

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

* * * * * CIVIL ACTION
NATALE FRONTINO * 06-85ML
*
VS. * MAY 12, 2006
*
H.R.M, INC., and *
MARINE RESCUE SERVICE,*
INC. * PROVIDENCE, RI
* * * * *

HEARD BEFORE THE HONORABLE MARY M. LISI

DISTRICT JUDGE

(MOTION TO AMEND COMPLAINT)

APPEARANCES:

FOR THE PLAINTIFF: ROBERT E. COLLINS, ESQ.
Clinton & Muzyka, P.C.
One Washington Mall
Suite 1400
Boston, MA 02108

FOR THE DEFENDANT: JOHN K. FULWEILER, ESQ.
DeOrchis & Partners, LLP
61 Broadway
26th Floor

New York, NY 10006-2802

Court Reporter: Anne M. Clayton, RPR
One Exchange Terrace
Providence, RI 02903

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1 THE COURT: This is the matter of Natale
2 Frontino versus HRM, Inc., and Marine Rescue Services,
3 Inc.

4 The matter is before the Court this morning on
5 the defendant's motion to dismiss or, in the
6 alternative, to stay this matter with an order
7 compelling arbitration.

8 In addition, the Court has a motion to amend the
9 Complaint filed by the plaintiff. Inasmuch as the two
10 motions appear to be intertwined and interconnected,
11 the Court scheduled both for hearing this morning.

12 I'm going to start with the motion to amend the
13 Complaint. I note that this motion was filed not only
14 after the defendant filed an answer but after the
15 defendant filed the motion to dismiss or, in the
16 alternative, to compel arbitration.

17 MR. COLLINS: Good morning, your Honor. Robert
18 Collins for the plaintiff, Natale Frontino.

19 The defendants have raised a couple of issues
20 relative to the motion to amend, and I think the
21 pertinent one to go to first is whether or not the
22 amendment, the proposed Amended Complaint is effective
23 in order to solve the problem. I filed --

24 THE COURT: Let me ask you this, Mr. Collins. I
25 have to tell you you've appeared before me on numerous

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1 occasions. I know you know the law in this area inside
2 and out. Frankly, when I read your motion, I -- it
3 occurred to me that this was really a contrived
4 response to the motion to dismiss and the holding of
5 Prima Paint. I don't see in the purported Amended
6 Complaint that you have alleged any new facts.

7 In looking at the agreement itself, it's not
8 like we're talking about a 50-page contract where the
9 arbitration clause is buried on page 48.

10 MR. COLLINS: I understand, your Honor.

11 THE COURT: So I have to tell you that I look at

12 your motion to amend with a rather jaundiced eye.

13 MR. COLLINS: With that in mind, your Honor, I
14 will proceed. I believe the applicable law relative to
15 this is the recent case of Kristian versus Comcast.
16 It's a First Circuit case from April 20, 2006.

17 The reason why I start with this is because what
18 I tried to do in the motion to amend was to add --

19 THE COURT: Let me ask you this. Factually --

20 MR. COLLINS: There are none different, your
21 Honor, it's the same --

22 THE COURT: Let me ask you this. The
23 arbitration clause is in the agreement.

24 MR. COLLINS: Is in the agreement.

25 THE COURT: And the only thing that your client

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1 was asked to sign or was even discussed that day was
2 the agreement as a whole, is that it?

3 MR. COLLINS: That is correct, your Honor. I
4 can't deny that.

5 THE COURT: All right. So you can't separate
6 out the clause in this case from the agreement itself.

7 MR. COLLINS: Well, I'm not sure about that.

8 What I tried to do with the motion to amend was to,
9 obviously, bring it out of Prima Paint and put it into
10 that we are contesting the arbitration clause also.

11 THE COURT: But you don't have any facts to
12 support that.

13 MR. COLLINS: Well, the arbitration clause came
14 in the same agreement at the same time.

15 THE COURT: It's basically a take-it-or-leave-it
16 agreement. As I understand it, your client makes the
17 call, the salver goes out, tells him, here's the deal,
18 take it or leave it. If you take it, I remove the
19 boat. If you leave it, good luck.

20 MR. COLLINS: That's correct, your Honor. And,
21 you know, there becomes a line where it becomes take it
22 or leave it versus, I don't want to be slanderous, but
23 it's undue influence, let's say, the term I'm looking
24 towards.

25 THE COURT: You might want to call it a contract

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1 of adhesion. It's a take-it-or-leave-it.

2 MR. COLLINS: Under salvage, I've alleged that

3 it's undue -- unfair --

4 THE COURT: What you're really saying is that
5 the amount charged is unfair. That's what he's
6 fighting about.

7 MR. COLLINS: That's basically it, your Honor.

8 THE COURT: That's what you're fighting about.

9 MR. COLLINS: There's a little bit bigger issue
10 here. Obviously, we're not that afraid about going to
11 arbitration. Boat U.S. is a competent -- which they
12 pointed out in their footnote. That's not the problem.
13 The problem that we're afraid of is this is going to
14 become common practice for HRM because they have --
15 they do most of the work here.

16 THE COURT: That doesn't affect this case. I'm
17 only looking at this case, Mr. Collins, and, as I said,
18 what gives me great pause is the fact that you filed a
19 complaint in this case, there was an answer, there was
20 then a motion to dismiss. Your response, by the way,
21 to the motion to dismiss was untimely.

22 MR. COLLINS: I understand.

23 THE COURT: As a matter of fact, the motion to
24 dismiss was filed March 27; your response, I think, was
25 due somewhere around the 13th of April.

1 MR. COLLINS: I believe it was five days.

2 THE COURT: Your objection was filed the 21st.
3 And interestingly, the motion to amend was filed before
4 the motion -- the objection, rather.

5 MR. COLLINS: I can explain that, your Honor.

6 THE COURT: As I say --

7 MR. COLLINS: They were actually at the same
8 time, but I didn't have -- the secretary didn't give
9 enough copies of the motions so Paula called me up and
10 I had to hand-deliver the copies.

11 Anyway, to get back on the point, what I tried
12 to do in the motion to amend is to specifically make
13 clear that we also attack the arbitration clause
14 because they're one and the same.

15 THE COURT: I understand that, but you've
16 alleged no new facts, and any of the facts that you
17 have available to you, you had when you filed the
18 initial Complaint, which renders the motion to amend
19 even more suspect at this point.

20 MR. COLLINS: Well, I certainly don't think the
21 motion to amend was in bad faith. I was trying to

22 allege that we also attack the -- because the original
23 Complaint just said the salvage agreement itself was
24 unfair whereas in the motion to amend --

25 THE COURT: I understand that, Mr. Collins, but

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1 you can't simply add another count making another claim
2 without adding any factual support to the additional
3 claim. You're past the point in time on a Rule 15
4 motion where the other side has already shown its hand.

5 So the Court is going to scrutinize any motion
6 to amend much more carefully than if you had used up
7 your first bite, so to speak, under Rule 15 prior to
8 the filing of a responsive pleading.

9 MR. COLLINS: Under the Kristian case, if I may
10 just quote from it, the Kristian case involved
11 customers of Comcast. There was an arbitration
12 agreement in there, and the question came as to the
13 enforceability of it. And the court in Kristian went
14 on to discuss Prima Paint and also discussed the later
15 Supreme Court case of Howsam. And the court in the
16 First Circuit per Judge Lipez to quote Howsam described

17 two categories of disputes where we presume that courts
18 rather than arbitrators should resolve the gateway
19 dispute. One, disputes about whether the parties are
20 bound by a given arbitration clause; and two,
21 disagreements about whether an arbitration clause in a
22 concedingly binding contract applies." What I'm trying
23 to do is fit --

24 THE COURT: Time out. How does that address
25 Rule 15? It doesn't at all.

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1 MR. COLLINS: It doesn't.

2 THE COURT: You don't even get there until you
3 get past Rule 15.

4 MR. COLLINS: Well, Rule 15 allows liberal
5 amendments to the -- the statute of limitations --

6 THE COURT: But there are limitations on that.

7 MR. COLLINS: But there are limitations if the
8 amendment is not going to pass muster, I guess I should
9 say, and what I --

10 THE COURT: Or, as I see it here, it's a
11 contrived after-thought.

12 MR. COLLINS: Well, I don't believe it's a

13 contrived after-thought.

14 THE COURT: That's how I see it, Mr. Collins.
15 It was made in response to the motion to dismiss. It's
16 clear.

17 MR. COLLINS: I admitted that it was made in
18 response to the --

19 THE COURT: End of story.

20 MR. COLLINS: Well, I don't have anything else
21 to say then, your Honor.

22 THE COURT: Okay. Thank you. Who from this
23 side is going to --

24 MR. DALY: Your Honor, I'm Mike Daly. I'm local
25 counsel for defendants in this case. John Fulweiler

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1 will be arguing as pro hac vice counsel.

2 MR. FULWEILER: Your Honor, may it please the
3 Court, John Fulweiler of DeOrgis & Partners.

4 Your Honor, to be frank, you have touched upon
5 all of the salient points that I would have the Court
6 hear this morning with respect to our opposition to the
7 motion to amend. I would only add that -- actually, I

8 wouldn't add anything. I would simply rest unless the
9 Court should have any questions that I could perhaps
10 field.

11 THE COURT: That was a brilliant move. Quit
12 while you're ahead. The motion to amend is denied.

13 The Court in this case, as I said, is very
14 critical of a motion filed in response to a motion to
15 dismiss, which points up that there is an arbitration
16 clause in this case.

17 The purported amendment in this case adds
18 nothing factually to the allegations made in the
19 initial complaint filed, but merely adds an initial
20 allegation that there was duress in the making of the
21 arbitration clause itself as a separate part of the
22 contract that forms the basis of the claims in the
23 initial complaint filed.

24 As I said, while responding to Mr. Collins'
25 argument, my initial reaction to his motion to amend is

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1 that this is nothing more than a contrived, and I'll
2 say it, after-thought that was prompted by the filing
3 of the motion to dismiss. I don't believe that it adds

4 anything more to the case. I believe that it is -- I
5 won't go so far as to say bad faith, Mr. Collins, but I
6 will say that it was not well-taken by the Court,
7 because what you did by filing the motion to amend was
8 to force the other side to expend the resources and
9 money that it did not need to have to do in the first
10 place, because, on its face, the case is pretty clear
11 that this case is governed by Prima Paint, which so far
12 as I know, is still good law in the First Circuit. So
13 the motion to amend is denied.

14 Now, there's a motion to dismiss or, in the
15 alternative, to stay this matter with an order to
16 compel arbitration.

17 MR. FULWEILER: Your Honor, as may be evident to
18 the Court -- let me back up here. The motion to
19 dismiss is based on the Prima Paint holding. The
20 plaintiff's objection is, essentially, a concession
21 that Prima Paint is applicable in this case. I don't
22 have much more to add.

23 THE COURT: He doesn't say he's conceded. I
24 know you say that, but I'll hear what he has to say
25 about that.

1 MR. FULWEILER: Very good.

2 THE COURT: Mr. Collins?

3 MR. COLLINS: Your Honor, I think Prima Paint
4 applies and that the question is whether or not you
5 dismiss the stay right now.

6 THE COURT: If the only claim here is really
7 whether or not or the amount that's being charged,
8 which is what the dispute is about, seems to me that
9 the arbitrator is going to be in a position to make
10 that determination and to give you full relief. So it
11 doesn't seem to make sense to keep the case here.

12 MR. COLLINS: Well, the only reason you might
13 want to, I guess it's the defendant's call as to
14 whether or not they want to come back after an
15 arbitrator's decision to enforce the arbitration.

16 THE COURT: I don't see the point of it.

17 MR. FULWEILER: Well, your Honor, the only
18 reason would be to enter back into Court to confirm the
19 arbitration award, but there'd be no reason to keep
20 this particular case open. We can start a new action
21 to confirm the arbitration award.

22 THE COURT: In that case then, the defendant's
23 motion to dismiss is granted because this case, the
24 underlying dispute is clearly an arbitrable dispute.
25 And so I will ask -- tell me your name again, please.

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1 MR. FULWEILER: John Fulweiler.

2 THE COURT; Mr. Fulweiler, if you would prepare
3 an order that addresses the Court's rulings on both
4 motions today, I'd appreciate it.

5 Where did you come from?

6 MR. FULWEILER: I came from New York, your
7 Honor. I must say I'm pleased to see an oar in the
8 courtroom. We don't have the luxury of that.

9 THE COURT: You don't have an oar?

10 MR. FULWEILER: And I might say I practice
11 heavily up and down the East Coast, and haven't seen an
12 oar in a courtroom aside from this particular forum.

13 THE COURT: We all have oars. I will tell you
14 that my very first day on the job, my very first
15 hearing was an admiralty case. And I saw the oar and I
16 thought to myself what I really need is a life jacket,
17 but --

18 MR. COLLINS: I know, your Honor, I've tried
19 with you a few times on admiralty and you always seem
20 to enjoy it.

21 THE COURT: We can go off the record.

22 (Discussion off the record.)

23 THE COURT: Back on the record. Mr. Fulweiler,
24 you had made some noise about counsel fees. Are you
25 pressing those?

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1 MR. FULWEILER: Responsible representation
2 dictates that I present them to the Court, and I leave
3 it at that.

4 THE COURT: I'm not going to make an award of
5 counsel fees in this case. What I am going to suggest
6 to you is that if you can't resolve this case amongst
7 counsel, get it to the arbitrator and get a decision
8 from the arbitrator.

9 MR. FULWEILER: And your Honor, just for point
10 of clarification, you are dismissing this case so the
11 issue of attorneys fees could be held for the
12 arbitrators in the Boat U.S. forum, right? You're not

13 reserving any --

14 THE COURT: Well, the attorneys fees you've
15 requested in this case. I don't see, unless I missed,
16 it in the contract that there was a provision for
17 counsel fees.

18 So I think if I deny them today or don't pass on
19 them today, it means you're not going to get them.

20 MR. FULWEILER: Bear with me. I just want to
21 take a look at the contract and see if there is a
22 provision. It does provide at paragraph six, your
23 Honor, and I could give you a copy if you'd like --

24 THE COURT: I have it. Six only deals with the
25 fees and charges.

14

1 MR. FULWEILER: It's the fees language. It
2 caught my eye. Apparently, this contract doesn't speak
3 to attorneys fees.

4 THE COURT: Let's keep it simple, fellas. Have
5 a good trip back to New York.

6 MR. FULWEILER: Thank you. The order may be
7 submitted to you next week? You didn't mention a day.

8 THE COURT: That's fine.

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MR. FULWEILER: Thank you.

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(Court concluded at 9:30 a.m.)

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C E R T I F I C A T I O N

I, Anne M. Clayton, RPR, do hereby certify
that the foregoing pages are a true and accurate
transcription of my stenographic notes in the
above-entitled case.

Anne M. Clayton, RPR

Date