SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MELISSA A. CRANE** **PART** **60M**

Justice

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GREAT LAKES INSURANCE SE IN ITS OWN RIGHT AND/OR AS SUBROGEE OF PACIFIC GULF SHIPPING CO.,

Plaintiff,

- v -

AMERICAN STEAMSHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION INC. A/K/A THE AMERICAN CLUB, SHIPOWNERS CLAIMS BUREAU INC.,GEORGE GOURDOMICHALIS, EFSTATHIOS GOURDOMICHALIS

Defendant.

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INDEX NO. 157295/2021

MOTION DATE 08/01/2023

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96

were read on this motion to/for JUDGMENT - SUMMARY.

In this action, plaintiff Great Lakes Insurance SE asserted claims in its own right and as Pacific Gulf Shipping Co.'s subrogee. The court previously granted the parties' motions to dismiss in part, such that plaintiff's claims for prima facie tort, promissory fraud, civil conspiracy, and unjust enrichment were dismissed. Only plaintiff's negligence claim against the Gourdomichalis defendants survived the prior motions (*see* Doc 35 [decision and order resolving MS 01 and 02]; Doc 50 [Appellate Division, First Department decision and order]).

In Count V of the complaint, plaintiff asserts that the Gourdomichalis defendants "owed a duty to Plaintiff . . . and Pacific Gulf to ensure that the [vessel] M/V ADAMASTROS was . . . seaworthy and had proper insurance coverages" (Doc 1 [Complaint], ¶ 177). Plaintiff asserts that the Gourdomichalis defendants breached their duties of care "when devising the scheme to

abandon the Vessel, its cargo, and its crew for the benefit of Defendants," and "[b]ut for [Gourdomichalis] Defendants' breach, Plaintiff would not have incurred damages in the amount of $18,500,000" (*id.*, ¶¶ 178-179).

In Motion Seq. No. 03, the Gourdomichalis defendants moved for an order summarily dismissing the complaint. Plaintiff opposed the motion. At oral argument, the court granted the motion and dismissed the negligence claim against Efstathios Gourdomichalis (8/1/23 tr. at 29-30). The court reserved on the motion as against George Gourdomichalis. Thus, this decision concerns only the negligence claim (the sole remaining cause of action in the complaint) as against George.

BACKGROUND

The court presumes familiarity with the facts (*see* Doc 35 [decision and order resolving motions to dismiss]). The court sets forward the following background facts only as relevant to this summary judgment motion.

It is not disputed that plaintiff is a foreign entity that provides maritime insurance services. Plaintiff authorized its managing agent, nonparty MECO, to issue marine liability policies through MECO's insurance brand, nonparty The Charterers P&I Club. On November 12, 2013, The Charterers Club issued a P&I policy to plaintiff's subrogee, Pacific Gulf.

The American Club provides P&I insurance to vessel owners and charterers. Shipowners Claims Bureau manages The American Club. Defendants George Gourdomichalis ("George") and Efstathios Gourdomichalis ("Efstathios") are both Greek residents and citizens. George has been a member of The American Club's Board of Directors and the Board's Chairman since June 21, 2018. Nonparty Phoenix Shipping & Trading S.A. ("Phoenix") is a foreign entity with

its principal place of business in Greece. George was Phoenix's President and CEO, and Efstathios is Phoenix's Secretary/Treasurer and an Executive Director.

Adamastos Shipping is the entity that owned the M/V ADAMASTOS, the merchant cargo vessel at issue in this action. Adamastos Shipping is a Liberian entity. George was its President and was one of its two Board members. Efstathios was its Secretary and its other Board member. According to defendants, Adamastos Shipping was owned by nonparty Drakoulis Gourdomichalis and "members of the Mourgelas family," including Antonis Mourgelas. Defendants also state that nonparty Piraeus Bank obtained the vessel through a foreclosure during the Greek economic crisis and financed Adamastos Shipping's purchase of the vessel. Thus, defendants claim that Piraeus Bank "had a significant ownership interest in the Vessel," and "had a significant say on how the Vessel would be managed and operated" (Doc 53 [Efstathios aff.]).

Phoenix Shipping entered an agreement with Adamastos Shipping to manage the Vessel (Doc 71 [Management Agreement]). Under that agreement, Phoenix Shipping operated and managed Adamastos Shipping's business, including chartering the Vessel, the Vessel's operation, its crew management, technical management, and commercial management, as well as its insurance services and accounting services. The record is contradictory as to who held what positions at Phoenix during the relevant time period. For instance, George testified on 12/20/18 that his father, Drakoulis Gourdomichalis, was Phoenix's "sole director, president, treasurer and secretary" (Doc 82 at 253). However, in his affirmation in support of this motion, Efstathios states that he was an executive director of Phoenix during that time (*see* Doc 53). In any event, at the time the vessel was held and then abandoned in Brazil, Phoenix was owned and operated

by Drakoulis, the Gourdomichalis defendants, and their associated holding companies, Alastor Marine S.A. and Thalassa Holdings S.A.

It is undisputed that Pacific Gulf chartered the vessel from Adamastos Shipping in April 2014. Pacific Gulf then entered a sub-charter party agreement with nonparty Integris. Integris, in turn, sub-chartered the Vessel to Marubeni, and Marubeni sub-chartered the Vessel to Marubeni America Corp. Marubeni arranged for soybean cargo to be transported by the vessel. In August 2014, Brazilian authorities cited the vessel's numerous deficiencies and detained the vessel. Not long afterwards, the vessel broke free of its moorings and grounded. Ultimately, Adamastos Shipping refused to fund the vessel's repair, Phoenix terminated the management agreement purportedly because Adamastos Shipping was not paying its fees, and the American Club terminated the vessel's P&I coverage. The vessel was abandoned in Brazil in January 2015, and its soybean cargo was eventually sold off for a loss.

Marubeni filed a cargo claim for $32,650,000, and Integris commenced an arbitration proceeding against Pacific Gulf for breach of their sub-charter agreement. Pacific Gulf then commenced an arbitration proceeding against Adamastos Shipping. In April 2017, an arbitrator found that Adamastos Shipping must indemnify Pacific Gulf for its losses. Marubeni's arbitration proceeding settled for $18 million. Plaintiff asserts that it funded Marubeni's settlement through its MECO/The Charterers Club insurance. MECO's claims director, Edward Turner, declared in 2019 that "the [Charterers] Club funded the Settlement of the Cargo Claim pursuant to Integris' Liability cover with the Club," but "The Club did not ask Integris to pay first" (Doc 91). Turner also stated that Integris and Pacific Gulf settled the claim between themselves for $18.5 million, and The Club debited the settlement amount from Pacific Gulf's

account and credited the same to Integris's account (*id.*). Thus, plaintiff asserts its negligence claim against defendants as Pacific Gulf's subrogee.

DISCUSSION

"The proponent of a summary judgment motion must make *a prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Silverman v Perlbinder*, 307 AD2d 230, 230 [1st Dept 2003]). The court must view the facts "in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). If movant meets this prima facie burden, the burden shifts to the non-moving party to furnish evidence in admissible form sufficient to raise a triable issue of fact (*Alvarez*, 68 NY2d at 324). The party opposing a motion for summary judgment must "produce evidentiary proof in admissible form" (*Stonehill Cap. Mgmt., LLC v Bank of the West*, 28 NY3d 439, 448 [2016]). Mere conclusions, expressions of hope, allegations, or assertions are insufficient to raise a triable issue of fact (*Zuckerman v City of N.Y.*, 49 NY2d 557, 562 [1980]).

1. **Personal jurisdiction**

Defendant argues that the complaint must be dismissed against him for lack of personal jurisdiction under CPLR 302 (a) (1). In Motion Seq. No. 02, the Gourdomichalis defendants moved, pre-answer, to dismiss the complaint for lack of personal jurisdiction. The court denied that motion and that portion of this court's decision was affirmed on appeal (*see* Doc 50 [3/30/23 decision and order, Appellate Division, First Department] ["Plaintiff's allegations are sufficient to establish long-arm jurisdiction over the Gourdomichalis defendants in accordance with CPLR 302[a][1]."]).

A defendant that has preserved a personal jurisdiction defense may move for summary judgment to dismiss a pleading for lack of personal jurisdiction after substantive discovery has occurred (*see e.g. Williams v Beemiller, Inc.*, 33 NY3d 523, 528-529 [2019]). Here, the Gourdomichalis defendants preserved their personal jurisdiction defense by denying plaintiff's detailed allegations concerning personal jurisdiction in their answer (*see Gibson v Air & Liquid Sys. Corp.*, 173 AD3d 519, 519-520 [1st Dept 2019]).

Although George's personal jurisdiction defense is preserved, he has not established *prima facie* entitlement to judgment as a matter of law dismissing the negligence claim against him on this basis. First, defendants' affirmations are inadmissible (*see* Docs 52-53). When this motion was filed, CPLR 2106 stated:

> "(b) The statement of any person, when that person is physically located outside the geographic boundaries of the United States, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States, subscribed and affirmed by that person to be true under the penalties of perjury, may be used in an action in lieu of and with the same force and effect as an affidavit. Such affirmation shall be in substantially the following form:
>
> I affirm this ___ day of _____, ____, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that I am physically located outside the geographic boundaries of the United States, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law."

As of January 1, 2024, CPLR 2106 has been updated to stated:

> "The statement of any person wherever made, subscribed and affirmed by that person to be true under the penalties of perjury, may be used in an action in New York in lieu of and with the same force and effect as an affidavit. Such affirmation shall be in substantially the following form:
>
> I affirm this ___ day of _____, ____, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law."

Here, the Gourdomichalis defendants state in their unsworn affirmations that they, "under the penalties of perjury under the laws of the United States pursuant to 28 U.S.C. § 1746, affirm that the following is true and correct" (Docs 52-53). That is not sufficient under either version of CPLR 2106. Moreover, the exhibits annexed to Efstathios's affirmation are unauthenticated and inadmissible.

While the plaintiff bears the ultimate burden of proof as the party seeking to assert personal jurisdiction, this is defendants' summary judgment motion and they bear the initial burden to establish prima facie entitlement to judgment as a matter of law (*see e.g. Lott-Coakley ex rel. Lott-Coakley v Ann-Gur Realty Corp.*, 23 Misc 3d 1114(A) [Sup Ct, Bronx County 2009] [on a motion for summary judgment, "the movant's burden to proffer evidence in admissible form is absolute"]). They have not done so with respect to defendant George Gourdomichalis. Though the court lacks jurisdiction over Efstathios, the record establishes that George procured the vessel's insurance policy from the American Club/SCB on Phoenix's and Adamastos's behalf and corresponded with the American Club and SCB [both located in New York] throughout the relevant time period in connection with the events in Brazil. Moreover, in *Great Lakes Ins. SE v Am. S.S. Owners Mut. Protection & Indem. Assn.* (2020 US Dist LEXIS 140912 [SDNY Aug. 6, 2020, No. 19-CV-10656 (RA)]), the District Court determined that "Defendants' alleged conspiracy to abandon the Vessel and terminate its insurance coverage—occurred not on "navigable waters," but "at offices in Greece and New York" (*id.* at *30). In addition, there is evidence that George visited New York for meetings as one of the American Club's board members.

2. Negligence

Defendants also assert that they are entitled to summary judgment because plaintiff cannot prove its negligence claim. Specifically, they contend that they owed plaintiff no duty, there was no breach, and plaintiff suffered no injury. They also assert that this claim is barred by the economic loss rule, and, in any event, the claim is time-barred.

Plaintiff's negligence claim states:

> "Defendants owed a duty to Plaintiff GREAT LAKES and Pacific Gulf to ensure that the M/V ADAMASTOS was, inter alia, seaworthy and had proper insurance coverages.
>
> . . . Defendants breached the duty to Plaintiff and failed to exercise reasonable care when devising the scheme to abandon the Vessel, its cargo, and its crew for the benefit of Defendants and to the detriment of Plaintiff"

(Complaint, ¶¶ 177-178).

The Court of Appeals has explained:

> "In order to prevail on a negligence claim, 'a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom.' In the absence of a duty, as a matter of law, there can be no liability. The definition and scope of an alleged tortfeasor's duty owed to a plaintiff is a question of law"

(*Pasternack v Lab. Corp. of Am. Holdings*, 27 NY3d 817, 825 [2016], quoting *Solomon v City of New York*, 66 NY2d 1026, 1027 [1985]; *see also Saudi v S/T Mar. Atl.*, 2001 US Dist LEXIS 14155, at *7 [SD Tex Feb. 19, 2001] ["To prove negligence under general maritime law, a plaintiff must demonstrate (1) a duty owed to the plaintiff by the defendant; (2) breach of that duty; (3) injury sustained by the plaintiff; and (4) a causal connection between the defendant's conduct and the plaintiff's injury."]).

The admissible evidence establishes that Adamastos Shipping, not George Gourdomichalis, owned the vessel. According to defendants, Drakoulis Gourdomichalis and "members of the Mourgelas family" [including, at least, Antonis Mourgelas] owned Adamastos Shipping. It is undisputed that Phoenix Shipping was engaged to manage the Vessel (Doc 71

[Management Agreement]) and that Phoenix was the entity that procured the American Club insurance policy. Phoenix was owned and operated by the Gourdomichalis family and their associated holding companies.

In essence, defendant contends that he cannot be liable for negligently failing to ensure that the vessel was seaworthy because he did not own Adamastos Shipping and the manager, Phoenix, was not authorized to repair the vessel because Adamastos's board issued a resolution that required Antonis Mourgelas's approval for any transactions over $25,000 (Doc 54). Put simply, defendants assert that Antonis Mourgelas controlled Adamastos's purse strings pursuant to the board resolution. Defendants claim, therefore, that Phoenix and the defendants had no authority to ensure that the vessel was seaworthy or properly insured and, thus, they cannot be liable for negligence.

The purported Adamastos Shipping board resolution is dated December 4, 2012 (Doc 54 [Resolution of Adamastos Shipping's Board of Directors]). In the resolution, the board named five representatives to transact business through Adamastos's Piraeus Bank account: George and Efstathios, as well as nonparties Antonios Mourgelas, Anastasia Livieratou, and Constantinos Moutsopoulos. The resolution authorized any two of those representatives, acting jointly, to make transactions up to $25,000 (*id.* at 1). For transactions over $25,000, one of George, Efstathios, Livieratou, and Moutsopoulos had to act jointly with Antonis Mourgelas (*id.* at 1-2). However, as discussed above, the board resolution is unauthenticated and inadmissible because it is annexed to Efstathios's inadmissible affirmation.

George has not met his prima facie burden. "[A] corporate officer who participates in the commission of a tort may be held individually liable, regardless of whether the officer acted on behalf of the corporation in the course of official duties and regardless of whether the corporate

veil is pierced" (*Espinosa v Rand*, 24 AD3d 102, 102 [1st Dept 2005] [citations omitted]; *see also Rajeev Sindhwani, M.D., PLLC v Coe Bus. Serv., Inc.*, 52 AD3d 674, 677 [2d Dept 2008]).

"An individual acting solely in his capacity as agent of his corporate principal, without any showing of exclusively independent control of operations, cannot be held individually liable for alleged corporate wrongdoing" (*Mendez v City of New York*, 259 AD2d 441, 442, [1st Dept 1999]). Here, however, defendants failed to submit sufficient admissible evidence to establish that George did not commit any "independent tortious acts, or that he acted in any other manner other than within the scope of his employment as a corporate officer" (*Lott-Coakley*, 23 Misc 3d 1114(A) at 10, citing *Mendez*, 259 AD2d at 442).

Defendants at least implicitly concede that Adamastos Shipping owed a duty to plaintiff or plaintiff's subrogee. Further, defendants' submissions do not eliminate all triable issues of fact as to whether Adamastos negligently failed to ensure that the vessel was seaworthy, in breach of its duties to plaintiff or plaintiff's subrogee. Similarly, there are issues of fact as to whether George participated in the alleged torts on his own behalf, or to benefit Phoenix, Adamastos, Piraeus Bank, or the American Club, as opposed to acting solely within the scope of his employment as a corporate officer. Notably, George was one of the American Club's board members during the relevant time period. While George did not own Adamastos, he was Adamastos's President and a Board member. Moreover, George was an executive at Phoenix, which he seemingly co-owned with his brother. At Phoenix, George was in charge of the day-to-day management of the vessel. Even crediting defendant's claim that Phoenix lacked authority to repair the vessel as a result of the [inadmissible] board resolution, the record demonstrates that Adamastos Shipping permitted the vessel to be undercapitalized and that defendants were aware that the vessel was "deteriorating" during its voyage to Brazil (*see* Doc 83 at 107 ["I remember

the vessel's condition started deteriorating on her way to Brazil. So, yeah, we were -- Phoenix was aware of the deteriorating situation of the vessel."]). Moreover, there is some evidence that the Gourdomichalis defendants made payments on Adamastos's behalf through their holding companies (*see* Doc 83 [E. Gourdomichalis EBT] at 95:17- 96:13).

The admissible evidence also establishes that Adamastos was operated largely from Phoenix's office, and Adamastos used Phoenix's email addresses and telephone numbers to conduct its business (*see e.g id.*). While defendants contend that Antonis Mourgelas was "calling the shots" for Adamastos (*see id.* at 106-107), defendants' submissions do not eliminate all triable issues of fact as to whether George participated in Adamastos's potentially negligent acts or omissions, or that he did so purely in his capacity as an Adamastos executive. Notably, after Brazilian authorities detained the vessel and the vessel became unmoored, **Phoenix** terminated the ship management agreement on the basis that Adamastos could not pay for its services, despite the fact that Adamastos had not been paying Phoenix's fees for a considerable period of time before those incidents occurred. Thus, there are issues of fact as to whether George acted negligently in cancelling the Shipman Agreement, which in turn caused the American Club to terminate the vessel's P&I policy.

Even if defendants had submitted certain proofs in admissible form (e.g., the board resolution and the brothers' affirmations), summary judgment would not be warranted. Defendants' affirmations contain conclusory and unsupported statements. Further, even if board resolution were admissible, it would not be sufficient to establish that George is entitled to summary judgment dismissing the negligence claim. The board resolution restricting defendants' ability to fund the vessel's repairs does not eliminate all issues of fact relating to the alleged negligent acts and omissions, or George's participating role, especially considering the

overlapping relationships between George, Phoenix [the vessel's manager], Adamastos [the vessel's owner], and the American Club [the vessel's insurer]. George was a board member and/or executive of all three entities. Whether or not Antonis Mourgelas controlled Adamastos's Piraeus Bank account, there would still be an issue of fact as to whether George contributed to the alleged negligent termination of the vessel's insurance to benefit one or more of those entities.

Next, defendants' submissions do not eliminate all triable issues of fact as to the issue of damages. Even if plaintiff had made a prima facie showing on that element of the negligence claim, which they do not, plaintiff's submissions raise a triable issue of fact (*see* Doc 91 [Turner declaration]). In addition, contrary to defendants' position, the economic loss rule has no application here (*see IKB Intl., S.A. v Wells Fargo Bank, N.A.*, 40 NY3d 277, 290 [2023] [holding that the economic loss rule "stands for the proposition that an end-purchaser of a product is limited to contract remedies and may not seek damages in tort for economic loss against a manufacturer, and does not have application beyond the products liability context"]).

Finally, the negligence claim is not time-barred. While the statute of limitations for a negligence claim is ordinarily three years, this court held, and the First Department affirmed, that plaintiff's equitable tolling allegations were sufficient to survive defendants' motion to dismiss (*see* Doc 50 at 3 [AD1 decision and order]). Defendants' submissions on this summary judgment motion are insufficient to establish that plaintiff's negligence claim should not be equitably tolled. Defendants do not submit any admissible proof establishing that plaintiff failed to do due diligence in connection with this claim, such as deposition testimony from plaintiff's representatives.

Even if defendants had met their prima facie burden on this issue, there are triable issues as to whether "the facts concerning Defendants' operational dominion and control over Phoenix Shipping, Adamastos Shipping, and the M/V ADAMASTOS until discovery was undertaken in the companion litigation" in 2019 (*see* plaintiff's mem. opp. [Doc 92] at 14-15). On this motion, defendants have not sufficiently rebutted that showing.

CONCLUSION

The court has considered the parties' remaining contentions and finds them unavailing.

Accordingly, it is

ORDERED that Motion Seq. No. 03 is granted only to the extent that the complaint is dismissed against Defendant Efstathios Gourdomichalis, and the motion is otherwise denied; and it is further

ORDERED that the remainder of the complaint against defendant George Gourdomichalis is severed and shall continue to trial; and it is further

ORDERED that the parties must appear for a pretrial conference over Microsoft Teams on 1/26/24 at 11:00 a.m.

1/12/2024
DATE

MELISSA A. CRANE, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE