

16-4067-ov
O'Rourke Marine Services L.P. v. M/V COSCO HAIFA, et al.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

1 At a stated Term of the United States Court of Appeals for the Second Circuit, held at the
2 Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York on the
3 10th day of July, two thousand eighteen.

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5 Present: BARRINGTON D. PARKER,
6 RICHARD C. WESLEY,
7 DEBRA ANN LIVINGSTON,
8 *Circuit Judges.*

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11 O'Rourke Marine Services L.P., L.L.P.,

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13 *Plaintiff-Cross Defendant-Counter Defendant-Appellant,*

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15
16 v.

16-4067-cv

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19 M/V COSCO HAIFA, IMO No. 9484338, her engines, apparel, furniture, equipment,
20 appurtenances, tackle, etc., *in rem*, M/V COSCO VENICE, IMO No. 9484405, her engines,
21 apparel, furniture, equipment, appurtenances, tackle, etc., *in rem*,

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23 *Defendants in rem-Counter-Claimants-Counter-Defendants-*
24 *Appellees,*

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26 ING Bank N.V.,

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28 *Third Party Defendant-Counter-Claimant-Cross-Claimant-*
29 *Appellee,*

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31 O.W. Bunker North America, Inc.,

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33 *Third Party Plaintiff,*
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1 O.W. Bunker USA Inc.,

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3 *Third Party Defendant.*¹

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6 Appearing for O'Rourke Marine Services L.P., L.L.P.: J. Stephen Simms, Casey L. Bryant,
7 Simms Showers LLP, Baltimore,
8 MD.

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10 Appearing for M/V COSCO HAIFA, M/V COSCO VENICE: James L. Ross, Gina M.
11 Venezia, Michael J. Dehart,
12 Freehill Hogan & Mahar
13 LLP, New York, N.Y.

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15 Appearing for ING Bank N.V.: Bruce G. Paulsen, Brian P. Maloney,
16 Seward & Kissel LLP, New York,
17 N.Y.

18
19 Appearing for O.W. Bunker USA Inc. Liquidated Trust and Dr. Gideon Böhm, as insolvency
20 administrator and foreign representative of O.W. Bunker Germany GmbH, *amici curiae*, in
21 support of appellees:

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23 Davis Lee Wright, Robert E.
24 O'Connor, Kaspar Kielland,
25 Montgomery McCracken Walker &
26 Rhoads LLP, New York, N.Y.

27
28 Andrew B. Kratenstein, Darren
29 Azman, McDermott Will & Emery
30 LLP, New York, N.Y.

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32 Justin M. Heilig, Hill Rivkins LLP,
33 New York, N.Y.

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37 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND**
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39 **DECREED** that the judgment of the District Court is **AFFIRMED**.

40 Appellant O'Rourke Marine Services L.P., L.L.P. ("O'Rourke") appeals from a judgment
41 of the United States District Court for the Southern District of New York (Forrest, J.). The

¹ The Clerk of Court is respectfully directed to amend the caption as above.

1 District Court entered judgment in favor of ING Bank N.V. (“ING”) and the Vessels M/V
2 COSCO HAIFA and M/V COSCO VENICE (together, the “Vessels”) pursuant to their
3 stipulation. We assume the parties’ familiarity with the underlying facts, procedural history, and
4 issues for review.

5 In October and November 2014, O’Rourke physically supplied bunkers to the Vessels in
6 Houston, Texas. O’Rourke was then never paid for the bunkers. In April 2015, O’Rourke
7 brought this action against the Vessels, asserting claims for maritime liens in an attempt to
8 recover for the unpaid bunkers. Following discovery, O’Rourke moved for summary judgment
9 on its maritime lien claims and, for the first time, argued it was entitled to summary judgment on
10 the basis of breach of contract and unjust enrichment. The District Court denied O’Rourke’s
11 motion, concluding that O’Rourke could not assert a maritime lien against the Vessels, and
12 declined to address O’Rourke’s unpleaded assertions of breach of contract and unjust
13 enrichment. O’Rourke then filed a motion for reconsideration, which the District Court denied.
14 The District Court eventually granted summary judgment against O’Rourke on its maritime lien
15 claims. This appeal followed.

16 On appeal, O’Rourke argues that the District Court erred in granting judgment to ING
17 and in finding that it was not entitled to a maritime lien under statute or in equity. We disagree
18 with these contentions. The District Court properly concluded that O’Rourke could not assert a
19 maritime lien because it did not meet the requirements for a maritime lien as set out by the
20 Commercial Instruments and Maritime Liens Act (“CIMLA”), 46 U.S.C. § 31301 *et seq.* We
21 held in *ING Bank N.V. v. M/V TEMARA*, 892 F.3d 511 (2d Cir. 2018), that “CIMLA requires
22 three elements for a maritime lien: (1) that the goods or services at issue were ‘necessaries,’ (2)
23 that the entity ‘provid[ed]’ the necessaries to a vessel; and (3) that the entity provided the

1 necessaries ‘on the order of the owner or a person authorized by the owner.’” *M/V TEMARA*,
2 892 F.3d at 519 (quoting 46 U.S.C. § 31342(a)). As to the third requirement, “CIMLA defines
3 ‘persons . . . presumed to have authority to procure necessaries for a vessel’ as ‘(1) the owner;
4 (2) the master; (3) a person entrusted with the management of the vessel at the port of supply; or
5 (4) an officer or agent appointed by—(A) the owner; (B) a charterer; (C) an owner pro hac vice;
6 or (D) an agreed buyer in possession of the vessel.’” *Id.* (quoting 46 U.S.C. § 31341(a)).

7 The District Court determined that only the third of those requirements was at issue and
8 concluded that O’Rourke did not meet it. We agree that O’Rourke did not supply the bunkers
9 upon the order of a statutorily authorized person, thus failing to meet CIMLA’s third
10 requirement for a maritime lien. Instead, O’Rourke was hired to supply the bunkers to the
11 Vessels by a subcontractor, O.W. USA, who, in turn, was contracted by the bunker contractor,
12 O.W. Far East (Singapore) Pte, Ltd. (“O.W. Far East”), who, in turn, was hired to provide
13 bunkers to the Vessels by the corporate affiliate of the agent of the Vessels’ owners. O’Rourke
14 does not appear to dispute this contractual chain. O’Rourke also did not adduce any evidence
15 that would tend to establish that the subcontractor and its contractor were in agency relationships
16 with a statutorily authorized person such that it could have been construed as being hired directly
17 by them. *See Marine Fuel Supply & Towing, Inc. v. M/V Ken Lucky*, 869 F.2d 473 (9th Cir.
18 1988). Nor did it adduce evidence that a statutorily authorized person controlled the selection of
19 O’Rourke as the physical supplier. *See Lake Charles Stevedores, Inc. v. PROFESSOR*
20 *VLADIMIR POPOV MV*, 199 F.3d 220 (5th Cir. 1999).

21 Instead, O’Rourke mainly argues about the effect of a particular clause, clause L.4(a), of
22 the O.W. Far East contractual terms. That clause purports to bind the buyer of the bunkers (here,
23 the Vessels’ agent) to the physical supplier’s terms when the physical supplier “insists” that the

1 buyer be bound. O'Rourke argues that clause means the Vessels should be deemed to have
2 agreed to O'Rourke's own terms of sale, which state that O'Rourke has a lien over the vessel for
3 the value of the bunkers delivered to it. The District Court properly rejected that argument. The
4 District Court properly concluded that maritime liens are solely creatures of statute, not contract,
5 and are construed strictly under the principle of *stricti juris*. O'Rourke's terms of sale cannot fill
6 the absence of one of the statutory requirements for a maritime lien under CIMLA, namely that
7 O'Rourke had been hired by a statutorily authorized person to supply the bunkers, which, in this
8 case, it was not.

9 Finally, O'Rourke argues that it should prevail on a theory of unjust enrichment, even
10 though it never pleaded such a claim in its complaint, but instead mentioned such a theory for
11 the first time in its motion for summary judgment. The District Court properly disregarded this
12 argument. A plaintiff cannot seek relief on a claim it failed to plead. Indeed, "a district court
13 does not abuse its discretion when it fails to grant leave to amend a complaint without being
14 asked to do so." *Greenidge v. Allstate Ins. Co.*, 446 F.3d 356, 361 (2d Cir. 2006). While
15 "plaintiffs who failed to include a claim in their complaint can move to amend the complaint"
16 and "if summary judgment has been granted to their opponents, they can raise the issue in a
17 motion for reconsideration," O'Rourke "took neither of these steps." *Id.* Nor was any sort of
18 unjust enrichment claim tried by express or implied consent of the parties, so as to invoke Rule
19 15(b)(2).² The District Court was entitled to disregard such unpleaded claims. In addition,
20 O'Rourke's argument fails because unjust enrichment claims must be brought *in personam*, and
21 O'Rourke has filed only an *in rem* claim against the Vessels. *See M/V TEMARA*, 892 F.3d at
22 522.

²Federal Rule of Civil Procedure 15(b)(2) provides, "When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings."

1 We have considered O'Rourke's other arguments and find them to be without merit.

2 Accordingly, the judgment of the District Court is **AFFIRMED**.

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FOR THE COURT:
CATHERINE O'HAGAN WOLFE, CLERK


