IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In re Petition of FRESCATI SHIPPING COMPANY, LTD., as Owner of the M/T ATHOS I, and TSAKOS SHIPPING & TRADING, S.A., as Manager of the M/T ATHOS I, for Exoneration from or Limitation of Liability	CIVIL ACTION NO. 05-cv-305 (JHS)
UNITED STATES OF AMERICA, Plaintiffs, v. CITGO ASPHALT REFINING COMPANY, CITGO PETROLEUM CORPORATION, and CITO EAST COAST OIL CORPORATION Defendants.	CONSOLIDATED CIVIL ACTION NO. 08-cv-2898 (JHS)

ORDER

AND NOW, this 9th day of April 2015, upon consideration of the following:

- Defendants' Motion for Partial Summary Judgment Granting Limitation of Liability under the Oil Pollution Act (Doc. No. 749);
- Plaintiff Frescati's Brief in Opposition to Defendants' Motion for Partial Summary Judgment Regarding the Limitation of Liability under the Oil Pollution Act (Doc. No. 772);
- Plaintiff United States' Brief in Response to Defendants' Motion for Partial Summary Judgment Seeking the Limitation of Liability under the Oil Pollution Act (Doc. No. 773);
- Defendants' Reply to the Frescati Plaintiffs' and the Government's Opposition to Defendants' Motion for Partial Summary Judgment Granting Limitation of Liability under the Oil Pollution Act (Doc. No. 784);

- Plaintiff United States' Motion to Strike CITGO's Oil Pollution Act Defense or in the Alternative Motion for Partial Summary Judgment (Doc. No. 747);
- Defendants' Memorandum in Opposition to the United States' Motion to Strike CITGO's Oil Pollution Act Defense or in the Alternative Motion for Partial Summary Judgment (Doc. No. 771);

it is **ORDERED** that Defendants' Motion for Partial Summary Judgment Granting Limitation of Liability Under the Oil Pollution Act (Doc. No. 749) is **DENIED**.[1] It is further **ORDERED** that

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[1] Defendants ("CARCO") have filed a Motion for Partial Summary Judgment Granting Limitation of Liability under the Oil Pollution Act. (Doc. No. 749.) Plaintiffs Frescati and the United States have filed Briefs in Opposition to Defendants' Motion. (Docs. No. 722, 773.) Defendants have filed a Reply. (Doc. No. 784.) In addition, Plaintiff United States has filed a Motion to Strike CARCO's Oil Pollution Act Defense or in the Alternative Motion for Partial Summary Judgment. (Doc. No. 747.) Defendants have filed a Response in Opposition to this Motion. (Doc. No. 771.) For the following reasons, the Court will deny Defendants' Motion for Partial Summary Judgment Granting Limitation of Liability under the Oil Pollution Act, and will grant in part and deny in part Plaintiff United States' Motion to Strike CARCO's Oil Pollution Act Defense or in the Alternative Motion for Partial Summary Judgment.

The ATHOS I, owned by Plaintiff Frescati Shipping Co., Ltd., was chartered to CARCO to deliver oil from Venezuela to its Paulsboro facility on the Delaware River. On November 26, 2004, as the ATHOS I approached CARCO's Paulsboro facility, it struck a submerged anchor, puncturing the vessel's hull and causing oil to spill into the Delaware River. Frescati initially assumed responsibility for removal costs and was partially reimbursed by the United States Government in accordance with the provisions of the Oil Pollution Act of 1990 ("OPA"). Thereafter, suit was filed in this Court by both Plaintiffs Frescati and the United States against CARCO seeking reimbursement for removal costs and OPA-related damages. Plaintiffs allege that CARCO was at fault for the oil spill.

More specifically, Plaintiffs Frescati and the United States seek to recover a combined total $133,305,668.00 from CARCO in damages and removal costs incurred to clean up the ATHOS I oil spill. (Doc. No. 749 at 1.) On August 15, 2006, the National Pollution Funds Center ("NPFC") determined that Frescati was entitled to limit its liability for removal costs to $45,474,000.00 under OPA-90, 33 U.S.C. § 2704(a)(1). (Id.) Because Frescati had already paid removal costs in excess of that amount, the Government reimbursed $87,988,151.00 to Frescati. (Doc. No. 749 at 1-2.) Through subrogation, the Government now seeks to recover that same amount from CARCO. (Id.) Additionally, Frescati seeks $45,317,511.00 from CARCO for unreimbursed removal costs that it paid as a responsible party under OPA. (Id.) In Defendants' Motion for Partial Summary Judgment, CARCO seeks to limit its liability for OPA-related damages and removal costs to $45,474,000.00, which is essentially what Plaintiff Frescati paid in damages and removal costs. (Id.) CARCO relies on a specific provision of

OPA, 33 U.S.C. § 2702(d), to limit its liability. (Id.) For the following reasons, Defendants' Motion for Partial Summary Judgment (Doc. No. 749) will be denied.

First, CARCO has waived its limitation of liability defense under OPA. This litigation has been ongoing for about ten years, starting in 2005. In 2010, this Court (Fullam, J.) held a 41-day trial. Subsequently, there was an appeal to the Third Circuit, which remanded this case in 2013 for findings on specific issues of liability. In re Frescati Shipping Co., 718 F.3d 184 (3d Cir. 2013). On August 15, 2014, CARCO, for the first time, raised the defense that it had the right to limit its liability as a third party under OPA, citing 33 U.S.C. § 2702(d). (Doc. No. 749 at 1.) By failing to assert this defense with specificity in the Answer to the Complaint filed in 2005 and waiting to raise this defense until three and a half years after completion of the original trial and fifteen months after the appellate decision and remand, CARCO has waived its right to assert this limited liability defense under OPA.

The Third Circuit has held that a defendant waives a defense if it fails to raise the issue "at a pragmatically sufficient time" and the plaintiff is prejudiced. Charpentier v. Godsil, 937 F.2d 859, 863-64 (3d Cir. 1991); see Chainey v. Street, 523 F.3d 200, 209-10 (3d Cir. 2008) (finding that a statute of limitations defense first raised in post-trial motions was waived where there was no justification for defendant's failure to raise the defense and plaintiff would be prejudiced by the surprise of a new defense after trial); U.S. v. National R.R. Passenger Corp., No. Civ. A. 86-1094, 2004 WL 1335250, at *3-4 (E.D. Pa. June 15, 2004) (finding that defendant waived an affirmative defense when it first raised it during a status conference nine years after the case had been pending and plaintiff would be prejudiced by its delayed introduction).

This Court agrees with Plaintiff Frescati's assertion that:

> To allow CARCO to insert a new legal defense long after the pleadings were closed and the case tried, would substantially prejudice Frescati and the United States. As an initial matter, had CARCO timely raised this defense, as the Rules require, Plaintiffs could have challenged its validity by their own earlier pre-trial motion to strike, or for summary judgment. The untimely assertion of such a motion diverts the parties' efforts and resources now directed towards the hearing under Rule 63 set to begin in early March. Instead of preparing their respective witnesses as part of the limited, agreed-upon, and court-directed Rule 63 re-call procedure, Plaintiffs have been asked to step back to 2005 to address a newly plead defense, four years after the case was tried. And Plaintiffs [sic] costs expended in reliance on the pleadings CARCO did file have been substantial.

(Doc. No. 772 at 7.) As Plaintiffs have noted, they would be "substantially" prejudiced should CARCO be permitted to raise a limitation of liability defense at this late stage of the proceedings. Plaintiffs could have avoided the OPA-related damages phase of the original 41-day trial because even CARCO's own expert, William McLellan, did not dispute that "legitimate clean-up costs exceeded $45 million." (Doc. No. 772 at 8.) Additionally, the parties could have eliminated the depositions and trial testimony of the following witnesses: (1) Kegelman, (2) Benson, (3) Roussel, (4) LaFerriere, (5) Hellberg, (6) Diamond (deposition only), and (7) McLellan, which took fifteen days to complete. (Id.) The costs of these

depositions during discovery and preparation for trial testimony were substantial. (Id.) As Plaintiff Frescati further noted, "[t]he attorneys, their clients, and the Court would have saved these resources if CARCO had simply raised the issue in its initial pleadings, as the Rules require." (Id.) Merely alleging in their Answer that Plaintiffs' claims were barred in whole or in part by OPA, and never specifying reliance on § 2702(d) until August of 2014, is insufficient to put Plaintiffs on notice of this defense. Here, there was no combination of pleading, deposition testimony, or email correspondence, to put Plaintiffs on notice that Defendants' relied on this defense. Therefore, by failing to raise this defense before nearly ten years of litigation had passed, and in light of the prejudice to both Plaintiffs and the waste of judicial resources, CARCO has waived this limitation of liability defense under OPA.

Second, even if CARCO's limitation of liability defense were not waived, its Motion for Partial Summary Judgment still would be denied under the provisions of OPA. The parties, in their respective motions for summary judgment, have only raised a legal issue as to whether the provisions of 33 U.S.C. § 2702(d) apply to this case. As noted, CARCO seeks to limit its liability for OPA-related damages and removal costs to about $45,474,000.00 under 33 U.S.C. § 2702(d)(2)(B). (Doc. No. 749 at 1.) This Court agrees with the holding and analysis of § 2702(d) in In re Alex C Corp., where the court found that "§ 2702(d) is specifically limited to third parties who do not have a contractual relationship with the responsible party." In re Alex C Corp., Civ. A. No. 00-12500-DPW, 2010 WL 4292328, at *45-46 (D. Mass. Nov. 1, 2010). Here, it is undisputed that CARCO had a contractual relationship with Frescati, the responsible party. Therefore, in accordance with In re Alex C Corp., and for reasons explained below, the provisions of § 2702(d) do not apply.

After the Exxon Valdez oil spill, Congress enacted OPA to address issues of liability and accountability in future oil spill disasters. Id. at *44. OPA imposes strict liability on "each responsible party for a vessel or a facility from which oil is discharged . . . into or upon navigable waters." 33 U.S.C. § 2702(a). OPA provides a comprehensive framework for assigning liability to parties involved in oil spills.

33 U.S.C. § 2702(d) covers the liability of a third party involved in an oil spill. Section 2702(d) provides as follows:

(1) In general

> (A) Third party treated as responsible party. Except as provided in subparagraph (B), in any case in which a responsible party establishes that a discharge or threat of a discharge and the resulting removal costs and damages were caused solely by an act or omission of one or more third parties described in section 2703(a)(3) of this title (or solely by such an act or omission in combination with an act of God or an act of war), the third party or parties shall be treated as the responsible party or parties for purposes of determining liability under this subchapter.
>
> (B) Subrogation of responsible party. If the responsible party alleges that the discharge or threat of a discharge was caused solely by an act or omission of a third party, the responsible party—(i) in accordance with

> section 2713 of this title, shall pay removal costs and damages to any claimant; and (ii) shall be entitled by subrogation to all rights of the United States Government and the claimant to recover removal costs or damages from the third party or the Fund paid under this subsection.
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> (2) Limitation applied
>
> (A) Owner or operator of vessel or facility. If the act or omission of a third party that causes an incident occurs in connection with a vessel or facility owned or operated by the third party, the liability of the third party shall be subject to the limits provided in section 2704 of this title as applied with respect to the vessel or facility.
>
> (B) Other cases. In any other case, the liability of a third party or parties shall not exceed the limitation which would have been applicable to the responsible party of the vessel or facility from which the discharge actually occurred if the responsible party were liable.

33 U.S.C. § 2702(d). Section 2702(d) must be read as a whole. In re Alex C Corp., 2010 WL 4292328, at *48. First, section 2702(d) addresses third party liability in general. 33 U.S.C. § 2702(d)(1). In certain situations where a third party is the sole cause of the oil spill, section 2702(d)(1) treats the third party as a responsible party, providing a defense that would limit the liability of the third party to pay OPA-related damages. Id. Second, section 2702(d) provides for the limitation of liability for a third party covered under this provision. 33 U.S.C. § 2702(d)(2). Because the statute must be read as a whole, subsections (d)(1) and (2) of this provision should be read together and do not stand alone. In re Alex C Corp., 2010 WL 4292328, at *48. As the court noted in In re Alex C Corp.:

> The subsections should not be viewed in isolation. The structure of § 2702(d) supports the interpretation that § 2702(d)(2), which is a specific limitation provision, qualifies § 2702(d)(1), a general provision that limits third party liability to non-contractual third parties. A review of the text and structure of § 2702(d) supports the conclusion that both subsections 2702(d)(1) and 2702(d)(2) are limited to non-contractual third parties.

Id. at *48.

More specifically, section 2702(d)(1) provides a limitation on the third party to whom this section will apply by referencing section 2703(a)(3). 33 U.S.C. § 2702(d)(1)(A). Section 2703(a)(3) provides a complete defense to liability for responsible parties when certain third parties are the sole cause of the oil spill. 33 U.S.C. § 2703(a)(3). It states as follows:

> A responsible party is not liable for removal costs or damages under section 2702 of this title if the responsible party establishes, by a preponderance of the evidence, that the discharge or substantial threat of a discharge of oil and the resulting damages or removal costs were caused solely by—(3) an act or omission of a third party, **other than** an employee or agent of the responsible party or **a**

Plaintiff United States' Motion to Strike CITGO's Oil Pollution Act Defense or in the Alternative Motion for Partial Summary Judgment (Doc. No. 747) is **GRANTED** in part and **DENIED** in part.[2]

> **third party whose act or omission occurs in connection with any contractual relationship with the responsible party** (except where the sole contractual arrangement arises in connection with carriage by a common carrier by rail), if the responsible party establishes, by a preponderance of the evidence, that the responsible party—(A) exercised due care with respect to the oil concerned, taking into consideration the characteristics of the oil and in light of all relevant facts and circumstances; and (B) took precautions against foreseeable acts or omissions of any such third party and the foreseeable consequences of those acts or omissions.

Id. (emphasis added). The words "other than" in section 2703(a)(3) categorically exclude third parties engaged in a contractual relationship with the responsible party. Therefore, by referencing section 2703(a)(3), section 2702(d)(1) excludes a third party in a contractual relationship with a responsible party from the benefit of limited liability under section 2702(d). The limitation to third party liability under section 2702(d)(2) would only apply to a third party who did not have a contract with the responsible party.

Here, CARCO is a third party that is attempting to limit its liability by assuming the position of a responsible party under section 2702(d). As noted, the responsible party in this case is Frescati. Since CARCO contracted with Frescati, it cannot be treated as a responsible party under the statute.

Moreover, the United States is permitted to proceed against Frescati as a subrogee. OPA allows for subrogation. 33 U.S.C. § 2715(a). Section 2715(a) provides:

> Any person, including the Fund, who pays compensation pursuant to this Act to any claimant for removal costs or damages shall be subrogated to all rights, claims, and causes of action that the claimant has under any other law.

Id. Here, the United States is subrogated to all rights of Frescati under this provision.

In sum, In re Alex C. Corp. has a reasoned analysis and discussion of the provisions of § 2702(d), which convinces this Court that this section would only apply to the conduct of a tortious third party not in a contractual relationship with a responsible party. Accordingly, Defendants' Motion (Doc. No. 749) will be denied.

[2] The United States Government has filed a Cross-Motion for Summary Judgment on the Defendants' limitation of liability defense (Doc. No. 747), which will be granted for the reasons set forth in footnote 1, supra. The Government also moves to strike Defendants' limitation of liability defense from the record. (Doc. No. 747.) In accordance with the Court's ruling on the first day of the Rule 63 proceeding, the Court will deny the

BY THE COURT:

Joel Slomsky

JOEL H. SLOMSKY, J.

Government's Motion to Strike (Doc. No. 749). (Doc. No. 792 at 5:10-6:10.) There is no need to strike a defense asserted by a party which the Court has found does not apply in this case.