

Not Reported in F.Supp.2d, 2005 WL 3693208 (W.D.Pa.), 2005 A.M.C. 786
(Cite as: **2005 WL 3693208 (W.D.Pa.)**)

C

United States District Court,
W.D. Pennsylvania.

Complaint of: CAMPBELL TRANSPORTATION
COMPANY, INC., As owner of the M/V Elizabeth M
and Barges HBL-8205 (Official No. 646167),
CTC962 (Official No. 690686), CGL7712 (Official
No. 582252), CTC7616 (Official No. 680657),
CTC7638 (Official No. 680679), and CBL8412 (Of-
ficial No. 672417), Plaintiff,

v.

Jacob WILDS, Claimant/Defendant.

No. CIVA 05-136.
March 11, 2005.

[Dennis A. Watson](#), [Holly M. Whalen](#), [Leo G. Daly](#),
Grogan Graffam, P.C., Pittsburgh, PA, for Plaintiff.'

Dennis M. O'Bryan, [Gary W. Baun](#), O'Bryan Baun-
Cohen Kuebler, Birmingham, MI, for Claimant.

MEMORANDUM OPINION

[SCHWAB](#), J.

*1 On January 9, 2005, while transporting six barges laden with cargo, the M/V Elizabeth M ran into trouble at the Montgomery Lock and Dam on the Ohio River, in Beaver County, Pennsylvania, and was swept over the dam with its crew on board. Complaint, ¶ 5-8. Tragically, four hands were lost,^{[FN1](#)} and the boat and barges were sunk, with cargo. On February 4, 2005, Campbell Transportation Company, Inc. ("Campbell"), the owner of the M/V Elizabeth M, filed this action to exonerate or to limit its liability in accordance with established practice under 46 U.S.C. Appx. §§ 181-196, known as the Vessel Owners Limitation of Liability Act and Rule F of the Supplemental Rules for Certain Admiralty and Maritime Claims of the

Federal Rules of Civil Procedure. Campbell claimed this Court's jurisdiction pursuant to [28 U.S.C. § 1333](#) and 46 U.S.C. Appx. § 185, and there is no doubt that this Court has jurisdiction. [Pure Oil Co. v. Suarez](#), [384 U.S. 202](#), [86 S.Ct. 1394](#), [16 L.Ed.2d 474 \(1966\)](#). Whether venue properly lies with this Court is another matter.

[FN1](#). The Complaint lists three crew members who were drowned, and notes that a fourth was missing and believed to be deceased. Complaint, ¶ 9. The Court takes judicial notice, from widely reported media coverage, that the body of the fourth crew member was found on March 4, 2005, when the M/V Elizabeth M was raised from the Ohio River.

Rule F(9) of the Supplemental Rules provides:

(9) Venue; Transfer.

The complaint shall be filed in any district in which the vessel has been attached or arrested to answer for any claim with respect to which the plaintiff seeks to limit liability; or, *if the vessel has not been attached or arrested, then in any district in which the owner has been sued with respect to any such claim.* When the vessel has not been attached or arrested to answer the matters aforesaid, and suit has not been commenced against the owner, the proceedings may be had in the district in which the vessel may be, but if the vessel is not within any district and no suit has been commenced in any district, then the complaint may be filed in any district. For the convenience of parties and witnesses, in the interest of justice, the court may transfer the action to any district; *if venue is wrongly laid the court shall dismiss or, if it be in the interest of justice, transfer the action to any district in which it could have been brought.* If the vessel shall

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have been sold, the proceeds shall represent the vessel for the purposes of these rules. [emphasis added]

Campbell claimed that venue was proper in this district “because the M/V Elizabeth M and its tow has not been attached or arrested in any district, Plaintiff has no knowledge of any suit having been commenced against them for the accident in question, and this is the District in which the vessel involved in that accident underlying this suit is located.” Complaint, ¶ 2. Although Campbell was unaware of it, a Jones Act suit previously had been filed against Campbell in the United States District Court for the Northern District of West Virginia by a surviving crew member of the M/V Elizabeth M, Jacob Wilds. *Wilds v. Campbell Transportation Co., Inc.*, Civil Action No. 5:05-cv-05 (N.D.W.Va.).

On February 14, 2005, Mr. Wilds filed a motion to dismiss (Document No. 5) requesting this Court to dismiss or, in the alternative, transfer the limitation of liability case to the Northern District of West Virginia, pursuant to Rule F(9). Campbell filed a response to the motion to dismiss, and a motion for this Court to retain jurisdiction of its complaint for exoneration or limitation of liability. (Document No. 7). The Court agrees with Mr. Wilds, and will transfer this case to the United States District Court for the Northern District of West Virginia.

*2 Mr. Wilds alleges, and Campbell concedes, that the M/V Elizabeth M has not been attached or arrested in any district. The parties also agree that Campbell was sued in the Northern District of West Virginia prior to commencement of this action, although Campbell asserts that it had not been served and did not know of the West Virginia lawsuit at the time it filed its complaint for exoneration or limitation of liability. This Court has no reason to doubt Campbell's assertion that it did not have any knowledge of the previously filed suit in West Virginia, but that lack of knowledge does not change the result demanded by the plain relevant language of Rule F(9), which states:

“if the vessel has not been attached or arrested, then [venue lies] in any district in which the owner has been sued with respect to any such claim.” That district in this case is the Northern District of West Virginia. *See In the Matter of: The Complaint of Mike's, Inc. and Mike's Marine, Inc. for Exoneration from or Limitation of Liability, 317 F.3d 894, 895 (8th Cir.2003)* (venue for vessel owner's limitation proceeding was proper only in the Southern District of Illinois because a crew member had filed suit against owner in state court in that district; United States District Court for the Eastern District of Missouri dismissed the case without prejudice); *In the Matter of Hot Energy Services, Inc., as Owner of Camco Barge # 3, 2003 WL 22835984, *2 (E.D.La.2003)* (“The rule makes clear that if the owner has been sued with respect to any claim to which the plaintiff seeks to limit liability, the limitation complaint must be filed in the district in which the owner has been sued.”), *citing In re Complaint of the Tug of Danielle M. Bouchard Corp., 1998 WL 164849, *2 (E.D.La.1998)* (numerous additional citations omitted).

Rule F(9) states that “if venue is wrongly laid the court *shall dismiss or*, if it be in the interest of justice, *transfer the action* to any district in which it could have been brought.” (emphasis added). Under this Rule, the district court has broad discretion either to dismiss the case or transfer it to the appropriate venue, but it must do one or the other. The preferred and customary practice is to transfer, rather than dismiss. *See Complaint of Mike's, supra, 317 F.3d at 898* (Rule F(9) “gives a judge broad latitude to transfer when it is necessary to achieve a just result. Indeed, most of the factually similar cases were transferred as opposed to being dismissed.”) (numerous citations omitted); *In the Matter of TLC Marine Services, Inc., as Owner of the M/V Miss Angie, in a Cause of Exoneration from or Limitation of Liability, 900 F.Supp. 54, 56-57 (E.D.Tex.1995)* (collecting cases). As in the majority of these cases, this Court finds that it is in the interests of justice to transfer the action to the Northern District of West Virginia rather than dismiss the action out-

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right. That Court may then determine, if a party should move for a change of venue for forum non conveniens, whether that forum or this more convenient for the parties and witnesses. [Hot Energy Services, 2003 WL 22835984 at *3](#).

*3 Claimant Wilds also has filed a motion for partial dismissal for failure to state a claim (Document No. 12), and Campbell has, in response, filed an amended complaint to cure the asserted deficiency in the initial complaint. In light of the order of transfer, it would not be appropriate for this Court to address this motion.

Finally, on February 10, 2005, this Court granted Campbell's Motion for Approval of Ad Interim Stipulation for Value and Letter of Undertaking and For an Order Directing Issuance of the Required Notice and for Issuance of an Injunction (Document No. 3), and, *inter alia*, directed Campbell to publish legal notices for four consecutive weeks in a newspaper of general circulation in the area. This notice directed all persons having claims to file such claims and answers to Campbell's complaint for exoneration from liability or the right to limitation of liability to file and serve on Campbell's counsel the claims and answers to the Complaint "on or before the 18th day of March, 2005, or be forever barred and defaulted." (Document No. 3, at 3).

Under the circumstances, given this Court's transfer of the case to the Northern District of West Virginia, this Court deems it prudent and fair to suspend the operation of its order of February 10, 2005 to the extent it imposes a deadline of March 18, 2005, for the purposes of filing claims and answers against Campbell. In all other respects, the Order of February 10, 2005, should remain in effect unless and until the United States District Court for the Northern District of West Virginia vacates or modifies that Order.

W.D.Pa.,2005.

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