

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

IN RE:

PETITION OF PETER J. MACKEY,
AS TITLED OWNER OF 2004 BLACK
THUNDER 430GT, COAST GUARD
CERT NO. 1208389, VESSEL
IDENTIFICATION NO. DON
43VL1K304 ITS ENGINES,
TACKLE AND APPURTENANCES

Case No. 8:24-cv-309-SDM-NHA

Petitioner.

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REPORT AND RECOMMENDATION

I recommend that Petitioner Peter Mackey’s Motion to Dismiss Claimants Freedom Marine Sales, LLC and Freedom Boat Club, LLC’s Crossclaim (Doc. 42) be denied, because Mr. Mackey waived his right to file a motion under 12(b)(6) by answering—rather than moving to dismiss—the same claims.

I. Limitation of Liability Actions

“Admiralty and maritime law includes a host of special rights, duties, rules, and procedures.” *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 446 (2001). Among them is the Shipowner’s Limitation of Liability Act, 46 U.S.C. §§ 30501, et seq., which allows a vessel owner to seek exoneration from liability or limit liability for damage or injury that occurs without the owner’s privity

or knowledge to the value of the vessel or the owner's interest in the vessel. 46 U.S.C. § 30529; *Orion Marine Constr., Inc. v. Carroll*, 918 F.3d 1323, 1325 (11th Cir. 2019). The procedures for seeking exoneration from liability, or limitation of liability, for damage are governed by both the Limitation of Liability Act, 46 U.S.C. §§ 30501, et seq., and Supplemental Rule F of the Supplemental Rules for certain Admiralty and Maritime claims.

II. Background

On July 30, 2023, a 2004 Black Thunder 430GT (the "Vessel") owned and operated by Mr. Mackey collided with a 2023 Crownline E235XS that was owned by Freedom Marine Sales, LLC and Freedom Boat Club, LLC (collectively "Freedom"), and operated by John Cornell. Am. Petition (Doc. 39).

On January 31, 2024, Mr. Mackey filed this admiralty action, seeking exoneration from, or limitation of, liability for the accident. Doc. 2. In response, Freedom filed an answer, affirmative defense, and claims against Mr. Mackey for common law indemnification, contribution, and negligence. Doc. 27. Mr. Mackey answered those claims. Doc. 35.

Then, on July 26, 2024, Mr. Mackey filed an Amended Petition, this time seeking only exoneration from (not limitation of) liability for the accident. Doc. 39. In response, Freedom filed an answer and affirmative defenses, as well as claims against Mr. Mackey identical to those Freedom previously filed. Doc. 40. But, rather than answer Freedom's claims this time, Mr. Mackey moved,

pursuant to Federal Rule of Civil Procedure 12(b)(6), to dismiss them. Motion to Dismiss (Doc. 42).

In his motion to dismiss, Mr. Mackey argues that: (1) Freedom's factual allegations for each claim fall short of the requirements of Rule 8 of the Federal Rules of Civil Procedure; (2) Freedom's indemnification claim is further barred in light of Mr. Mackey's allegations that Freedom was at fault in the incident; and (3) Freedom's contribution claim is premature because no judgment has been entered against Freedom. Motion to Dismiss (Doc. 42) at pp. 2–4.

Freedom opposes the motion, arguing that (1) Mr. Mackey waived his right to bring the motion by previously answering, rather than moving to dismiss, the same claims; (2) the counterclaims were sufficiently pleaded; and (3) admiralty law permits Freedom's indemnity and contribution claims. Response (Doc. 43).

III. Analysis

Freedom first asks the Court to deny Mr. Mackey's motion to dismiss because Mr. Mackey previously answered (Doc. 35) identical claims (Doc. 27) filed in response to Mr. Mackey's original petition and, therefore, Mr. Mackey waived his right to bring a 12(b)(6) motion. Response (Doc. 43) at pp. 3–4.

A Rule 12(b)(6) defense, “must be made before pleading if a responsive pleading is allowed.” Fed. R. Civ. P. 12(b). In other words, Rule 12(b) would not have allowed Mr. Mackey to answer the claims and then move to dismiss them.

However, that is not precisely what occurred here. Rather, when Mr. Mackey filed his initial petition, Freedom filed an answer and claims against Mr. Mackey, who answered the claims. *See* Docs. 27, 35. Then, Mr. Mackey filed an Amended Petition (Doc. 39), in response to which Freedom filed an answer and re-filed identical claims. *See* Doc. 40. This time, Mr. Mackey did not answer the claims but moved to dismiss them pursuant to Rule 12(b)(6).

As a general rule, an amended pleading supersedes the initial pleading and becomes the operative pleading in the case. *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1219 (11th Cir. 2007). Freedom’s re-filed claims are the operative pleading. I must determine whether Mr. Mackey waived his right to bring a Rule 12(b)(6) motion to dismiss the operative claims by answering the prior identical claims.

Rule 12(g) sheds some light on the issue. It provides that “a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.” Fed. R. Civ. P. 12(g)(2). Although the language of the rule contemplates successive pre-answer motions to dismiss, courts have interpreted Rule 12(g) to prevent a defendant who answered an original complaint from later moving to dismiss an amended complaint on grounds that could have been raised against the original complaint. *See, e.g., Noveshen v. Bridgewater Assocs., LP*, No. 13-CV-61535-KAM, 2015 WL 11170928, at *3

(S.D. Fla. July 20, 2015) (“A defense is unavailable for purposes of Rule 12(g)(2) if its legal basis did not exist *at the time of the answer* or pre-answer motion, so that it was for all practical purposes impossible for the defendants to interpose their defense.” (emphasis added) (internal quotations and citation omitted)).

This application of Rule 12(g) is consistent with the Eleventh Circuit’s observation that “[a]lthough, under the Federal Rules of Civil Procedure, an amended complaint supersedes the initial complaint and becomes the operative pleading in the case, . . . the filing of an amended complaint does not automatically revive all defenses or objections that the defendant may have waived in response to the initial complaint.” *Krinsk v. SunTrust Banks, Inc.*, 654 F.3d 1194, 1202 (11th Cir. 2011) (internal quotation and citation omitted) (citing 5C Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1388 (3d ed. 2004) (“The filing of an amended complaint will not revive the right to present by motion defenses that were available but were not asserted in timely fashion prior to the amendment of the pleading.”)). Moreover, extending Rule 12(g) to prevent parties from moving to dismiss amended claims that are substantively identical to those previously filed, but refiled in response to a new petition or complaint, promotes the “just, speedy, and inexpensive” resolution of cases, *see* Fed. R. Civ. P. 1, by preventing

plaintiffs from amending their pleadings to create a “second bite at the [12(b)(6)] apple.”

Thus, I agree with Freedom’s argument that, because Mr. Mackey answered, rather than moved to dismiss the previously filed identical claims, he cannot now move to dismiss them under Federal Rule of Civil Procedure 12(b)(6).¹ After Mr. Mackey answers the claims, however, he retains the right to move for judgment on the pleadings, pursuant to Rule 12(c).² *See* Fed. R. Civ. P. 12(h)(2)(B).

IV. Conclusion

For the reasons stated, I respectfully RECOMMEND that District Court:

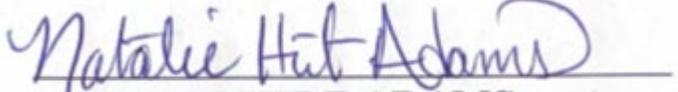
1. DENY Mr. Mackey’s Rule 12(b)(6) Motion to Dismiss (Doc. 42); and

¹ At a hearing on November 18, 2024 (*see* Doc. 48), Mr. Mackey asserted that he did not waive his right to move for dismissal under Rule 12(b)(6), because he was raising arguments that were not previously available to him. Specifically, he explained that he moved to dismiss Freedom’s claims because they could not be asserted against a petitioner who sought only exoneration from liability, as he does now, rather than limitation of liability, as he did in his initial petition. However, the motion to dismiss does not appear to raise an argument that the claims are improper because Mr. Mackey’s amended petition seeks only exoneration from liability.

² At this juncture, it would be improper to convert Mr. Mackey’s motion to one under Rule 12(c) and proceed with deciding the merits of his motion. Rule 12(c) motions can be made only “[a]fter the pleadings are closed” and, here, Mr. Mackey has not yet answered the renewed claims.

2. Direct Mr. Mackey to answer Freedom's re-filed claims (Doc. 40, pp. 7–11) within 21 days of the Court's order.

Submitted for the District Court's consideration on November 25, 2024.



NATALIE HIRT ADAMS
United States Magistrate Judge

NOTICE TO PARTIES

A party has fourteen days from this date to file written objections to the Report and Recommendation's factual findings and legal conclusions. A party's failure to file written objections waives that party's right to challenge on appeal any unobjected-to factual finding or legal conclusion the district judge adopts from the Report and Recommendation. *See* 11th Cir. R. 3-1. To expedite resolution, parties may file a joint notice waiving the 14-day objection period.