

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

CARLTON P. PERCY,)
)
 Plaintiff)
)
 v.) **Civil No. 00-191-P-C**
)
 CARRIE H. SUCHAR,)
)
 Defendant)

**RECOMMENDED DECISION ON DEFENDANT’S
MOTION TO DISMISS AND PLAINTIFF’S
MOTION FOR SUMMARY JUDGMENT AS TO COUNTERCLAIMS**

Defendant Carrie Suchar moves pursuant to Fed. R. Civ. P. 12(b)(1) and (6) to dismiss plaintiff Carlton Percy’s complaint for partition of a commercial fishing vessel on the basis of lack of subject matter jurisdiction and/or failure to state a claim as to which relief can be granted, while Percy moves pursuant to Fed. R. Civ. P. 56 for summary judgment as to Suchar’s two counterclaims for damages arising from the loss of fishing gear. Defendant Carrie H. Suchar’s Motion To Dismiss, etc. (“Defendant’s Dismiss Motion”) (Docket No. 11) at 1; Plaintiff’s Motion for Summary Judgment Regarding Defendant’s Counter Claim (“Plaintiff’s SJ Motion”) (Docket No. 9); Plaintiff’s Amended Complaint (“Complaint”) (Docket No. 2); Answer and Counterclaim (Docket No. 3) at Counterclaim (“Counterclaim”) ¶¶ 1-11. For the reasons that follow, I recommend that the defendant’s motion be granted and that of the plaintiff be denied.

I. Motion To Dismiss

A. Applicable Legal Standards

When a defendant moves to dismiss pursuant to Rule 12(b)(1), the plaintiff bears the burden of demonstrating that subject-matter jurisdiction exists. *Lundquist v. Precision Valley Aviation, Inc.*, 946 F.2d 8, 10 (1st Cir. 1991); *Lord v. Casco Bay Weekly, Inc.*, 789 F. Supp. 32, 33 (D. Me. 1992). Both parties may rely on extra-pleading materials. 5A C. Wright & A. Miller, *Federal Practice and Procedure* § 1350 at 213 (2d ed. 1990); *see also Hawes v. Club Ecuestre el Comandante*, 598 F.2d 698, 699 (1st Cir. 1979) (question of jurisdiction decided on basis of answers to interrogatories, deposition statements and an affidavit).

“When evaluating a motion to dismiss under Rule 12(b)(6), [the court] take[s] the well-pleaded facts as they appear in the complaint, extending [the] plaintiff every reasonable inference in his favor.” *Pihl v. Massachusetts Dep’t of Educ.*, 9 F.3d 184, 187 (1st Cir. 1993). The defendant is entitled to dismissal for failure to state a claim only if “it appears to a certainty that the plaintiff would be unable to recover under any set of facts.” *Roma Constr. Co. v. aRusso*, 96 F.3d 566, 569 (1st Cir. 1996); *see also Jackson v. Faber*, 834 F. Supp. 471, 473 (D. Me. 1993).

B. Factual Context

Percy asserts in his complaint that “[t]his is a case of Admiralty and Maritime Jurisdiction”; that he and Suchar are each the owners of an undivided one-half interest in the commercial fishing vessel *The Real Thing*; and that inasmuch as the owners are unable to agree on either the business of the vessel or its sale, he seeks partition pursuant to Rule D of the Supplemental Rules for Certain Admiralty and Maritime Claims (“Supp. R. Adm. D”). Complaint ¶¶ 1, 5-7.

Percy and Suchar were involved in a romantic relationship for approximately ten years, until September 1999. Deposition of Carrie Suchar dated January 24, 2001, attached as Exh. A to

Plaintiff's Opposition to Defendant's Motion To Dismiss ("Plaintiff's Dismiss Opposition") (Docket No. 15), at 4. In 1994 the parties took delivery of the F/V The Real Thing, which had been purchased with a down payment of \$20,000 and a loan of \$50,000. *Id.* at 13, 17. Both Percy and Suchar contributed \$10,000 toward the down payment; however, because Percy had a poor credit history he was unable to secure financing for the purchase of the vessel. *Id.* at 13, 15. Suchar had a good credit rating and as a result was able to secure a \$50,000 loan secured by a ship's mortgage. *Id.* at 15, 18. Title to the vessel was placed in her name. *Id.* at 15.

From 1994 until 1996 the parties both worked aboard the vessel, placing their fishing earnings into a joint account called the "Real Thing" account from which mortgage and other vessel expenses were paid. *Id.* at 33, 39, 139-41. After Percy sustained an injury in 1996 Suchar became captain of the F/V The Real Thing. *Id.* at 39. In September 1999 the parties ended their romantic relationship. *Id.* at 4. During the fall of 1999 Suchar ran the vessel and paid a portion of vessel proceeds to Percy. *Id.* at 95. During the winter of 2000 the parties entered into negotiations regarding the liquidation of their lobstering business, including sale of the F/V The Real Thing. Deposition of Carrie Suchar dated January 20, 2000 ("1/20/00 Suchar Dep."), attached as Exh. B to Plaintiff's Dismiss Opposition, at 22-23.

Percy admits that ownership documents name Suchar as owner of the vessel; however, he asserts a one-half interest based on oral agreements. Deposition of Carlton Percy, attached as Exh. B to Defendant's Dismiss Motion, at 19, 33, 52-53. Suchar asserts that the vessel belongs to her, and not to the parties' partnership. Deposition of Carrie Suchar, attached as Exh. C to Defendant's Dismiss Motion, at 15-16, 35-36, 38, 40-41, 130-31. In the context of an unrelated case, Suchar testified that Percy had an interest in the F/V The Real Thing, that the proceeds of the fishing operation were used to

pay the ship's mortgage and that she and Percy had a 50-50 partnership as to the percentages of income that each would take back from the business. 1/20/00 Suchar Dep. at 17-18.

C. Analysis

In her motion to dismiss, Suchar argues *inter alia* that the court lacks subject-matter jurisdiction to adjudicate Percy's claim for partition inasmuch as the action is not ripe and Percy lacks standing to press it. Defendant's Dismiss Motion at 3-5. Specifically, Suchar contends that (i) a partition action in admiralty presupposes the existence of an ownership interest in a vessel, (ii) the underlying interests in the F/V The Real Thing are disputed, and (iii) the court has no jurisdiction in admiralty to adjudicate that underlying dispute. *Id.* I agree.

Percy brings his claim for partition pursuant to Rule D, which provides in relevant part: "In all actions for possession, partition, and to try title maintainable according to the course of the admiralty practice with respect to a vessel . . . the process shall be by a warrant of arrest of the vessel . . . and by notice in the manner provided by Rule B(2) to the adverse party or parties." Supp. R. Adm. D. An advisory committee's note explains:

This carries forward the substance of Admiralty Rule 19.

Rule 19 provided the remedy of arrest in controversies involving title and possession in general. In addition it provided that remedy in controversies between co-owners respecting the employment of a vessel. It did not deal comprehensively with controversies between co-owners, omitting the remedy of partition. Presumably the omission is traceable to the fact that, when the rules were originally promulgated, concepts of substantive law (sometimes stated as concepts of jurisdiction) denied the remedy of partition except where the parties in disagreement were the owners of equal shares. The Supreme Court has now removed any doubt as to the jurisdiction of the district courts to partition a vessel, and has held in addition that no fixed principle of federal admiralty law limits the remedy to the case of equal shares. . . .

Supp. R. Adm. D advisory committee's note (citations omitted).

The language of the rule, as explicated by the advisory committee's note, certainly seems to contemplate that an action such as Percy's – in which a plaintiff claiming title brings an action for partition and the defendant contests the plaintiff's ownership – is cognizable in admiralty. It is not so simple. Critically, the rule provides only for possession, partition and title actions “maintainable according to the course of the admiralty practice with respect to a vessel[.]” The mere fact that an action is brought pursuant to Rule D does not confer jurisdiction. *See, e.g., Cary Marine, Inc. v. Motorvessel Papillon*, 872 F.2d 751, 754 (6th Cir. 1989) (“In the absence of admiralty jurisdiction, . . . these remedies [possessory, petitory and partition actions pursuant to Rule D] are not available.”) (footnote omitted).

Percy does not bring a “petitory” – or title – action; however, even assuming *arguendo* that he did, his suit would not be cognizable in admiralty because Suchar possesses sole legal title to the vessel. A “petitory” action in admiralty must be predicated on the existence of legal, not merely equitable, title. *See, e.g., Jones v. One Fifty Foot Gulfstar Motor Sailing Yacht*, 625 F.2d 44, 47 (5th Cir. 1980) (“[U]nlike a typical case of replevin, [the plaintiffs'] success in an admiralty petitory action would require proof of *legal title* and not merely a superior *equitable* title or interest.”) (footnote omitted) (emphasis in original); *Trueman v. The Historic Steamtug New York*, 120 F. Supp.2d 228, 233 (N.D.N.Y. 2000) (same); *Privilege Yachting, Inc. v. Teed*, 849 F. Supp. 298, 301 (D. Del. 1994) (same).

Nor, under the circumstances of this case, can Percy maintain his partition action unless and until such time as the parties' underlying ownership dispute – which I conclude is non-maritime in nature and accordingly with respect to which the court is without jurisdiction – is resolved.

As a threshold matter, Percy contests that there is any *bona fide* dispute between the parties regarding his asserted ownership. Plaintiff's Dismiss Opposition at 3-5. He points out that Suchar has acknowledged that (i) he invested money toward purchase of the F/V The Real Thing, (ii) monies generated from the parties' commercial fishing business were used to pay the ship's mortgage and (iii) he has an interest in the vessel and that the parties were equal partners in the commercial-fishing venture. *Id.* Nonetheless, I find no acknowledgement from Suchar that Percy held a fifty percent interest in the F/V The Real Thing. The question of the extent of Percy's interest in the vessel would have to be adjudicated prior to institution of any partition proceeding by the court.

This squarely raises the question whether the court has jurisdiction in admiralty to resolve that underlying dispute. Such caselaw as I have been able to find suggests that the answer is no. *See, e.g., Ward v. Thompson*, 63 U.S. 330, 333 (1859) (holding that dispute concerning distribution of profits from steamboat business not cognizable in admiralty; noting that “[a] court of admiralty takes cognizance of certain questions between part owners, as to the possession and employment of the ship, but will not assume jurisdiction in matters of account between them.”); *Economu v. Bates*, 222 F. Supp. 988, 991 (S.D.N.Y. 1963) (“[I]t is difficult to see on what basis the purchase of a half interest in a vessel constitutes a maritime contract. . . . Since the underlying transaction sued upon is one of joint venture or partnership and the principal relief sought is an accounting of profits arising out of the enterprise, it is not maritime and is beyond admiralty jurisdiction.”); *The Red Wing*, 10 F.2d 389, 389 (S.D. Cal. 1925) (“Admiralty has no jurisdiction of a contract of partnership to engage in maritime commerce.”) (citation and internal quotation marks omitted); *Turner v. Beacham*, 24 F. Cas. 346, 348 (D. Md. 1858) (No. 14,252) (“[A] contract to form a partnership to purchase a vessel, or to purchase anything else, is certainly not maritime; a court of admiralty has no right to decide whether such a

contract was legally or equitably binding, nor to adjust the accounts and liabilities of the different partners.”).

I am mindful that in this case, unlike in the cases cited above, Percy sues neither for an accounting nor for his share of profits from the fishing venture. Nonetheless, Suchar’s defense to Percy’s request for partition would require the court to delve into the intricacies of a non-maritime contract ? the underlying partnership agreement as it touched on ownership rights in the vessel. In effect, the court would be called upon to render an accounting of the parties’ rights in the vessel. The court has no jurisdiction to do so. *See, e.g., The Managua*, 42 F. Supp. 381, 382 (S.D.N.Y. 1941) (court lacked jurisdiction inasmuch as, although claim was denominated as petitory, possessory or llicitation¹ cause of action in admiralty, its main purpose was to settle partnership dispute, after which vessels were to be delivered to partnership or partition sought).

A final request by Percy remains to be addressed. Percy asks that, if the court finds it has no admiralty jurisdiction to resolve the parties’ underlying ownership dispute, it exercise its supplemental jurisdiction to accomplish the same. Plaintiff’s Dismiss Opposition at 5. However, the existence of supplemental jurisdiction hinges on the existence of primary jurisdiction. *See, e.g., Camelio v. American Fed’n*, 137 F.3d 666, 672 (1st Cir. 1998) (“A federal court exercising original jurisdiction over federal claims also has supplemental jurisdiction over all other claims that are so related to the claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.”) (citation and internal quotation marks omitted).

Here, there can be no primary (in this case, admiralty) jurisdiction until the underlying ownership dispute is resolved. Until then, as Suchar suggests, the action for partition is not ripe. *See,*

¹ “Licitation” is the equivalent of “partition.” *See* Black’s Law Dictionary 922 (6th ed. 1990) (defining “licitation” *inter alia* as “an (continued on next page)

e.g., Risinger v. Concannon, 117 F. Supp.2d 61, 65 (D. Me. 2000) (“[T]he ripeness doctrine applies when a claim involves uncertain and contingent events that may not occur as anticipated, or indeed may not occur at all.”) (citations and internal quotation marks omitted).

Suchar accordingly is entitled to the dismissal of Percy’s complaint pursuant to Fed. R. Civ. P. 12(b)(1) on the basis of lack of subject-matter jurisdiction.²

II. Motion for Summary Judgment

A. Applicable Legal Standard

Summary judgment is appropriate only if the record shows “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). “In this regard, ‘material’ means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party’” *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, “the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue.”

offering for sale to the highest bidder”).

² I further recommend that Percy’s action for partition be dismissed without prejudice in the event that Percy finds it necessary to seek the partition remedy upon resolution of the underlying ownership dispute.

National Amusements, Inc. v. Town of Dedham, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). “This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof.” *International Ass’n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

B. Factual Context

I note at the outset that the landscape of facts cognizable on summary judgment is shaped in large part by Percy’s substantial noncompliance with Local Rule 56. As Suchar points out, the first two of Percy’s four statements of fact are unsupported by any record citation, while the fourth is neither admitted nor supported by the citation given. *See* Plaintiff’s Statement of Material Facts (“Plaintiff’s SMF”) (Docket No. 10) ¶¶ 1-2, 4; Defendant Carrie H. Suchar’s Statement of Material Facts (“Defendant’s Opposing SMF”) (Docket No. 13) ¶¶ 1-2, 4-5. I accordingly disregard those statements. *See* Loc. R. 56(e) (“The court may disregard any statement of fact not supported by a specific citation to record material properly considered on summary judgment.”).

In addition, the plaintiff attempts in his reply memorandum to assert a number of new facts. *See* Plaintiff Reply to Defendant’s Opposition to Plaintiff’s Motion [sic] for Summary Judgment Regarding Defendant’s Counterclaim (“Plaintiff’s SJ Reply”) (Docket No. 14) at 2-3. In so doing she commits two errors, either of which independently merits the set-aside of the newly proffered statements ? (i) strewing facts in the body of a brief rather than containing them in a separate statement as required by Local Rule 56, and (ii) exceeding the boundaries of a reply statement of material facts, which “shall be limited to [admitting, denying or qualifying] any additional facts submitted by the opposing party.” Loc. R. 56(d). The facts sought to be proffered in the reply brief accordingly are also disregarded.

In view of the foregoing, the parties' statements of material facts, credited to the extent that they are either admitted or supported by record citations in accordance with Loc. R. 56, and viewed in the light most favorable to Suchar, reveal the following:

Suchar and Percy had a personal relationship, which broke up in September 1999. Defendant's Opposing SMF ¶ 6; Plaintiff's Response to Defendant's Statement of Material Facts ("Plaintiff's Reply SMF") (Docket No. 16) ¶ 6. Percy made threats to Suchar to intimidate her and cause her to stop lobstering. *Id.* ¶ 7.³ Percy's statements included outright statements that Suchar's lobster traps would be cut if she tried to fish in 2000. *Id.* ¶ 8.⁴ Suchar's lobster traps were cut in the summer of 2000. *Id.* ¶ 9. There were no witnesses to this event. Plaintiff's SMF ¶ 3; Defendant's Opposing SMF ¶ 3.

C. Analysis

In her counterclaim, Suchar alleges that Percy intentionally cut the lines of lobster traps belonging to her or caused others to do so, as a result of which she lost gear valued at approximately \$5,000 and has suffered lost income. Counterclaim ¶¶ 4-7. She also seeks punitive damages for the conduct of which she complains. *Id.* ¶¶ 8-11.

Percy seeks summary judgment as to these counterclaims "on the basis that the Defendant has failed to establish sufficient facts from which a reasonable fact finder could conclude that the Plaintiff, or persons acting on the Plaintiff's behalf[,] cut her lines." Plaintiff's Memorandum of Law in Support of Motion for Summary Judgment Regarding Defendant's Counter Claim (Docket No. 9) at 1. Percy

³ Percy denies this; however, the record material he cites does not contradict Suchar's statement. *See* Plaintiff's Reply SMF ¶ 7; Deposition of Carrie Suchar ("Suchar Dep."), attached as Exh. A to Plaintiff's SJ Reply, at 107.

⁴ Percy denies this. *See* Plaintiff's Reply SMF ¶ 8. However, the response on which he relies is ambiguous, at least in cold type. Suchar was asked, "Carlton has never explicitly threatened to cut your gear, is that correct?," to which she responded, "No." Suchar Dep. at 107. This could mean either, "No, that is not correct," or "No, he never explicitly threatened to cut my gear." Even giving Percy the benefit of the doubt, the record must be viewed in the light most favorable to Suchar, the non-movant, for purposes of summary judgment.

patently is not entitled to prevail. For purposes of this motion, it is undisputed that the parties' relationship broke up, Percy subsequently threatened Suchar in at least a generalized fashion, and Suchar's fishing gear was then cut. Moreover, viewing the evidence in the light most favorable to Suchar, Percy directly threatened the loss that ultimately occurred. A reasonable jury could find in Suchar's favor on these facts.⁵

IV. Conclusion

For the foregoing reasons, I recommend that the Defendant's Dismiss Motion be **GRANTED** and the Complaint dismissed without prejudice, and that the Plaintiff's SJ Motion be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 8th day of March, 2001.

*David M. Cohen
United States Magistrate Judge*

TRLIST STNDRD

U.S. District Court
District of Maine (Portland)

CIVIL DOCKET FOR CASE #: 00-CV-191

⁵The court has subject-matter jurisdiction over Suchar's counterclaims inasmuch as they assert the commission of a maritime tort. *See, e.g., Florio v. Olson*, 129 F.3d 678, 680 (1st Cir. 1997) ("A party wishing to assert maritime jurisdiction over a tort must satisfy both the 'location' and 'connection' requirements of the test. In order to satisfy the 'location' or 'situs' requirement, a party must show either that the injury occurred on navigable water or that the injury was caused by a *vessel* on navigable water. In order to satisfy the 'connection' or 'nexus' requirement, the party must show that the type of incident involved has a potentially disruptive impact on maritime commerce and that the 'general character' of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity.") (citations omitted) (emphasis in original); *CEH, Inc. v. F/V Seafarer (ON 675048)*, 70 F.3d 694, 696-97 (1st Cir. 1995) (case concerning destruction of offshore lobstering gear brought pursuant to district court's maritime jurisdiction).

PERCY v. SUCHAR
Assigned to: JUDGE GENE CARTER
Demand: \$0,000
Lead Docket: None
Dkt# in other court: None

Filed: 06/29/00

Nature of Suit: 120
Jurisdiction: Federal Question

Cause: 28:1331 Federal Question

THE PARTITION OF THE F/V REAL
THING
IN RE

CARLTON P PERCY
plaintiff

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