UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE/OPELOUSAS DIVISION

JERAMIE and DAPHNE BROWN	*	CIVIL ACTION
VERSUS	*	NO. 04-1486
SEA MAR MANAGEMENT, L.L.C. et al	*	SECTION L-0
	*	JUDGE DOHERTY
	*	MAG. JUDGE HILL

* *

MEMORANDUM OF OFFSHORE OIL SERVICES IN OPPOSITION TO MOTION FOR SUMMARY JUDGEMENT FILED BY SEA MAR MANAGEMENT, INC.

May it please the Court:

This litigation arises out of the claim of personal injuries by Jeramie Brown. According to the allegations of the Complaint For Damages and the documentation produced in discovery, the plaintiff was employed at the time of injury by L&L Sandblasting, Inc. The injury is alleged to have occurred when Brown was "swinging from platform to boat" and the "accident occurred on jump deck of CAPE COOK". (See attached Exhibit 1, L&L Sandblasting Inc. "First Report of Injury"). Although the Complaint For Damages improperly named the "CAPTAIN COOK" as the vessel involved at time of injury, per the Motion for Summary Judgement filed by Sea Mar Management, the vessel properly should be the CAPE COOK. The Answer and Third Party Complaint filed by Sea Mar Management admits that the CAPE COOK was owned by Nabors US Finance and bareboat chartered by Sea Mar Management. (See Answer and Third Party Complaint filed in the record). The

Motion for Summary Judgement by Sea Mar Management before this Court seeks a determination that Offshore Oil Services owes a contractual defense and indemnity obligation to Sea Mar Management pursuant to a Master Time Charter Agreement (attached Exhibit 2) and separate Short Form Time Charter Agreement (attached Exhibit 3) both entered into by Sea Mar Management and Offshore Oil Services on March 6, 2002. This memorandum on behalf of Offshore Oil Services is filed in opposition to the Motion for Summary Judgement of Sea Mar Management and seeks instead a determination by the Court that a contractual defense and indemnity obligation is not owed by Offshore Oil Services.

A. Summary Judgement Standard:

A motion for summary judgement is a procedural device used to avoid a full-scale trial where there is no genuine factual dispute. It should only be granted if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue as to material fact and that the mover is entitled to judgement as a matter of law. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 2512 (1986). In this case, the Motion for Summary Judgement submitted by Sea Mar Management has failed to establish that there is no genuine issue for trial. Instead the evidence submitted by the nonmover, Offshore Oil Services, establishes that the contractual defense and indemnity is not owed and the third party demand is without merit.

B. The Master Time Charter Agreement language:

As submitted by Sea Mar Management in its memorandum, Offshore Oil Company and Sea Mar Management did enter into a Master Time Charter Agreement which set forth their working relationship for the time charter of the M/V CAPE COOK. It is agreed among both parties that this written agreement was in effect at the time of the alleged accident involving plaintiff. It is further not in dispute that the agreement is a maritime contract and that its indemnity provisions are valid and enforceable under maritime law.

What is in dispute is the interpretation of this agreement as well as the effect of the **reciprocal indemnity obligations** under that Agreement. In its memorandum, Sea Mar Management has addressed and introduced ***in part*** only one paragraph of the Master Time Charter Agreement (See Exhibit 2 at numbered paragraph 14 of the Agreement) setting forth the indemnification obligations of Offshore Oil Services as the time charterer of the CAPE COOK. Sea Mar Management failed to point out that identical, reciprocal indemnification language under numbered paragraph 13 of that same Agreement calls for an indemnity to flow from Sea Mar Management to Offshore Oil Services.

These applicable paragraphs of the Master Time Charter Agreement must be reviewed along with the supporting pleadings, depositions, answers to interrogatories, admissions and affidavits to see whether there are genuine issues of material fact and whether Sea Mar Management can be granted judgement as a matter of law. Once reviewed, this Court will come to the conclusion that Sea Mar Management's motion cannot be granted and must be denied.

Specifically, numbered Paragraph 13 of the Master Time Charter Agreement sets forth Sea Mar Management's indemnity obligations as the designated "Owner" under the Agreement:

13. **Owner's Indemnities.**
Neither Charterer, its officers, employees, nor the underwriters of any of the foregoing shall have any of the responsibility or liability for any claim involving damage to or loss of the vessel or any of Owner's equipment, or **for any injury,** illness, disease, or death **of employees, agents, or representatives of Owner, Owner's subcontractors or invitees**, and **Owner shall defend, indemnify, and hold harmless Charterer**, it's officers, employees, and the underwriters of each of the foregoing **from and against any such claim, whether groundless or not, and whether caused in whole or in part by the negligence or fault of indemnitees**, or by the equipment of Charterer, Charterer's property or Charterer's subcontractors property. It is expressly understood that Owner shall insure its obligations assumed under this paragraph. (Bold emphasis added).

Additionally, the Master Time Charter Agreement sets forth in numbered paragraph 14 the reciprocal indemnity obligation of Offshore Oil Services as the designated "Charterer":

14. **Charterer's Indemnities.**
Neither Owner, its officers, directors, employees, the vessel, her owners, operators, master and crew, nor the underwriters of any of the foregoing shall have any responsibility or liability for any claim involving the damage to or loss of any property, drilling rigs, vessels, cargo and/or equipment of Charterer, Charterer's other subcontractors, Charterer's customers or invitees or **for any injury**, illness, disease or death **of employees, agents or representatives of Charterer, Charterer's other subcontractors, Charter's customers or invitees**, and **Charterer shall defend, indemnify, and hold harmless Owner**, its officers, directors, employees, the vessel, its owners, operators, master, and crew, and the underwriters of each of the foregoing **from and against any such claim, whether groundless or not, and whether caused in whole or in part by the negligence or fault of indemnitees, or by unseaworthiness of the vessel** or equipment of Owner, Owner's property or Owner's subcontractors' property. It is expressly understood that Charterer shall insure its obligations assumed under this paragraph. (Bold emphasis added).

In evaluating the specific language of the Agreement, these reciprocal indemnity obligations of Sea Mar Management (as "Owner") and Offshore Oil Services (as "Charterer") are based on the status of person claiming injury, Jeramie Brown. In other words and specific to the instant case, the obligation to provide defense and indemnification is based upon the relationship that Jeramie Brown and his employer, L&L Sandblasting, had with Sea Mar Management and/or Offshore Oil Services.

C. Jeramie Brown is not an Employee, Subcontractor, Customer, nor Invitee of Offshore Oil Services:

In order for Offshore Oil Services to owe a defense and indemnity obligation to Sea Mar Management, it must be established that there is no genuine issue of material fact about the status of Jeramie Brown at the time of injury. For an indemnity to flow in favor of Sea Mar Management, it must be shown that (1) Brown was an "employee, agent or representative" of Offshore Oil Services, or (2) Brown's employer, L&L Sandblasting, was a "subcontractor" to Offshore Oil Services, or (3) Brown's employer, L&L Sandblasting, was the "customer" of Offshore Oil Services, or (4) Brown was an "invitee" to work aboard the CAPE COOK by virtue of an invitation onto that vessel by Offshore Oil Services. As set forth below, none of these facts can be shown and, as a result, no indemnity obligation is owed by Offshore Oil Services.

i) Brown is not an employee of Offshore Oil Services:

Per the allegations of the Complaint and facts agreed by both Offshore Oil Services and Sea Mar Management for purposes of the hearing of this Motion, Jeramie Brown was employed by L&L Sandblasting at the time of his alleged accident and injury in July 2003. Further, per the affidavit of Michael T. Gay, Executive Vice-president of Offshore Oil Services (See attached Exhibit 4), Brown was **not** an "employee, agent or representative" of Offshore Oil Services.

ii) Brown is not a subcontractor of Offshore Oil Services:

Additionally, the affidavit of Mr. Gay (Exhibit 4) and Keith T. Perkins (See attached Exhibit 5) establish that Offshore Oil Services did not have a contractual relationship with L&L Sandblasting. Accordingly, neither L&L Sandblasting nor its employee, Jeramie Brown, can be deemed to be a "subcontractor" of Offshore Oil Services.

iii) Brown is not a customer of Offshore Oil Services:

Further, the affidavits of Mr. Gay (Exhibit 4) and Mr. Perkins (Exhibit 5) establish that the "customer" for Offshore Oil Services in undertaking this time charter of the CAPE COOK was Williams Field Services. Since Brown is not an employee of Williams Field Services, he cannot be found to be a "customer" of Offshore Oil Services for purposes of the indemnity obligations.

iv) Brown is not an invitee of Offshore Oil Services:

In defining the term "invitee, the United States Fifth Circuit Court of Appeals has held that an "invitee" is a person who goes onto premises with the express or implied invitation of the occupant, on business of the occupant or for their mutual advantage." *Blanks v. Murco Drilling Corp., 766 F. 2d 891, 894 (5th Cir. 1985); cited with approval by Reynaud v. Rowan Companies, Inc., 1999 U.S. Dist. LEXIS 1507 (E.D.L.a. 1999) and Williams Energy, Inc. v. National Union Fire Insurance Company, 2004 U.S. Dist. LEXIS 22094 (E.D. La.* 2004). More simply put, the Fifth Circuit recognized in the *Blanks* case that "invitee status is determined by who invites the injured party onto the premises." *Blanks, Id. at 894.*

The affidavit of Mr. Gay (Exhibit 5) confirms that neither Rollins nor his employer, L&L Sandblasting, was an "invitee" of Offshore Oil Services to come onto the M/V CAPE COOK. The work of L&L Sandblasting, as Brown's employer, was pursuant to its work for Williams Field Services. (See affidavit of Keith T. Perkins, Exhibit 5). As a result, the plaintiff's presence aboard the CAPE COOK was with the express or implied invitation of Williams Field Services, not Offshore Oil Services. Clearly, no invitation was extended by Offshore Oil Services for Brown to perform his work nor to be a passenger on or aboard the CAPE COOK. Brown accordingly does not qualify as an "invitee" of Offshore Oil Services.

D. The Master Time Charter Agreement is ambiguous and /or leads to an absurd result and therefore must be interpreted against its drafter, Sea Mar Management:

The interpretation of maritime contract indemnity clauses is ordinarily governed by federal maritime law rather than state law. *Corbitt v. Diamond M. Drilling Co.*, 654 F.2d 329, 332 (5th Cir. 1981). Under federal maritime law, the obligation to indemnify is to be strictly construed, and the status of the indemnitee (the party demanding to be indemnified) is to be interpreted narrowly. *Gulf Oil Corp. V. Mobile Drilling Barge or Vessel Margaret,* 441 F. Supp. 1, 5 (E.D. La. 1975) *aff'd.* 565 F. 2d 958 (5th Cir. 1978); *Marathon Pipe Line Co. V. Drilling Rig Rowan/Odessa,* 527 F. Supp. 824 (E.D. La. 1981), *aff'd* 699 F. 2d 240 (5th Cir. 1981), *cert. den.* 104 S. Ct. 82 (1982); *Smith v. Tenneco Oil Co.,* 803 F. 2d 1386, 1388 (5th Cir. 1986). The Court should read the contract as a whole and may not look beyond written language of the document to determine the intent of the parties unless the disputed contract provision is ambiguous. *Corbitt v. Diamond M. Drilling Co.*, Id at 333; *Weathersby v. Conoco Oil Company*, 752 F.2d 953, 955 (5th Cir. 1984). If there is an ambiguous contractual provision, it must be construed against the party which drafted the agreement; i.e. in this instance, Sea Mar Management. *Tidex Inc. v. A.L. Commercial Blast Corporation,* 567 F. Supp. 918, 921 (E.D. La. 1983); *Transcontinental Gas Pipeline Corp. v. Mobile Drilling Barge MR. CHARLIE*, 294 F. Supp. 1025 (E.D.La.1968), *aff'd in part, rev'd on other grounds*, 424 F.2d 684 (5th Cir. 1970).

In the instant case, the language of the Master Time Charter's indemnity provisions clearly establishes a type of "knock-for-knock" indemnity agreement whereby each party would indemnify the other for claims brought by its employees or subcontractors or invitees. See *Weathersby*, 752 F.2d at 955-957. It is anticipated that Sea Mar Management will argue to this Court that Brown is

an "implied invitee" of Offshore Oil Services. This "implied" status would, arguably, arise from the "advantage" to Offshore Oil Services by having its customer (Williams Field Services) have its contractor's employees (employees of L&L Sandblasting such as Brown) come aboard the chartered CAPE COOK to sleep, eat, and work. If the Court would accept this argument of Sea Mar Management of such an "implied invitee" status, it must then also conclude that Brown was most certainly an "express invitee" of Sea Mar Management under the facts of this case and this Master Time Charter Agreement. Specifically, Sea Mar Management was the bareboat charterer and operator of the CAPE COOK and would have an "advantage" by expressly inviting employees of L&L Sandblasting onto its vessel daily to perform their work and to sleep and eat aboard the vessel. Without the presence of employees of L&L Sandblasting aboard the CAPE COOK, there was no need for the services of the vessel provided by Sea Mar Management; i.e. an obvious "advantage" to Sea Mar.

If we accept this interpretation of such "invitee" status for Brown, he thus becomes the "invitee" of both Sea Mar Management and Offshore Oil Services. Under such interpretation of this contract, both Sea Mar Management and Offshore Oil Services would owe to each other defense and indemnity for injury to Brown. Such a result either could not have been expected under the reciprocal indemnity language or is so absurd a result that the language must then be deemed to be ambiguous and therefore interpreted against the drafter of the agreement; i.e. Sea Mar Management. see *Tidex, Inc. v. A.L. Commercial Blast Corporation*, 567 F. Supp. 918, 921 (E.D. La. 1983); *Transcontinental Gas Pipeline Corp. v. Mobile Drilling Barge MR. CHARLIE*, 294 F. Supp. 1025 (E.D.La.1968), *aff'd in part, rev'd on other grounds*, 424 F.2d 684 (5th Cir. 1970). In either interpretation, no indemnity would be owed to Sea Mar Management by Offshore Oil Services and thus summary

judgement must be denied and, with it, the claim for contractual defense and indemnity under the Third Party Complaint by Sea Mar Management.

SUMMARY

Jeramie Brown has brought this personal injury suit against Sea Mar for a claim of injury arising out of the operations of the M/V CAPE COOK. The Master Time Charter Agreement entered into between Sea Mar Management and Offshore Oil Services for the services of the CAPE COOK contained certain reciprocal indemnity obligations on behalf of both parties. The contractual obligation to defend and indemnify for an injury claim is determined by the status of the injured person, in this case, the plaintiff. Brown did not qualify as any one of the defined categories of persons to entitle Sea Mar Management to such contractual defense and indemnity by Offshore Oil Services. The fact that Brown and his employer, L&L Sandblasting were **not** (1) "employees, agents or representatives", (2) "subcontractors", (3) "customers", nor (4) "invitees" of Offshore Oil Services requires that this Court deny the Motion for Summary Judgement sought by Sea Mar Management. Alternatively, if the Court would find that Brown was an "invitee" of both Sea Mar Management and Offshore Oil Services, the obligation for defense and indemnity again would not exist. The reciprocal defense and indemnity obligations would be extinguished because they would be owed by each company to each company (an absurd result) or it would render the term "invitee" ambiguous to thus be interpreted against Sea Mar Management as the party which drafted the written agreement. These pleadings, discovery and evidence show that there is no genuine issue of material fact and that judgement as a matter of law should be entered against Sea Mar Management on its Third Party Complaint for contractual defense and indemnity.

RESPECTFULLY SUBMITTED:

WILLIAM B. SCHWARTZ LSBA # 11854
1110 Poydras Street, 20th Floor
New Orleans, Louisiana 70163
Telephone: 504/569-2900
and (158623)
BURKE & MAYER, Of Counsel
Attorneys for Offshore Oil Services, Inc.

CERTIFICATE

I certify that a copy of the above and foregoing pleading has been served on all counsel of record by depositing same in the U.S. Mail, postage pre-paid, this 27th day of December, 2005.

William B. Schwartz