

**UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA**

HANSON INDUSTRIES, INC.,)	
)	
Plaintiff,)	A03-94 CV JWS
)	
vs.)	ORDER FROM CHAMBERS
)	
ALASKA MARINE TRANSPORT & SALVAGE, INC.,)	[Re: Motion at Docket 62]
)	
Defendant.)	
_____)	

I. MOTION PRESENTED

At docket 62, Alaska Marine Transport & Salvage, Inc., moves to exclude evidence of damages allegedly suffered by Hanson Industries, Inc., due to its arrest of the *M/V Polar Bear*. Alaska Marine also moves to exclude evidence of the *Polar Bear's* size and any damages that Hanson Industries may have suffered as a result of the vessel's size. Finally, Alaska Marine moves to prevent Hanson Industries from calling Peter Kelly as a witness at trial. At docket 66, Hanson Industries opposes Alaska Marine's motion to exclude evidence regarding the arrest of the *Polar Bear* and the vessel's size, but does not oppose Alaska Marine's motion to prevent Kelly from testifying at trial. Oral argument has not been requested and would not assist the court.

II. BACKGROUND

In March of 2003, Hanson Industries entered a charter agreement with Alaska Marine.¹ Hanson Industries promised to pay Alaska Marine to carry Hanson Industries' cargo aboard Alaska Marine's vessel, the *Polar Bear*, from Tacoma, Washington, to Good News Bay, Alaska.² But, before the cargo reached Good News Bay, a dispute arose over when Hanson Industries' payment was due.³ The dispute was not resolved, and on April 30, 2003, Hanson Industries filed suit in this court against Alaska Marine *in personam* and the *Polar Bear in rem*.⁴

Two days after filing suit, Hanson Industries had the *Polar Bear* arrested in Seward, Alaska.⁵ However, after the vessel was arrested, Hanson Industries allowed it to be released on the condition that it complete its voyage to Good News Bay.⁶ The *Polar Bear* arrived at Good News Bay in June of 2003, and Hanson Industries' cargo was off-loaded.⁷

¹Doc. 1 at 2.

²*Id.*

³*Id.*

⁴*Id.* at 1.

⁵Doc. 46 at 2.

⁶Doc. 10.

⁷Doc. 52 at 4.

III. DISCUSSION

A. Evidence on Damages Resulting from the *Polar Bear*'s Arrest

Having a maritime lien against a vessel is a prerequisite to arresting the vessel⁸ and bringing an *in rem* action against it.⁹ Despite the fact that Hanson Industries did not have a maritime lien against the *Polar Bear*, it arrested the vessel and brought an *in rem* action against it.¹⁰ The court dismissed that action because Hanson Industries did not have a maritime lien against the *Polar Bear*.¹¹ Now, Alaska Marine moves to exclude evidence of the damages Hanson Industries claims it suffered in arresting the *Polar Bear*.

The court will exclude evidence of any such damages. Hanson Industries did not have a maritime lien against the *Polar Bear* and should not have had the vessel arrested. Consequently, it must bear the costs of the arrest.¹²

B. Evidence of the *Polar Bear*'s Size

Hanson Industries supports its breach of contract claim against Alaska Marine with two assertions. The first assertion is in its complaint. There, it alleges that Alaska

⁸SUPP. R. C(3)(a)(ii)(A).

⁹SUPP. R. C(1)(a).

¹⁰Doc. 57 at 3 – 4.

¹¹*Id.*

¹²*Cf. Stevens v. F/V Bonnie Doon*, 655 F.2d 206, 209 (9th Cir. 1981) (quoting *The Swedish Bark Adolph*, 5 F. 114 (S.D.N.Y. 1880)) (vessel's owner entitled to recover damages resulting from vessel's arrest only if arrest was in bad faith).

Marine threatened to off-load its cargo at Seward unless it paid Alaska Marine \$50,000.¹³ Hanson Industries' second assertion is in its statement of issues filed at docket 65. According to its statement of issues, one issue to be resolved at trial is whether its contract with Alaska Marine required Alaska Marine to use a larger barge than the *Polar Bear* to ship Hanson Industries' cargo.¹⁴

In Alaska Marine's view, the only assertion that is properly before the court is the assertion in the complaint relating to Alaska Marine's alleged demand for payment. Alaska Marine argues that the assertion relating to the *Polar Bear's* size is not properly before the court because it is not in the complaint.

Under Federal Rule of Civil Procedure 15(b), the court may allow pleadings to be amended to reflect an issue raised during litigation but not in the pleadings. This is true even when one party objects to evidence on the new issue, as long as that party is not prejudiced by admitting the evidence.¹⁵ If the party opposing evidence on the issue fails to show that it would be "seriously prejudiced in the presentation of the action or defense on the merits ... the court should grant leave to amend and allow evidence on the newly raised issue to be introduced."¹⁶

¹³Doc. 1 at 2.

¹⁴Doc. 65 at 1.

¹⁵FED. R. CIV. P. 15(b).

¹⁶CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 1495 (Civil 2d ed. 1990) (citations omitted).

In this case, the parties agree that whether the *Polar Bear's* size constitutes a breach of their contract is an issue that is not raised in the complaint. As such, it is subject to Rule 15(b). Under that rule, Alaska Marine bears the burden of demonstrating that it will be prejudiced by the court admitting evidence on the issue of the *Polar Bear's* size. Alaska Marine has not presented any evidence that it will be prejudiced by the court admitting evidence on that issue, nor does it contest Hanson Industries' assertion that the issue has been explored in depositions and in conversations between counsel.¹⁷ Thus, the court concludes that Alaska Marine has received adequate notice of the issue and is able to prepare a defense to it.

Consequently, the court will allow Hanson Industries to present evidence on the issue of the *Polar Bear's* size and its damages allegedly resulting from the vessel's size. However, that allowance is conditioned on Hanson Industries filing and serving an amended complaint setting forth that issue.

C. Peter Kelly's Testimony

In its final trial witness list, Hanson Industries lists Peter Kelly as a witness it intends to call at trial.¹⁸ Alaska Marine moves to prevent Kelly from being called as a witness on the ground that he "was not included on any prior witness lists, and his name

¹⁷Doc. 66 at 2.

¹⁸Doc. 64 at 2.

was not included in [Hanson Industries'] Rule 26 disclosures."¹⁹ Hanson Industries does not oppose Alaska Marine's motion to prevent Kelly from testifying.

In its order at docket 58, the court directed the parties to file final witness lists including "only persons who have been previously disclosed as potential witnesses in a timely filed prior witness list."²⁰ Kelly was not included on Hanson Industries' earlier witness list.²¹ Consequently, Hanson Industries may not call Kelly to testify at trial.

IV. CONCLUSION

For the reasons set out above, the motion at docket 62 is **GRANTED** in part and **DENIED** in part. It is granted with respect to 1) excluding evidence of Hanson Industries' damages resulting from its arrest of the *Polar Bear* and 2) preventing Hanson Industries from calling Kelly as a witness at trial. It is denied with respect to excluding evidence of the issue of the *Polar Bear's* size and Hanson Industries' damages allegedly resulting from the vessel's size, provided that within ten (10) days of the date of this order Hanson Industries files and serves an amended complaint presenting that issue.

DATED at Anchorage, Alaska, this ____ day of May 2005.

JOHN W. SEDWICK
UNITED STATES DISTRICT JUDGE

¹⁹Doc. 62 at 3.

²⁰Doc. 58 at 2.

²¹See Doc. 42