protest only if: (1) the party delivering the fuel does not allow the Captain to limit liability by putting a stamp on the delivery receipt; or (2) there is a dispute as to the amount or quality of fuel. Def.'s Ex. O. There was no evidence in this case of either situation. Even if there was, Defendant presented no evidence to show that it had possession of the Operations Manual prior to this lawsuit, so Defendant could not have reasonably relied on these procedures to its detriment. *Am. Marine Holdings, Inc.*, 2005 WL 3158049, at *8.

Based on the evidence presented at trial, the Court concludes that Defendant failed to show by a preponderance of the evidence that Plaintiff "allowed or caused others to believe" that Copenship had the "authority to conduct the act in question." *See, e.g.*, *Am. Marine Holdings, Inc.*, 2005 WL 3158049, at *8. Defendant, moreover, cannot create apparent authority from its own subjective understanding, especially where Defendant contracted with Copenship and knew of its existence as the charterer of the Vessel. *Id.*; *c.f. El Amigo*, 285 F. 868, 870 (5th Cir. 1923) (finding apparent authority because there was "an absence of evidence tending to prove that any of the appellees either knew, or from any accessible source of information could have learned, of the existence of the charter party").

IV. Final Conclusions

Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED AND ADJUDGED as follows:

(1) Plaintiff/Counterclaim Defendant, Adventure Shipping Co., is entitled to judgment in his favor against Defendant/Counterclaim Plaintiff, Trans-Tec International, S.R.L., with respect to both the Complaint, **D.E. 1**, and Counterclaim, **D.E. 10**, in this action.

(2) The Court hereby DECLARES that there is no contract between Adventure Shipping Co. and Trans-Tec International, S.R.L. for delivery of 357.600 metric tons of fuel oil and 24.200 metric tons of gas oil to the Vessel, *GEORGIOS P*, on or about November 6, 2014. Adventure Shipping Company Co. is not liable to Trans-Tec International, S.R.L., *in personam*, for the amounts due for the fuel and gas oil delivered to the Vessel.

(3) Final Judgment will be entered by separate order, in accordance with Federal Rule of Civil Procedure 58.

DONE AND ORDERED in Chambers at Miami, Florida, this 25th day of March, 2016.

URSULA UNGARO
UNITED STATES DISTRICT JUDGE

copies provided: counsel of record