

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

**CHARLES P. DONATONE, JR.,** )  
 )  
 Plaintiff )  
 )  
 v. )  
 )  
**ACADIAN WHALE WATCHER CO.,** )  
 *In personam,* )  
 )  
 and )  
 )  
**M/V ACADIAN WHALE WATCHER,** )  
 her engines, tackle and )  
 equipment, *in rem,* )  
 )  
 Defendants )

Civil No. 95-103-B

MEMORANDUM OF DECISION<sup>1</sup>

Plaintiff Charles Donatone Jr. brings this action for damages resulting from Defendants' alleged breach of a bareboat charter into which the parties entered on October 17, 1994 in Bar Harbor, Maine. On June 21 and 22, 1996, the matter was tried before this Court. All parties were afforded an opportunity to be heard, to examine and cross-examine witnesses, and to present evidence relevant to the issues. Jurisdiction for this matter is based upon 28 U.S.C. § 1333.

**I. FINDINGS OF FACT**

The Court finds the following facts: In the Fall of 1994, Charles Donatone [“DONATONE”], interested in securing a passenger boat with which to operate an excursions

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<sup>1</sup>On April 9, 1996, the parties consented to proceed before the United States Magistrate Judge pursuant to Fed. R. Civ. P. 73(b).

business in the Virgin Islands, traveled to Bar Harbor, Maine. He contacted Robert Wilds [”WILDS”] and Greg Curry [”CURRY”], President and Vice President of Acadian Whale Watcher Co. respectively. The Plaintiff, Wilds and Curry discussed the lease of the M/V ACADIAN WHALE WATCHER [”AWW”], a 149-foot passenger boat. Mr. Donatone inspected the vessel and accompanied Wilds and Curry on a test run. The Plaintiff expressed a desire for a boat capable of achieving 20 knots and was satisfied with the performance of the AWW. The parties agreed to the lease of the vessel.

The Defendants, without the assistance of legal counsel,<sup>2</sup> prepared a Letter of Agreement and a document designated as a BAREBOAT CHARTER PARTY AGREEMENT. Under a bareboat or demise charter the leasee or charterer takes possession and assumes control of the boat with the owner retaining general ownership and a right of reversion. Gilmore and Black, *The Law of Admiralty* § 4-20, at 215-216 (1957). The charter the parties signed adhered to this basic notion. It provided for Mr. Donatone to lease the boat, the AWW, for a six-month period, beginning in November 1994. Plaintiff would be responsible for reimbursing the owner for insurance, as well as all maintenance and operational costs. He was required to pay \$25,000 before the boat was taken from Bar Harbor to cover the cost of delivery to and return from the Virgin Islands. The charterer was to make regular lease payments which would have totaled, for the entire six-month period, \$60,000. No mention was made in the documents of who would captain the boat in the Virgin Islands. The Court nonetheless finds, over dispute, that prior to the signing of the document, Defendants expressly required that their own captain, Gerry Blanford [”BLANFORD”], remain on board for the duration of the lease. Pursuant to that insistence,

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<sup>2</sup>The Court notes that this entire matter could in all probability have been avoided had the parties consulted an attorney when their discussions concerning the lease were reduced to writing.

Plaintiff agreed to employ Blanford.

Blanford and First Mate Scott Pelletier [”PELLETIER”], both employees of the Acadian Whale Watcher Co., accompanied Wilds and Curry on the AWW to the Virgin Islands. On route, they stopped in New Jersey to pick up Mr. Donatone’s sons and furniture. The voyage from Bar Harbor was without incident. There was no evidence introduced that the boat was functioning improperly.

Arriving in the Virgin Islands in the early morning of November 6, 1994, Defendants’ witnesses expressed surprise at what greeted them. Although Mr. Donatone had flown down ahead of the boat to drum up business, no business at that time existed. Mr. Donatone had scheduled no excursions nor did he appear to have the requisites for operation of a business, such as an office. Although the Plaintiff, according to his testimony, planned to draw most of his customers from local hotels, he had no vehicle with which to travel around the island. Blanford testified that the boat did little or no work during the month of November.

By December, however, Mr. Donatone had managed to secure some ferrying work among the Virgin Islands from a local company, Smith’s Ferry Services, Ltd. [”SMITH’S FERRY”], whose officer, Marjorie Smith [”SMITH”], testified at trial. Ms. Smith testified she would have employed the AWW in December for lucrative ferrying work, but the boat was too slow to meet the schedule island ferries were forced to keep. Although the AWW had been capable of 20 knots when Plaintiff inspected it in Bar Harbor, once in the Virgin Islands the boat’s starboard engine developed a problem with its thermostat which caused it to overheat and rendered it inoperable. The evidence suggests, and the Court concludes, that this problem was due to water temperatures higher in the Virgin Islands than off the coast of Maine. With only two strong

engines, the AWW could not reach 20 knots. Ms. Smith also expressed reservations about Blanford's ability to pilot the vessel and discussed with Mr. Donatone the employment of one of her company's captains, Wayne Stout.

Relations between Plaintiff and Captain Blanford deteriorated rapidly in November and early December. Blanford was justifiably dismayed and worried at the lack of work for the AWW and the failure of Plaintiff to pay him or Pelletier throughout the month of November. Mr. Donatone, who considered the captain insolent, informed the Defendants in a letter dated December 12 that he was dismissing Blanford. Shortly thereafter, the Defendant's insurance agent, Marty Blackadar, informed Mr. Donatone that insurance coverage of the AWW would be continued only if Blanford remained captain. Mr. Curry traveled to the Virgin Islands in December to attempt to salvage his company's business relationship with Mr. Donatone but, accomplishing little, took possession of the boat and motored it to Florida in the early days of January. Plaintiff at that time had made none of the scheduled lease payments, nor had he made any payments towards the insurance, numerous notices from the insurer notwithstanding.

## **II. CONCLUSIONS OF LAW**

Plaintiff's complaint amounts to this: He, Wilds and Curry entered into a bareboat charter, according to which Mr. Donatone was to be owner *pro hac vice*, entitled to complete possession of the boat for the duration of the charter and allowed to appoint his own captain and crew. As Defendants insisted that Blanford remain captain, they violated the terms of the charter and frustrated Plaintiff's attempt to run a profitable excursion business in the Virgin Islands. Plaintiff also claims that Defendants breached the charter by not providing a boat capable of twenty knots, upon which he insisted and with which he could have ferried passengers for

Smith's Ferry. The Court finds in favor of the Defendants.

### **A. The Bareboat Charter**

Plaintiff insists that the agreement he and the Defendants entered was a bareboat charter, the terms of which Defendants breached by demanding that Blanford serve as captain. The Court agrees with the Plaintiff that the contract was a bareboat charter, but does not find that Blanford's captaincy was a breach of that contract. We acknowledge that the test of whether an agreement is a bareboat or demise charter is stringent. Courts are reluctant to find such an agreement when the actions of the parties involved suggest a less demanding relationship. "Courts are not inclined to regard the contract as a demise of the ship if the end in view can conveniently be accomplished without the transfer of the vessel to the charterer." *Saridis v. S.S. Paramarina*, 216 F. Supp. 794, 797 (E.D. Va. 1962); *DiBiase v. U.S.*, 711 F. Supp. 648, 650-651 (D. Me. 1989).

Plaintiff argues that Defendants should be held to a bareboat charter as they drafted the document, which contains the words "BAREBOAT CHARTER PARTY AGREEMENT" printed clearly at the top of the page. A verbal formula, however, is not enough to establish a bareboat charter. "Even where words of demise are used, yet it must appear that the instrument taken as a whole was intended to operate as such or it will not be so construed." *Saridis*, 216 F. Supp. at 797. In order to determine whether the agreement signed by the parties was a bareboat charter, the court must examine the relationship between owner and charterer. *Federal Barge Lines v. SCNO Barge Lines*, 711 F.2d 110 (8th Cir. 1983). "The test for determining the existence of a demise charter is primarily one of control." *DiBiase*, 711 F. Supp. at 650 (citing Gilmore and Black, *The Law of Admiralty*, § 4-21). It is clear Mr. Donatone had control of the vessel. Acadian Whale Watcher delivered the boat to the Virgin Islands to serve his needs. The

Plaintiff hired Blanford and Pelletier, and he accepted responsibility for their wages. Plaintiff possessed and commanded the vessel. “To create a demise the owner must completely and exclusively relinquish ‘possession, command, and navigation’ thereof to the demisee.” *Guzman v. Pichirilo*, 369 U.S. 698, 699 (1962) (quoting *United States v. Shea*, 152 U.S. 178 (1894)).

The Plaintiff determined when the boat would work, what passengers would be carried and the duration and specific route of any voyage. *See Reed v. S.S. Yaka*, 373 U.S. 410 (1969).

Accordingly, the Court agrees with Plaintiff that the parties did enter into a bareboat charter agreement.

However, the Court disagrees that Defendants’ insistence on Blanford remaining captain of the boat amounted to a breach of that agreement. The mere employment of the owner’s captain does not defeat a bareboat charter, provided he works under the direction of the charterer. “[T]he fact that the Captain is employed by the owner is not fatal to the creation of a demise charter for a vessel can be demised complete with captain if he is subject to the orders of the demisee during the period of the demise.” *Guzman*, 369 U.S. at 701; *Benedict on Admiralty*, §52 at 3-11 (1996). *But see McAleer v. Smith*, 57 F.3d 109 (1st Cir. 1995). Courts are not in complete agreement on this point. The First Circuit ruled that, while not fatal to the agreement, the retention of the owner’s captain on board was “‘very strong presumptive evidence’” that the charterer did not have possession consistent with that of a bareboat charterer. *Stephenson v. Star-Kist Caribe, Inc.*, 598 F.2d 676, 680 (1st Cir. 1979) (citing *Hanson v. E. I. DuPont DeNemours & Co.*, 33 F.2d 94, 96 (2d Cir. 1929) (Hand, J.)) That case, however, can be effectively distinguished from the present matter. In *Stephenson*, the owner accepted “ultimate financial responsibility for the crew’s wages.” *Id.* In this case, Plaintiff offered Blanford a job, and he, not

the owner, was responsible for the crew's wages. Blanford, during the term of the charter, was the Plaintiff's employee. While it is true that according to the insurance Mr. Donatone could not dismiss the crew, he agreed to continuation of the owner's insurance and was responsible for abiding by its terms. The parties, the Court rules, entered a bareboat charter, and Blanford's employment was not a breach of that contract. Resolution of issues of credibility of the witnesses was important to the Court's findings on this issue.

Furthermore, even if we found that forced retention of the owner's captain was a violation of the bareboat charter, the breach was partial or immaterial. Mr. Donatone received the benefit of the bargain. Plaintiff introduced no evidence suggesting that the Blanford's captaincy impaired Plaintiff's ability to operate a successful business or that his business would have been markedly improved had someone else been captain of the boat. The Court grants that there was evidence introduced that Marjorie Smith would have preferred another captain to perform the ferrying work in the month of December. The primary reason for Smith's reluctance to employ the AWW, however, was the boat's slow speed, due to an overheating problem. That issue is dealt with below. The Court finds that the retention of Gerry Blanford as captain of the AWW was a partial breach, if it can be construed as a breach at all.

### **B. Engine Failure**

Another problem is presented by the overheating of one of AWW's engines and its subsequent failure to do 20 knots when in the Virgin Islands. Under a bareboat charter, the owners are responsible to provide a boat in proper working condition. *Maine Seaboard Paper v. The Maurice R. Shaw*, 46 F.Supp 767, 769 (D. Me. 1942). The Court concludes that the boat when delivered was in working order, and accordingly, the Defendants did not breach. Based on

the evidence presented, we find that the failure of the starboard engine was due to the difference in the water temperatures between the coast of Maine and the Virgin Islands. The problem developed after the boat was transferred to the Plaintiff.<sup>3</sup> The terms of the agreement indicate that Plaintiff was responsible for maintenance of the boat while in his possession. “[T]he Lessee shall pay all of the operational costs of the Acadian Whale Watcher including but not limited to maintenance and repairs . . . .” Letter of Agreement, paragraph 4. Plaintiff became aware of the need for a new thermostat soon after the boat’s arrival in the Virgin Islands. Plaintiff’s failure to repair the boat is inexplicable, but he cannot now avoid the responsibilities to which he agreed when he signed the charter.

### **III. Rule 11 Sanctions**

In his response to Defendant’s Final Argument, Memorandum of Law and Proposed Findings of Fact and Conclusions of Law, Plaintiff demands that pursuant to Rule 11 of the Fed. R. Civ. P., sanctions be imposed upon the Defendants for their allegedly frivolous counterclaim brought originally but subsequently dismissed at the end of trial. The Court will treat this demand as a motion for sanctions according to Rule 11 (c) (1) (A). The motion is denied. In breach of the charter, Plaintiff was responsible to pay for insurance coverage. “Charterer agrees to pay the Owner to insure and keep insured the Vessel, its tackle, apparel and appurtenances.” BAREBOAT CHARTER PARTY AGREEMENT, paragraph 11. Yet Plaintiff never reimbursed Defendant for the insurance premium Defendant owed to insurer for coverage during the term of

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<sup>3</sup> There was no evidence suggesting that the thermostat on the engine was in need of repair prior to the AWW leaving Maine. Presumably, if it was, it nevertheless caused no problem in Maine waters. In any event, the Court can only conclude that the warmer waters of the Virgin Islands led to the breakdown of the thermostat.

the charter. As Acadian Whale Watcher Co. was unable to cover the premium, a lien was placed against the AWW. Defendants submit that the amount of the premium owed was \$19,490.47. The Court finds that the counterclaim was neither frivolous nor made in bad faith. “[I]f the counterclaim was not made in bad faith, there could be no Rule 11 violation and there is considerably less justification for sanction.” *Media Duplication Services v. HDG Software*, 928 F.2d 1228, 1241 (1st Cir. 1991). Sanctions under Rule 11 are hereby DENIED.

***Conclusion***

For the reasons stated above, judgment is rendered in favor of both Defendants.

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Eugene W. Beaulieu  
United States Magistrate Judge

Dated in Bangor, Maine on August 7, 1996.