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10 UNITED STATES DISTRICT COURT
 11 NORTHERN DISTRICT OF CALIFORNIA

12 LORRAINE FERGUSON,)	Case No. C 11-03391 MEJ
)	
)	
13 Plaintiff,)	PROPOSED ORDER GRANTING
)	ADMINISTRATIVE MOTION TO
14 v.)	CERTIFY JUDGMENT UNDER F.R.C.P.
)	RULE 54(b) AND CERTIFYING
15 HORIZON LINES, INC.; M/V HORIZON)	JUDGMENT PURSUANT TO F.R.C.P.
16 ENTERPRISE, its engines, tackle,)	RULE 54(b)
17 equipment, furnishings, and machinery, <i>in</i>)	
18 <i>rem</i> ; ANDREI A. TRETYAK,)	
)	
Defendants.)	
_____)	

19 NOW before the Court is Plaintiff’s Administrative Motion to Certify Judgment
 20 Under F.R.C.P. Rule 54(b). Pursuant to Civil Local Rule 7-1(b), the Court finds this matter
 21 suitable for disposition without oral argument. Plaintiff’s Motion is Granted.
 22

23 NOW COMES the Court and expressly determines that there is no just reason for
 24 delay for the entry of judgment and certification pursuant to F.R.C.P. 54 (b) in this matter.

25 The Court finds:

26 1. All claims against Horizon Lines have been adjudicated and were addressed
 27 in the order granting Summary Judgment in favor of Horizon Lines.
 28

[PROPOSED] ORDER GRANTING ADMINISTRATIVE MOTION TO CERTIFY JUDGMENT UNDER F.R.C.P. RULE 54(b) AND
 CERTIFYING JUDGMENT PURSUANT TO F.R.C.P. RULE 54(b)

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1 Dist. LEXIS 3165, 4 (ND Cal. 2000). See also, *Arizona State Carpenters Pension Trust*
2 *Fund v. Miller*, 938 F.2d 1038, 1039 (9th Cir. 1991).

3 Plaintiff's claims against Horizon are sufficiently separable from those remaining to
4 be adjudicated against defendant Tretyak. Plaintiff alleges Mr. Tretyak directly assaulted
5 her whereas her claims against Horizon Lines are based on a theory of *respondeat*
6 *superior/vicarious liability*. At issue in the appeal is whether Horizon Lines can be held
7 accountable for the conduct of its seaman as he was returning to the ship from shore leave
8 through the only access point available to him. A resolution as whether the employer or the
9 vessel can be held liable for the conduct of its seaman is separate and distinct from whether
10 the conduct occurred. An appeal from the granting of the summary judgment in favor of
11 Horizon Lines on this issue would be specific as to whether the court erred and would be
12 limited only to Horizon Lines. It would not result in piecemeal appeals.

13
14
15 The judgment in favor of Horizon conclusively resolves Plaintiff's claim against
16 Horizon Lines and it is final in the adjudication. *Continental Airlines, Inc. v. Goodyear Tire*
17 *& Rubber Co.*, 819 F2d 1519, 1524 (9th Cir. 1987) (certification of partial summary
18 judgments); see also *In re Hanford Nuclear Reservation Litig.*, 292 F3d 1124, 1132 (9th
19 Cir. 2002). Based upon our findings of fact and conclusions of law in our decision, the court
20 expressly determines that there is no just reason for delay for entry of judgment and
21 certification under F.R.C.P 54(b) is appropriate as there are no further facts to adjudicate as
22 to Horizon Lines.

23
24 The Court has specifically found that there was no vicarious liability claim against
25 Horizon for Tretyak's torts. The Court has previously found the following:

26 Ferguson's other claim against Horizon seeks to attach vicarious liability on the
27 company for Tretyak's torts of assault, battery, and false imprisonment. Both parties
28 agree that for Horizon to be vicariously liable, Tretyak's acts must have been
committed within the scope of his employment. Horizon argues that regardless

1 whether maritime law or California law applies, it cannot be held responsible for
2 Tretyak's acts because they were not related to his job. Ferguson, on the other hand,
3 argues that maritime law applies to this dispute, and whether Tretyak's conduct was
4 within the scope of his employment is a question of fact that is proper for a jury to
5 decide. Ferguson bases a large part of her argument on the fact that shore leave for a
6 crew member like Tretyak is 'unlike personal recreational time for non-maritime
7 employees' and is instead an integral part of the job that is within the scope of
8 employment. Opp. at 1.

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There is no need to determine whether to apply maritime or California law to
this dispute because under both jurisdictions, as explained below, the Court finds
that Tretyak was not acting within the scope of his employment as a matter of law.
the Court concludes that even if Tretyak sexually assaulted someone while he was
on the ship and working (i.e., he was not on shore leave and consequently there is no
dispute whether he was or was not on duty), the Court would still find that such an
assault is not within the scope of employment since it would be unrelated to his
duties as an employee. *See* 3 Witkin, Summary 10th (2005) Agency, § 190, p. 242
("Courts generally have held that an employee who sexually assaults a third party is
not acting within the scope of employment for purposes of imposing liability on the
employer under the doctrine of respondeat superior. *It is immaterial whether the
assault occurred at or away from the workplace or when the employee was on or off
duty.*

(*Emphasis in original*). Order Granting Defendant's Motion for Summary Judgment,
Document #41, pgs. 5-6.

In following California law, this Court found the following:

With respect to California law, for conduct to be within the scope of employment, it
must be "reasonably related to the kinds of tasks that the employee was employed to
perform," or "reasonably foreseeable in light of the employer's business or the
employee's job responsibilities." CACI 3720. While this determination is usually a
question of fact for a jury to determine, it becomes a question of law when the facts
are undisputed and no conflicting inferences are possible. *Lisa M. v. Henry Mayo
Newhall Mem'l Hosp.*, 12 Cal.4th 291, 299 (1995). The Court finds the holding in
Lisa M., a case that presents analogous issues as those presented here, dispositive to
this matter. ...

His reasons for sexually assaulting Ferguson did not derive from any events or
conditions of his employment and were entirely of his own invention. Due to this,
Horizon should not be held responsible for Tretyak's acts which were based on
"personal motivations [that] were not generated by or an outgrowth of workplace
responsibilities, conditions or events." *Id.* at 302. His sexual assault was "the
independent product of [his] aberrant decision to engage in conduct unrelated to his
duties. In the pertinent sense, therefore, [his] actions were not foreseeable from the
nature of the work he was employed to perform." *Id.* at 303.

Order Granting Motion for Summary Judgment, Document #41, pgs 6-7.

1 These are, in part, specific findings the court made in its Order on Summary
2 Judgment (Document #41). In this certification, the appellate court will not be required to
3 address issues that are similar to those claims still pending before the trial court. *Morrison-*
4 *Knudsen Cteh eo., Inc. v. Archer*, 655 F2d 962, 965 (9th Cir. 1981); see *National Ass'n of*
5 *Home Builders v. Norton*, 340 F.3d 835, 840 (9th Cir. 2003)]. As such, this court expressly
6 determines there is no just cause for delay.
7

8 Certified for review are the claims of the Plaintiff, either under California law or
9 maritime law, that Horizon is vicariously liable for the actions of Tretyak. *Air-Sea*
10 *Forwarders, Inc. v. Air Asia Co., Ltd.*, 880 F2d 176, 190, fn. 17 (9th Cir. 1989).
11

12 This court specifically found and adopted Horizon's arguments whereby:

13 “if the Court is going to use maritime law rather than California law, then it should
14 employ the vicarious liability test from the Restatement (Second) of Agency §228
15 (Section 228), as several other courts have done in maritime disputes. *See, e.g.,*
16 *Stoot v. D & D Catering Serv., Inc.*, 807 F.2d 1197, 1200 (5th Cir. 1987). Under
17 Section 228, “[c]onduct of a servant is within the scope of employment, if, but only
18 if, (a) it is the kind he is employed to perform; (b) it occurs substantially within the
19 authorized time and space limits; (c) it is actuated, at least in part, by a purpose to
20 serve the master; and (d) if force is intentionally used by the servant against another,
21 the use of force is not unexpected by the master.” Because Tretyak’s sexual
22 assault was not related to his work or actuated by any purpose to serve Horizon, the
23 Restatement test also corroborates that Horizon should not be vicariously liable for
24 his conduct.”

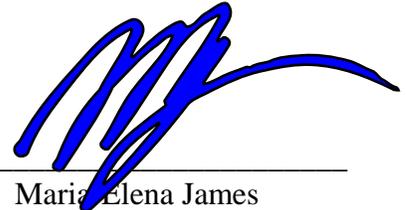
25 Order Granting Motion for Summary Judgment, Document #41, pg. 8.

26 In addition to the Order and Judgment in favor of Horizon, the claim against
27 Horizon, the Court expressly determines that there is no just reason for delay and this case
28 is certified for appeal pursuant to F.R.C.P 54(b) as well as this court's prior order under
§1292(b). As previously stated, the Court maintains jurisdiction
pending this appeal.

IT IS SO ORDERED.

Dated: July 17, 2013

By: _____


Maria Elena James