

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

RICHARD A. BALZANO,)
)
 Plaintiff)
)
 v.) Civil No. 93-171-P-DMC
)
 F/V NORTHSTAR, et al.,)
)
 Defendants)

MEMORANDUM DECISION¹

The plaintiff, record owner of the F/V NORTHSTAR, brought this admiralty action for wrongful possession of the NORTHSTAR (Count I) and breach of contract and/or quantum meruit (Count II). Defendant Marineast, Inc. counterclaimed for breach of contract (Count I), enforcement of a maritime lien (Count II) and payment for boat services (Count III). A bench trial was held before me on February 16 and 17. At trial I granted the plaintiff's motion for judgment as a matter of law on Count III of Marineast's counterclaim. See Fed.R.Civ.P 52(c). Findings of fact and conclusions of law on the remaining issues follow.

I. Findings of Fact

1. Marineast is a marina and boat repair shop located in South Portland, Maine. Judy O'Brien is a principal owner of Marineast. She is in charge of all bookkeeping and billing. Dan O'Brien, Judy's husband, is

¹ Pursuant to 28 U.S.C. 636(c), the parties have consented to have United States Magistrate Judge David M. Cohen conduct all proceedings in this case, including trial, and to order the entry of judgment.

Marineast's yard manager. He handles all repair operations.

2. Through their marina and boat repair operations, the O'Briens came to know the Balzanos, a local family of commercial fishermen and ferry operators. The Balzano family consists of Thomas Balzano, Sr. and his sons, Thomas, Jr., Vincent, Richard and Sean. Thomas Balzano, Sr. was the record owner of the NORTHSTAR, a sixty-five foot steel hulled commercial fishing vessel, during the time that most of the events comprising this lawsuit occurred. Richard Balzano has since become its owner. The parties have stipulated that Vincent Balzano was at all relevant times acting as the agent of the NORTHSTAR's owners.

3. Over the course of their dealings, the Balzanos' and O'Briens' business relationship developed into a friendship. The Balzano sons, namely Vincent and Thomas, performed numerous errands for the O'Briens and Marineast, including taxi and freight service to Great Diamond Island and helping with the removal of docks and floats during the winterization of the marina. They expected no payment for these services. In turn, Marineast performed some hull work on one of the Balzanos' boats for free. The O'Briens also arranged for the Balzanos to have the use of a twenty-nine foot boat, the SEA REED, owned by Judy's father, for their water taxi service when their regular boat was laid up for repair. The Balzanos used the SEA REED for most of the 1992 summer yet only paid \$500 for its use. Judy also lent her father's vacation home in the Bahamas to Richard and his girlfriend.

4. At some point in the late summer or early fall of 1992, Vincent discussed with the O'Briens the possibility of the Balzanos using the Marineast repair facilities to overhaul the NORTHSTAR. They eventually reached an oral agreement on this matter. Because the Marineast facility would be in regular

use through October, they agreed that the Balzanos would begin their overhaul work sometime in late October or early November. The work was to take two to three months and the Balzanos were to perform the majority of it themselves. Vincent, the supervisor of the project, hoped to have the work completed in time for shrimp season, which runs from December 15 through April 15. He had secured \$55,000 in financing for the project from a local bank.

5. As part of their arrangement, Marineast agreed to provide certain services and materials for the NORTHSTAR overhaul. See, e.g., Complaint 10-11; Answer 10-11. Dan O'Brien was to be on site to operate the crane and perform welding and painting services. Vincent agreed to pay Marineast for all services, materials, equipment and utilities it provided for the project. See, e.g., Answer to Counterclaim 11-12. Marineast agreed not to charge the Balzanos rent for the use of the premises. Because of their close personal relationship, Vincent and his brothers were also permitted to use Marineast's accounts with outside vendors to obtain materials and supplies for the overhaul. They also were given access to the marina's store and the repair shop's inventory to take whatever supplies they needed. Judy O'Brien charged the Balzanos only a ten percent mark-up above cost on all these items instead of Marineast's usual forty percent mark-up. A forty percent mark-up is the Portland marina industry standard. Vincent was supposed to bring his Marineast account current every two weeks.

6. The NORTHSTAR was eventually removed from the water and placed in the Marineast repair shop on November 5, 1992. A wooden and plastic shelter was constructed over the aft of the vessel because it did not fit all the way into the shop. The work the Balzanos were originally planning to perform consisted of repairing weak spots in the hull, upgrading the boat's winches and replacing

part of the deck. Vincent envisaged that the project, as then planned, would take two to three months. He had no experience with overhauling steel boats, however, just wooden ones. He also had no experience with cost estimating or budgeting for an overhaul project.

7. Once the boat was in the repair shop and the work had started, the scope of the overhaul project, per Vincent's direction, grew enormously. Vincent decided to perform a more extensive overhaul of the NORTHSTAR than originally planned. By December the boat was a complete shell -- the deck, the winches, the wheel house, the engine, the fuel tank, the propeller and the shaft all had been removed. During this period Dan O'Brien continually warned Vincent that the project was going to take much longer than three months.

8. By January 1993 the overhaul was nowhere near complete, and the relationship between the Balzanos and the O'Briens began to deteriorate. The project was over schedule and the Balzanos had yet to make any payments to Marineast. In addition, contrary to Dan's recommendation, Vincent hired more welders for the project. Around the middle of January Dan ceased working on the project altogether.

9. Through January 1993 Marineast provided numerous services to the NORTHSTAR for its overhaul, including crane work, welding and painting. These services were all performed by Dan O'Brien. Marineast also provided the construction materials to build the shelter over the vessel and the supplies for welding and painting the vessel. *See, e.g.,* Complaint 11; Answer 11. The Balzanos and their hired welders used Marineast's welding equipment and fuel cylinders to perform the welding on the NORTHSTAR's hull, deck and winches. The Balzanos also used Marineast employees on occasion to pick up supplies.

10. Vincent utilized Marineast's accounts to procure numerous items from outside vendors, such as welding supplies, sandblast supplies, fuel and paint, all of which were eventually used in the NORTHSTAR overhaul. Judy would receive telephone calls from Portland Welding to authorize purchases by Vincent on Marineast's account. Dan kept a list of materials from Marineast vendors that were supplied to the project. The invoices reflecting these charges are a part of Defendant's Exhibit 2. Dan also kept an inventory of supplies taken from the repair shop for the project, while Judy kept an inventory of supplies taken from the marina store. These items are listed in Defendant's Exhibit 2 (shop mat02 (purchase order list). Vincent also ordered some items, including bilge pumps, through the marina store. Vincent never picked up or paid for these pumps, though he knew they had arrived.

11. Sometime around Christmas Judy provided Vincent with a copy of the invoices and work order containing the charges for services and material used in the overhaul to that point. Vincent disputed only one charge on the work order and that charge was removed. Despite Vincent's agreement to make biweekly payments, over the course of the project Marineast received only two payments totalling \$1,500. The first payment it received was in February 1993 when Vincent tendered a check for \$1,000. The project was heading into its fourth month by this time. Vincent tendered a second payment of \$500 in March.

No payments have been made to Marineast since then. Vincent made some direct payments to outside vendors for purchases on Marineast's accounts, see generally Plaintiff's Exhibit 8 (Nos. 48-98), including a \$756.69 payment to Central Maine Power ('`CMP') for electricity used in the repair shop when CMP threatened to shut off the power for nonpayment, see Defendant's Exhibit 2 (utilities folder). After March Vincent ignored Judy's efforts to obtain

payment from him.

12. During the period of the NORTHSTAR overhaul, Dan O'Brien was engaged in some other, unrelated welding and sandblasting projects. In December he repaired a winch for a fishing ship. In April he did some steel work on another boat. According to Dan, none of the products used in either of these two projects were billed to the NORTHSTAR. However, Dan also performed a number of other small projects, including welding and sandblasting a plow and propane tank, repairing and fabricating the steel dump door of a barge and refurbishing brake calipers. These were all minor projects compared to the NORTHSTAR overhaul; the overwhelming majority of activities that took place in the repair shop during the overhaul period were connected to the overhaul.

13. In April, after having received only \$1,500 in payment, the O'Briens locked the Marineast premises and prevented the Balzanos from getting to the boat to continue the overhaul. They eventually worked out some resolution and the Balzanos were allowed to resume their work. However, no further payments were made. The project neared completion sometime in June. When the Balzanos attempted to secure the boat's removal in early June, Marineast refused its release, claiming that the Balzanos owed it money for services and materials rendered. Richard Balzano filed the instant suit on June 24, 1993 to recover possession of the vessel. Bond having been posted, a warrant for the arrest of the NORTHSTAR was issued on July 8 and the boat was released on July 9. The boat, though it could float, could not leave under its own power and had to be towed from the Marineast launch site. Following completion of all repair work after the boat's fishing service until November 1993.

14. The total cost of the overhaul project, according to Vincent, was

\$54,800. Of this amount, the Balzanos spent \$19,000 on labor for welders. Except for steel purchases, the invoices for materials and supplies paid directly by the Balzanos total \$12,180. See Plaintiff's Exhibit 8. Marineast has paid all of the bills for which it seeks reimbursement from the plaintiff.

Though a number of the claimed charges are in the name of Hockomock, a business entity separate from Marineast, Marineast has paid these bills too. Hockomock is the company that owns some of the large equipment, such as the crane, used by Marineast. Marineast rents the crane from Hockomock and is responsible for the charges and billing related to its use.

15. Marineast claims to have incurred \$15,467.55 in damages from the NORTHSTAR overhaul. See Defendant's Exhibit 7.² This breaks down to \$1,750 for storage; \$538.80 for use of the welding equipment and fuel cylinders; \$1,496 for labor; \$8,650.06 for materials, supplies and utilities; \$561.02 for state sales tax; \$804.58 for a ten percent mark-up on the supplies and materials; and \$1,667.09 for interest on the outstanding balance. See *id.* The plaintiff does not dispute the \$1,496 claim for labor. As for the \$8,650.06 claim for materials, supplies and utilities, \$546.48 represents utilities; \$1,096.82 represents construction materials; \$1,908.59 represents paint, propellers and other supplies; \$256.39 represents mechanical parts; \$3,021.24 represents welding and sandblasting materials; \$1,298.88 represents heating fuel, kerosene, propane and electrical products; and \$521.66 represents various shop materials. See Defendant's Exhibits 1 & 2.

II. Conclusions of Law

² The total reflected on Defendant's Exhibit 7 is incorrect inasmuch as it carries over from Defendant's Exhibit 1 (summary of invoices) an erroneous total that omits the \$521.66 shop materials category, which appears in the summary. The plaintiff, however, has been fully apprised of the details of Marineast's claim.

1. On Count I of the plaintiff's complaint I find for Marineast. Marineast's retention of the NORTHSTAR was not wrongful because it had a valid maritime lien on the vessel. Under 46 U.S.C. 31342 anyone providing necessaries to a vessel on the order of the owner's authorized agent has a maritime lien on that vessel. The evidence presented at trial, as well as the plaintiff's admissions in his complaint and counterclaim answer, provide ample proof that Marineast provided necessaries to the NORTHSTAR giving rise to a maritime lien.

The term ``necessaries'' is statutorily defined to include repairs, supplies, towage and the use of a dry dock. 46 U.S.C. 31301(4). Additionally, the First Circuit has adopted a broad definition of necessaries, holding that any service, material or supply furnished for the continuing operation of a vessel constitutes necessaries. See *Farrell Ocean Servs., Inc. v. United States*, 681 F.2d 91, 92-93 (1st Cir. 1982) (prior statute); see also *Chi Shun Hua Steel Co. v. Crest Tankers, Inc.*, 708 F. Supp. 18, 24 (D.N.H. 1989) (prior statute) (necessaries includes most goods and services that enable the vessel to perform its particular function). I find that all of the materials, supplies and service Marineast actually furnished to the NORTHSTAR constitute ``necessaries'' since they were part of the overhaul of the NORTHSTAR. According to the testimony of the Balzanos (Vincent, Thomas, Jr. and Thomas, Sr.), an overhaul was necessary for the NORTHSTAR's continued operation as a commercial fishing vessel, especially to maintain insurance coverage, given its age and deteriorating condition. Any goods or services rendered to it in connection with the overhaul therefore constitute ``necessaries.'' See *Farrell*, 681 F.2d at 92-93; *Chi Shun Hua*, 708 F. Supp. at

24.

I also find that the overwhelming majority of the claimed ``necessaries'' were actually ``provided'' to the NORTHSTAR, as required by statute.³ See 46 U.S.C. 31342. Indeed, the plaintiff does not dispute that Marineast furnished numerous services and supplies to the boat, including materials to construct a shelter; welding and painting supplies; crane work; and painting, sandblasting and welding services to repair and refurbish the hull, deck, winches and wheel house. See, e.g., Complaint 10-11; Answer 10-11. Vincent Balzano also admitted that the welders on the project, who performed over \$19,000 worth of welding on the NORTHSTAR, used Marineast's welding equipment and fuel cylinders.

As for the disputed claims, I find sufficient evidence to prove that the majority of these were also provided to the NORTHSTAR over the course of its overhaul. Dan and Judy O'Brien testified, and I accept as true to the extent discussed later, that the claimed services and supplies charged against the NORTHSTAR were provided to the NORTHSTAR. Judy recorded the items leaving the marina's shop for use in the overhaul project. She also authorized purchases for Vincent from Portland Welding. Dan, who was present in the repair shop during most of the overhaul project, testified that he observed the claimed items being used in the overhaul. He also recorded the items taken from the repair shop's inventory that were used in the overhaul. As a matter of law, I find that all of the materials and supplies that were used in conjunction with the overhaul project were necessities ``provided'' to the NORTHSTAR. See *Equilease Corp. v. M/V Sampson*, 793 F.2d 598, 603 (5th Cir.), cert. denied, 479

³ Contrary to the plaintiff's contention, the defendant is not required to prove that the necessities were provided on the credit of the vessel. 46 U.S.C. 31342(a)(3).

U.S. 984 (1986) (prior statute); *Farrell*, 681 F.2d at 92-93 (prior statute); *Davis v. U.S. Gas Screw Nola Dare*, 125 F. Supp. 677, 678-79 (E.D.N.C. 1954) (prior statute).

Moreover, aside from the testimony of the O'Briens, I note that the circumstances surrounding the NORTHSTAR overhaul clearly indicate that the vast majority of the contested materials and supplies were provided to the NORTHSTAR. Aside from some minor welding and sandblasting projects, to be discussed later, the only other project occurring at the Marineast facility at the time of the NORTHSTAR overhaul was the NORTHSTAR overhaul. If this project had not been going on, the Marineast repair shop would likely have been closed for the winter and none of these claimed charges would have been incurred. Thus, for example, electricity and heat to the facility, for which Vincent agreed to pay, would not have been consumed but for the NORTHSTAR overhaul. As for the \$3,021.24 claimed for welding and sandblasting supplies, which the plaintiff denies, I note that Vincent spent \$19,000 on labor for outside welders, these welders used Marineast's equipment and fuel cylinders, and Vincent regularly charged Marineast's account at Portland Welding to purchase supplies. Because Dan performed only minor welding projects during the NORTHSTAR overhaul, I find adequate evidence from these facts to infer that the overwhelming majority of the claimed welding charges were for supplies used for procuring the \$19,000 worth of welding on the NORTHSTAR.

Because I find that the claimed materials, supplies and services constitute ``necessaries'' that Marineast actually ``provided'' to the NORTHSTAR, Marineast acquired a valid maritime lien on the NORTHSTAR. To protect its lien, Marineast was entitled to refuse the release of the NORTHSTAR until the outstanding balance was paid or, as here, adequate security was

posted. See generally 2 *Benedict on Admiralty*, 22, 20-21, 23, 21-22 (7th ed. rev. 1991). The plaintiff has cited no authority to the contrary. When bond was posted, the vessel was properly released.

Finally, I note that even if Marineast's retention of the NORTHSTAR can somehow be construed as ``wrongful,'' through lassitude or delay in its release of the vessel, I find that the plaintiff suffered no damages as a result. When the boat left the Marineast facility in July 1993 it was inoperable. By the time the Balzano's finished overhauling the boat the shrimp and groundfish seasons had long since passed. Indeed, the NORTHSTAR did not return to commercial fishing operations until November 1993, at least three months after the end of the groundfish season on August 1. Any fishing losses resulting from the absence of the NORTHSTAR from service are attributable solely to the extensive nature of the overhaul and Vincent's lack of understanding or foresight in planning it. Finally, I also note that the plaintiff failed to plead *any* damages, let alone loss of fishing income, in his claim of wrongful possession. This by itself bars any recovery for such damages. See Fed.R.Civ.P. 8(a).

2. As for Count II of the plaintiff's complaint, I also find for the Marineast. Both Vincent and Thomas, Jr. testified that they expected no compensation for the services they rendered to the O'Briens. Furthermore, the idea of an ``exchange of services'' arrangement was first suggested after this suit had commenced; it was not part of the original overhaul agreement between Vincent and Marineast. As for the quantum meruit contention, I find that the Balzanos were more than compensated for their freight and other services by the favorable terms given to them by Marineast for the overhaul of the NORTHSTAR.

3. On Counts I and II of the counterclaim I find for Marineast. As set forth above, I find sufficient evidence that Marineast provided certain necessities to the NORTHSTAR per its oral agreement with Vincent Balzano for which the plaintiff has never made payment. I do not find, however, that the defendant has sustained its burden of proof of showing that all of the claimed charges were for necessities provided to the NORTHSTAR. For example, during the NORTHSTAR project Dan O'Brien used the Marineast repair shop to perform some minor welding and sandblasting work not related to the NORTHSTAR overhaul.

The defendant did not offer any evidence of an allocation of the expenses for these projects. Because these expenses are not properly charged to the NORTHSTAR, I must attempt to determine which expenses were attributable to non-NORTHSTAR projects. Based on the testimony adduced at trial, I find that these projects comprised at the most ten percent of the total work performed at the Marineast repair shop. Marineast's claimed expenses for utilities, fuel, and welding and sandblasting supplies must therefore be reduced by this amount. As to each of the damage claims, I find as follows:

A. Storage: The defendant is not entitled to any amount for storage. The agreement was that Marineast would not charge rent for the use of its facilities. A storage charge is merely a form of rent for use of the facilities.

B. Rentals: Marineast claims \$538.80 for rentals for the Balzanos' use of Marineast's welding equipment. Of this amount \$500 represents a charge for three month's use of five welding units at \$100 apiece and \$38.80 represents the rental charges for the fuel cylinders. These figures are based on Portland Welding's going rates. Because the plaintiff admits using Marineast's welding equipment during the overhaul, and agreed to pay for such

use, I find that \$538.80 is properly charged to the plaintiff and the NORTHSTAR.

C. Labor: The plaintiff does not dispute Marineast's claim for \$1,496 in labor.

D. Invoices: The utilities (\$546.48), welding and sandblasting (\$3,021.24) and miscellaneous/fuel charges (\$1,298.88) must all be reduced by ten percent to account for the non-NORTHSTAR projects. This reduces the amount for necessities properly charged to the plaintiff and the NORTHSTAR to \$8,163.40. All of the other materials and supplies were properly charged to the plaintiff and the NORTHSTAR as necessities provided to the vessel.

E. Mark-Up: The defendant charged the plaintiff a ten percent mark-up on the materials acquired through its store or its outside vendor accounts. This was far below the standard forty percent mark-up. Marineast is certainly entitled to this small mark-up, which represents an amount only slightly above its costs. Based on the revised figures, the amount of the mark-up comes to \$767.16.

F. Tax: Marineast is entitled to recover the six percent Maine sales tax it was required to pay on the goods and services provided to the NORTHSTAR during 1992-93. Based on the revised figures, the allowable tax amounts to \$535.83.

G. Interest: Marineast claims interest on the outstanding balance in the amount of \$1,667.09. Interest was not part of the original oral agreement on the overhaul project. The basis for this claim now is the finance provision in the Marineast work order given to Vincent in December 1992. This work order, however, was never signed by Vincent and therefore the plaintiff cannot be bound by its unilateral terms. Moreover, even if it can be said that

Vincent impliedly assented to this provision through his silence and inaction once given the work order, which I doubt, the lack of any interest rate in the provision requires me to construe it against Marineast, the drafter, and strike its contractual claim for interest.

This, however, is not the end of the matter. Under admiralty law a maritime lienholder is normally entitled to prejudgment interest on the amount of its lien. See, e.g., *Marine Fuel Supply & Towing, Inc. v. M/V Ken Lucky*, 869 F.2d 473, 479 (9th Cir. 1988); *The Snetind*, 276 F. 139, 144-45 (D. Me. 1921); see also *Borges v. Our Lady of the Sea Corp.*, 935 F.2d 436, 443-44 (1st Cir. 1991). Such prejudgment interest generally runs from the date the lienholder filed notice of its claim. Here, that date is August 2, 1993, the date Marineast filed its counterclaim. Calculated at eight percent per annum, see *Borges*, 935 F.2d at 444, the amount of interest due on the outstanding \$11,501.19 through the date of judgment, February 28, 1994, is \$536.72.

III. Conclusion

On the basis of the foregoing, judgment shall be entered for defendant Marineast, Inc. on all of the plaintiff's claims and for defendant Marineast, Inc. in the amount of \$12,037.91 on its counterclaim against the plaintiff, *in personam*, and the F/V NORTHSTAR, *in rem*.

Dated at Portland, Maine this 28th day of February, 1994.

David M. Cohen
United States Magistrate Judge