

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

WILLIAM D. LACKEY, et al.,)
)
 Plaintiffs)
)
 v.)
)
 BREWER'S SOUTH FREEPORT)
 MARINE, INC.,)
)
 Defendant)

Docket No. 00-28-P-H

MEMORANDUM DECISION ON PLAINTIFFS' MOTION TO STRIKE JURY DEMAND

The plaintiffs, William D. Lackey and nine other individuals, move to strike the defendant's demand for jury trial on all counts of their complaint. The amended complaint asserts eighteen counts of breach of contract and ten counts of negligence, all arising out of a fire at the defendant's boat yard. First Amended Complaint (Docket No. 2). The demand for jury trial first appears in the defendant's answer, which does not assert any counterclaims. Defenses and Answer to Plaintiffs' First Amended Complaint and Demand for Jury Trial (Docket No. 4) at 13. Asserting that their claims are brought pursuant to the court's admiralty jurisdiction and Fed. R. Civ. P. 9(h),¹ the

¹ That portion of the rule provides, in pertinent part: "A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims. If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes whether so identified or not." Rule 38(e) provides: "These rules shall not be construed to create a right to trial by jury of the issues in an admiralty or maritime claim within the meaning of Rule 9(h)."

plaintiffs contend that the defendants are not entitled to a jury trial. Motion to Strike Jury Demand, etc. (Docket No. 7) at 1.

Generally, jury trial is not available on admiralty claims. *Natasha, Inc. v. Evita Marine Charters, Inc.*, 763 F.2d 468, 470 (1st Cir. 1985) (no right to jury trial in admiralty suit except as provided by statute). In its opposition to the motion, the defendant does not dispute that the contract claims asserted by the plaintiff are within the court's admiralty jurisdiction. Rather, it focuses on the negligence claims, asserting that they do not invoke admiralty jurisdiction under relevant case law and concluding that it is therefore entitled to jury trial on all claims, including the contract counts. Defendant's Memorandum in Opposition to Plaintiffs' Motion to Strike Jury Demand (Docket No. 9) at 2-5. The defendant cites in support of its argument only case law in which a single claim or only tort claims were at issue. A different body of case law applies, however, when both claims that are within admiralty jurisdiction and claims that are not are present in the same case.

Most of that case law deals with actions in which a complaint raises admiralty claims and a counterclaim asserts one or more legal claims. In such cases, the courts have either allowed jury trial on the counterclaim only, *e.g.*, *Wilmington Trust v. United States Dist. Court*, 934 F.2d 1026, 1032 (9th Cir. 1991), or refused to allow jury trial at all, *e.g.*, *Camrex (Holdings) Ltd. v. Camrex Reliance Paint Co.*, 90 F.R.D. 313, 317 (E.D.N.Y. 1981).

The First Circuit has declined to rule on the question whether a plaintiff who invokes Fed. R. Civ. P. 9(h) may insist that no jury trial be allowed when a complaint sounds in admiralty and a counterclaim does not. *Concordia Co. v. Panek*, 115 F.3d 67, 71 (1st Cir. 1997). However, it is noteworthy that the "split of authority" in the case law to which the First Circuit refers in that opinion is on the question whether a defendant is entitled to jury trial on a legal counterclaim brought

in response to a claim sounding in admiralty; in none of the case law cited did the courts allow a defendant bringing a legal claim to force a plaintiff to submit its admiralty claim to a jury. The defendant here is not entitled to a jury trial on the contract claims, as to which it apparently concedes that admiralty jurisdiction exists.

With respect to the negligence claims, it is not necessary to decide whether they could come within the admiralty jurisdiction of this court. Once a plaintiff has invoked Rule 9(h), as have the plaintiffs here, that choice overrides any right to a jury trial that a defendant may have on fewer than all of the claims in the plaintiff's complaint. *Royal Ins. Co. of Am. v. Hansen*, 125 F.R.D. 5, 9 (D. Mass. 1988); *Arkwright-Boston Mfrs. Mut. Ins. Co. v. Bauer Dredging Co.*, 74 F.R.D. 461, 462 (S.D.Tex. 1977). Nothing in these opinions, which I find persuasive, is inconsistent with Judge Hornby's unpublished Order on Defendants' Motion to Strike Plaintiff's Jury Demand and on Plaintiff's Motion to Amend Complaint issued July 26, 1999 in *South Port Marine, LLC v. Gulf Oil Ltd. Partnership*, Docket No. 98-20-P-H, currently on appeal before the First Circuit, upon which the defendant relies.

Accordingly, the plaintiffs' motion to strike the defendant's demand for jury trial is **GRANTED**.

Dated this 27th day of April, 2000.

David M. Cohen
United States Magistrate Judge

LACKEY, et al v. BREWER'S SOUTH FREEP Filed: 01/26/00 Assigned to: JUDGE D. BROCK
HORNBY Demand: \$505,000 Nature of Suit: 340Lead Docket: None Jurisdiction: Federal

QuestionDkt# in other court: NoneCause: 28:1333 AdmiraltyWILLIAM D LACKEY LEONARD W. LANGER plaintiff [COR LD NTC] MARSHALL J. TINKLE [COR] TOMPKINS, CLOUGH, HIRSHON & LANGER THREE CANAL PLAZA P.O. BOX 15060 PORTLAND, ME 04112-5060 207-874-6700DAVID W. FOSS LEONARD W. LANGER plaintiff (See above) [COR LD NTC] MARSHALL J. TINKLE (See above) [COR]ROBERT B GERWIG LEONARD W. LANGER plaintiff (See above) [COR LD NTC] MARSHALL J. TINKLE (See above) [COR]HARRISON B W HOFFMAN LEONARD W. LANGER plaintiff (See above) [COR LD NTC] MARSHALL J. TINKLE (See above) [COR]JOHN W JORDAN LEONARD W. LANGER plaintiff (See above) [COR LD NTC]Docket as of May 1, 2000 7:36 am Page 1 Proceedings include all events.2:00cv28 LACKEY, et al v. BREWER'S SOUTH FREEP STNDRD MARSHALL J. TINKLE (See above) [COR]PAUL A COLLET LEONARD W. LANGER plaintiff (See above) [COR LD NTC] MARSHALL J. TINKLE (See above) [COR]RICHARD F PESCE LEONARD W. LANGER plaintiff (See above) [COR LD NTC] MARSHALL J. TINKLE (See above) [COR]DAVID N PAGE LEONARD W. LANGER plaintiff (See above) [COR LD NTC] MARSHALL J. TINKLE (See above) [COR]FOSTER L TREWORGY LEONARD W. LANGER plaintiff (See above) [COR LD NTC] MARSHALL J. TINKLE (See above) [COR]JAMES G TALIAFERRO, JR LEONARD W. LANGER plaintiff (See above) [COR LD NTC] MARSHALL J. TINKLE (See above) [COR] v.BREWER'S SOUTH FREEPORT MARINE, PHILLIP D. BUCKLEYINC. 947-4501 defendant [COR] PAUL W. CHAIKEN 947-4501 [COR LD NTC]Docket as of May 1, 2000 7:36 am Page 2