

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
IN ADMIRALTY**

CASE NO. 21-80357-CIV-CANNON

IN RE:

COMPLAINT OF KURT BERTSCH,
as owner, and **RILEY BERTSCH,**
as Owner Pro Hac Vice, for exoneration from or
limitation of liability, of a 1994 Dolphin Boat Inc. 20'
Runabout Vessel, Bearing Hull Id No. Dfl21668f393.

ORDER DENYING RESPONDENT'S MOTION TO DISMISS

THIS CAUSE comes before the Court upon Respondent's Motion to Dismiss Petitioners' Complaint for Exoneration from or Limitation of Liability ("Motion to Dismiss") [ECF No. 8]. For the reasons stated below, Respondent's Motion to Dismiss is **DENIED**.

I. Factual Background and Procedural History

This admiralty action is brought by Petitioners Kurt Bertsch and Riley Bertsch following a boating injury that occurred near Boca Raton, Florida [ECF No. 1]. Petitioners are owners and operators of a 1994 DOLPHIN BOAT INC. 20' RUNABOUT vessel bearing Hull Identification No. DFL21668F393, and Florida Vessel Registration No. FL9608HV [ECF No. 1 ¶ 6].

As alleged in the Complaint, on November 22, 2020, Petitioners operated the vessel in question to transport Respondent James Berger from Boynton Beach, Florida to Lake Boca, Florida [ECF No. 1 ¶¶ 13-14]. Upon reaching Lake Boca, Respondent allegedly left the vessel for several hours and returned "visibly intoxicated" [ECF No. 1 ¶ 15]. Petitioners claim that Respondent was instructed to remain seated for the return trip to Boynton, Beach, Florida, but nonetheless fell overboard while the boat was in motion and "struck his left arm against the Vessel's propeller" [ECF No. 1 ¶ 16]. Petitioners retrieved Respondent from the water, bandaged

his arm, and provided further medical care until he was taken by an ambulance to a hospital for medical treatment [ECF No. 1 ¶ 17].

On January 29, 2021, about two months after the November 22, 2020 incident, Petitioners received a letter from Respondent's attorney [ECF No. 8, p. 6]. First, the letter identified Glenn Goldman, Esq. as newly retained counsel for Respondent to "represent James Berger with respect to personal injuries he sustained in the boating accident of November 22, 2020" [ECF No. 8, p. 6]. Second, the letter identified the boat in question as "the 1994 Dolphin boat with Vessel Identification Number DFL21668F393 and Vessel Registration Number FL9608HV, which was responsible for this accident" [ECF No. 8, p. 6]. Third, the letter advised Petitioners to contact their insurance carrier "immediately and notify them of this accident" [ECF No. 8, p. 6]. Lastly, the letter made a request to preserve evidence and warned that if Petitioners did not respond, "we will have no other alternative but to do whatever is necessary to protect our client's interest" [ECF No. 8, p. 6].

Petitioners filed the Complaint in this action on February 19, 2021 [ECF No. 1]. The Complaint seeks exoneration from or limitation of liability for any damages resulting from the November 22, 2020 incident [ECF. No. 1 ¶ 22]. Attached to the Complaint is a copy of the Insurance Policy Declarations Page for the vessel in effect at the time of the incident, reflecting the value of Petitioner's boat at \$15,000 [ECF No. 1-1]. Petitioners also deposited with the Court a Letter of Undertaking from their insurer in the sum of \$15,000, plus interest, as security for the benefit of claimants [ECF No. 1-2].

On February 19, 2021, Petitioners filed a Motion for Entry of Order Approving Letter of Undertaking, Issuance of Monition and Injunction, and Directing Clerk to Issue Notice to Claimants of Complaint [ECF No. 3], which the Court granted on February 23, 2021

[ECF Nos. 4 and 5]. On February 23, 2021, the Clerk of Court entered a Notice to Claimants of the Complaint for Exoneration from or Limitation for Liability [ECF No. 6], instructing all claimants to file their claims on or before April 6, 2021, or be defaulted. Petitioners published copies of the notice once a week for four consecutive weeks in the Palm Beach Daily Business Review [ECF No. 10].

On April 5, 2021, one day before the deadline for potential claimants to submit a notice of a claim, Respondent filed the instant Motion to Dismiss [ECF No. 8].¹ Respondent argues that the Complaint should be dismissed because it was prematurely filed [ECF No. 8]. According to Respondent, the January 29, 2021 letter sent by Respondent's counsel did not constitute "written notice of a claim" under 46 U.S.C. § 30511, and hence Petitioners filed their Complaint before receiving legally sufficient notice of a claim [ECF No. 8]. Petitioners disagree, arguing that the text of 46 U.S.C. § 30511 does not require a vessel owner to receive written notice of a claim prior to bringing a civil action for limitation of liability [ECF No. 9]. Further, even if receipt of written notice were a requirement, Petitioners argue that the letter submitted to Petitioners by Respondent's counsel did constitute "written notice of a claim" sufficient to trigger the six-month deadline under 46 U.S.C. § 30511(a) [ECF No. 9]. Respondent did not submit a Reply. The Motion to Dismiss is ripe for review.

II. Legal Standard

Pursuant to the Limitation of Liability Act, 46 U.S.C. §§ 30501, *et seq.*, a shipowner can limit its liability for certain claims involving its vessel to the value of the vessel. *See Orion Marine Constr., Inc. v. Carroll*, 918 F.3d 1323, 1325 (11th Cir. 2019) ("The Act establishes a procedure by which a shipowner can limit its liability for certain claims involving one of its vessels to the

¹ To date, Respondent has not filed a claim in this action.

value of the vessel plus its then-pending freight.”). Section 30511(a) of the Act provides as follows: “The owner of a vessel may bring a civil action in a district court of the United States for limitation of liability under this chapter. The action must be brought within 6 months after a claimant gives the owner written notice of a claim.” 46 U.S.C § 30511(a). Supplemental Admiralty Rule F also imposes a six-month deadline: “Not later than six months after receipt of a claim in writing, any vessel owner may file a complaint in the appropriate district court, as provided in subdivision (9) of this rule, for limitation of liability pursuant to statute.” Fed. R. Civ. P. Supp. F(1).

“The six-month filing deadline specified by 46 U.S.C. § 30511(a) is a non-jurisdictional claim-processing rule, and a shipowner’s failure to meet it does not deprive the district court of subject matter jurisdiction but rather provides a basis on which to dismiss the owner’s limitation action on the merits.” *Orion*, 918 F.3d at 1338. To trigger the six-month filing period, a claimant must provide the shipowner or its agent with a written notice that reveals a “reasonable possibility” of a claim that will exceed the value of the vessel at issue. *Id.*

III. Discussion

Respondent’s Motion to Dismiss fails for two reasons.

First, the January 29, 2021 letter sent from Respondent’s counsel to Petitioners constitutes “written notice of a claim” sufficient to trigger the six-month filing deadline under 46 U.S.C. § 30511(a). As the Eleventh Circuit recently explained, the test to determine whether a claimant’s notice qualifies as a “written notice of a claim” under 46 U.S.C. § 40611(a) is whether the claim reveals a “reasonable possibility” that the claim “will exceed the value of the offending vessel(s).” *Orion*, at 1338. This “reasonable-possibility requirement serves the six-month limitation period’s

purpose by encouraging shipowners to act promptly while at the same time eliminating consideration of small-value cases unlikely to benefit from the Act's protection." *Id.*

In this case, the content of the letter sent by Respondent's counsel to Petitioners reveals a "reasonable possibility" of an actual or potential claim that would exceed the \$15,000 value of the vessel. The Court quotes the letter in full below:

Dear Mr. Bertsch:

This is to advise that I have been retained to represent James Berger with respect to personal injuries he sustained in the boating accident of November 22, 2020.

It is our understanding that you were the driver of the 1994 Dolphin boat with Vessel Identification Number DFL21668F39 3 and Vessel Registration Number FL9608HV, which was responsible for this accident. Please contact the undersigned immediately and advise us of the name and address of your insurance carrier, agent and policy number so that we may contact them directly. Further, I suggest that you contact your carrier immediately and notify them of this accident. If you are not insured, it is important that you inform us immediately upon receipt of this letter. Please fill out the second page of this letter and return it to us in the enclosed self-addressed stamped envelope provided.

According to Florida law, you are hereby put on notice that you have a duty to preserve any relevant evidence existing at or around my client's incident. We formally request that you **immediately obtain and preserve a copy of any relevant information recorded by camera** and provide us with same upon your receipt of this letter. Should we decide to litigate this case, your failure to preserve relevant evidence will likely result in a spoliation jury instruction.

If we do not hear from you by return mail or telephone call, we will have no other alternative but to do whatever is necessary to protect our client's interest. Kindly govern yourself accordingly.

Sincerely,

GLENN GOLDMAN, ESQUIRE

[ECF No. 8 p. 6 (emphasis in original)].

As reflected in the text of the letter, Respondent's counsel identified the vessel in question as "responsible for the accident" in reference to "personal injuries" sustained by Respondent

[ECF No. 8, p. 6]. Petitioners were aware of the injuries that Respondent had suffered onboard the vessel, since they were the ones who “assisted James Berger back in the Vessel,” “applied a tourniquet to James Berger’s left arm” [after Mr. Berger struck his arm against the boat’s propeller], and provided “additional medical aid” before an ambulance could arrive [ECF No. 1 ¶ 17]. Additionally, in very serious terms, the letter requested preservation of evidence and warned that counsel would do “whatever is necessary to protect our client’s interest” [ECF No. 8, p. 6]. Under these circumstances, although the letter did not specifically identify a monetary claim exceeding \$15,000, it provided a reasonable possibility that a forthcoming lawsuit was imminent, and that damages likely would exceed the value of the vessel in question. *See In re Eckstein Marine Serv. L.L.C.*, 672 F.3d 310, 317 (5th Cir. 2012) (“[T]he claimant need only raise a ‘reasonable possibility’ that the damages sought will exceed the value of the vessel. While this standard is not toothless, it is also not particularly stringent.”).

Faced with “written notice of a claim,” Petitioners complied with the six-month deadline in 46 U.S.C. § 30511(a). They received notice of a potential claim in the January 29, 2021 letter sent by Respondent’s counsel [ECF No. 8-1, p. 6]. And they filed the Complaint on February 19, 2021—well before the six-month deadline. 46 U.S.C. § 30511(a).

Second, even if there were some question as to whether the January 29, 2021 letter qualified as “written notice of a claim” under 46 U.S.C. 30511(a), that still would not present a legal bar to Petitioners’ suit or warrant dismissal on timeliness grounds as suggested by Respondent. By its plain terms, the six-month deadline in 46 U.S.C. § 30511(a) requires a vessel owner to bring a suit within six months of receiving written notice of a claim. *Orion*, at 1329 (noting that the six-month time bar does nothing special beyond setting “an exception-free deadline”). Section 30511(a) does

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not, by contrast, mandate written notice of a claim as a prerequisite to filing a limitation action, and indeed Respondent has supplied no authority to support that view.

Under these standards, Respondent's Motion to Dismiss must be denied. Petitioners received written notice of a claim in the January 29, 2021 letter sent by Respondent's counsel [ECF No. 8-1, p. 6]. The content of the letter revealed a reasonable possibility that a forthcoming claim would exceed the value of the vessel. And Petitioners filed their Complaint on February 19, 2021, in compliance with the six-month deadline. 46 U.S.C § 30511(a).

IV. Conclusion

For the foregoing reasons, it is **ORDERED AND ADJUDGED** that Respondent's Motion to Dismiss [ECF No. 8] is **DENIED**.

DONE AND ORDERED in Chambers at Fort Pierce, Florida this 17th day of May 2021.


AILEEN M. CANNON
UNITED STATES DISTRICT JUDGE

cc: counsel of record