

COMMONWEALTH OF MASSACHUSETTS

NOTIFY
SUTCLIFFE, S.

SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO. PLCV2004-01166-B

KIM DELEO, FRANCIS HAGGERTY
and EARL CORNISH,
on behalf of themselves and all other
similarly situated,

Plaintiffs,

v.

BOUCHARD TRANSPORTATION
COMANY, INC., TUG EVENING TIDE
CORPORATION AND B. NO. 120
CORPORATION,

Defendants.

MEMORANDUM OF DECISION AND ORDER ON
DEFENDANTS' MOTION TO AMEND THE CLERK'S
POST-TRIAL DOCKET ENTRY TO REFLECT
THE PROPER APPLICATION OF MARITIME LAW

INTRODUCTION

Following a jury trial and docket entry in plaintiffs' (collectively, "Deleo") favor, Defendants (collectively, "Bouchard") assert that Deleo's case is subject to Federal maritime jurisdiction. The issue before the court is whether Bouchard is entitled to an amendment to the verdict to (1) eliminate prejudgment interest (2) calculate postjudgment interest at the rate employed in the Federal courts (3) exclude punitive damages and (4) clarify that there will be no award of attorney or expert fees. For the reasons stated below, the motion is **DENIED**.

BACKGROUND

Following the jury trial in March of 2010, the court entered judgment in favor of Deleo in accordance with Massachusetts law. Bouchard now asserts that the case is subject to maritime jurisdiction given that it arose on navigable waters and involves a traditional maritime activity—the transportation of oil. Bouchard further argues that up until the point of awarding damages, there was not a conflict between Federal admiralty law and state law. Under state law, the court awards prejudgment interest automatically, calculates postjudgment interest at the state rate, doubles damages under G. L. c. 91 § 59A, and awards attorney and expert witness fees to a plaintiff that succeeds at trial under G. L. c. 21E § 15. Bouchard argues that Federal law preempts state law on the calculation of damages because application of state law would disrupt the uniform application of Federal law.

DISCUSSION

The court denies Bouchard's motion with respect to prejudgment interest and double damages. It would be unfair to do otherwise in light of Bouchard's actions at trial and its decision to raise its choice of law defense this late in the proceedings. The defendant does not have an absolute right to raise preemption at any stage it wishes during proceedings, let alone after the completion of the trial. See Sweeney v. Westvaco Co., 926 F.2d 29, 37-41 (1st Cir. 1991). Had Bouchard raised the issue earlier in the case, Deleo could have requested a jury instruction as required under Federal law to receive prejudgment interest.¹ Deleo could have also sought a jury determination on whether Bouchard's actions amounted to gross negligence, the

¹ This court will grant prejudgment interest in this case for equitable reasons. While this court rules that Federal law does not govern this case, it will ask for a jury verdict on prejudgment interest in future trials in this class action to obtain a verdict if the court is mistaken about the inapplicability of Federal law. It is this court's intention to apply state law in such future trials.

standard required to receive punitive damages under Federal law.²

The court also denies Bouchard's motion with respect to postjudgment interest³ and attorney's fees.⁴ This case does not arise in admiralty and as such is not subject to Federal law. The Admiralty Extension Act, 46 U.S.C. § 740 does not govern this case. In Askew v. American Waterways Operators, Inc., 411 U.S. 325, 329 (1973), the Supreme Court noted that "[s]ea-to-shore pollution historically within the reach of the police power of the States-is not silently taken away from the States by the Admiralty Extension Act which does not purport to supply the exclusive remedy." Id. at 343. The Oil Pollution Act, 33 U.S.C. § 2707 is also inapplicable because the plaintiffs' claims are for residential property. The Oil Pollution Act's regulations note that "[c]ompensation for loss of use of noncommercial property is not allowable." 33 CFR § 136.217(b).

Because the Oil Pollution Act preempts all other Federal law governing oil spills the general maritime law is also inapplicable. See South Port Maine, LLC v. Gulf Oil Limited Partnership, 234 F.3d 58, 65 (1st Cir. 2000). Furthermore, the First Circuit Court of Appeals has noted that the Oil Pollution Act "[is] compelling evidence that Congress does not view either expansion of liability to cover purely economic losses or enactment of comparable state oil pollution regimes as an excessive burden on maritime commerce." Ballard Shipping Co., Etc. v. Beach Shellfish, 32 F.3d 623, 631 (1st Cir. 1994). It is thus well within Massachusetts' police power to establish additional liability where oil spills affect its coastline and citizen's property.

Even if maritime law applies in this case, it does not preempt Massachusetts law. As the

² This court rules that federal law does not govern this case, but will ask for a jury determination on gross negligence in future trials to obtain a verdict if the court is mistaken about the inapplicability of Federal law.

³ The award of postjudgment interest under the Federal rate does conflict with the rate under state law. Because this case does not arise in admiralty, the court will not calculate postjudgment interest at the Federal rate.

⁴ The court will award attorneys fees under state law even though it conflicts with the Federal standard. The court notes that even if this case were governed by Federal law, the award of fees and expenses in admiralty actions is discretionary with the district court judge upon a finding of bad faith. See American Nat'l Fire Ins. Co. v. Kenealy, 72 F.3d 264, 270 (2nd Cir. 1995). This issue, however, is not currently before the court.

First Circuit has recognized, “[i]n balancing the state interest in regulation against a potential overriding federal need for harmony . . . no one can doubt the state’s interest in avoiding pollution in its navigable waters and on its shores and in redressing injury to its citizens from such pollution, is a weighty one.” Ballard Shipping Co., Etc., 32 F.3d at 629. Bouchard’s reliance on Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917) and its holding which favors application of Federal over state law in areas in which the two laws conflict, is misplaced as the Supreme Court has “decline[d] to move the Jensen line of cases shoreward to oust state law from situations involving shoreside injuries by ships on navigable waters.” Askew, 411 U.S. at 344. Massachusetts law will therefore apply in situations as serious as an oil spill affecting its coastline and citizen’s property.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that the defendants’ motion to amend the clerk’s post-trial docket entry is **DENIED**.



Raymond J. Brassard
Justice of the Superior Court

Dated: July 2, 2010

Entered July 14, 2010