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ADMIRALTY LAW

Superstorm Sandy Resurfaces in Court

By James E. Mercante

Superstorm Sandy is now flooding the courts. Lawsuits have been filed across the tri-state area by parties looking to recover for storm-related destruction to their property. Many lawsuits are by vessel owners—or against vessel owners, marinas and yacht clubs. The suits seek damages arising from the unprecedented storm surge that swept thousands of boats from their berths and from storage ashore.

The first known reported decision in New York concerning Superstorm Sandy is not a marine case (despite the proximity of the loss to navigable waters). But the analysis applied by Judge Philip S. Straniere in *Pietrangelo v. S&E Customize It Auto* is relevant and informative. The complaint was filed in Richmond County Civil Court by the owner of a motor vehicle damaged by rising flood waters while stored inside a repair shop adjacent to the Kill Van Kull waterway on Staten Island.[1] The decision is unusually comprehensive for a small claims dispute and see-worthy for its broader implications. Straniere even engaged in self-described "intellectual speculation" as to whether human activities could have contributed to changes in the atmosphere (i.e., global warming) "leading to altered patterns of more extreme weather" that made 'Sandy' into a 'superstorm.'[2]

Bailment Meets Nature

A few days before the arrival of Sandy, plaintiff left his vehicle at the defendant's shop for repairs. As the sea water rose to unexpected high levels during the storm, the facility flooded and the vehicle took on enough water to be declared a total loss. The auto insurer indemnified the owner of the car less the deductible. Not to be short-changed, the car owner sought to recover his out-of-pocket $1,000 deductible and filed suit against the repair shop.

Delivery of the vehicle to the garage for repairs created a "mutual benefit bailment" requiring the bailee (repair shop) to exercise that degree of care which a reasonably careful person in possession of similar goods would exercise under the same circumstances, an ordinary negligence standard.[3] A rebuttable presumption of negligence arises when a bailee returns property in damaged condition or not at all.[4] However, the "act of Nature" (which the court assumed to be 'the politically correct modern equivalent of the common law for act of God'), refers to a natural occurrence over which humans have no control and were not involved in creating the occurrence.[5]

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The court observed that Superstorm Sandy "caused the loss of life, resulted in billions of dollars of property damage, and caused the disruption of countless people's lives." The existence of such occurrences, Straniere noted, makes it "impossible for a human to be negligent and responsible for losses incurred."[6] Thus, the destruction (no matter what category the storm was when it made landfall) rose to the level of supporting an "act of Nature" defense.[7]

Insurance Obligation?

The vehicle owner also alleged that the facility should have obtained flood insurance to pay for losses to property in its care. In New York, there is no duty for a bailee to procure insurance for goods in its care and custody. However, such a duty may be created by mutual agreement between the parties; a statute requiring such insurance; a showing of custom and usage in the industry; or by course of prior dealings between the parties.[8] But, none of these existed and therefore the repair facility had no liability for not obtaining insurance for the vehicle in its possession.

The judge sua sponte raised a thought-provoking argument, to wit, whether the claimant could establish that he was the third-party beneficiary of any insurance requirements under the repair shop's lease with its landlord. For example, if the lease required tenant (repair shop) to obtain insurance for property in its possession, the vehicle owner could potentially benefit by same if the tenant could somehow be considered the third-party beneficiary of such insurance requirement.[9] No evidence existed to support this argument, and the court concluded that defendant's failure to have casualty or flood insurance for third-parties was not negligence.[10]

Act of God Defense

Back to admiralty. The act of God defense has been invoked in maritime cases involving hurricanes and other heavy weather occurrences since wind met sail. Courts have frequently considered the "act of God defense" in deciding marine casualty cases.[11] The burden of proof of exercising reasonable precautions rests on the party asserting it, but not if the force of nature is of 'catastrophic' proportions, sufficient to overcome all reasonable preparations.[12]

The term has been defined in general maritime law as a disturbance of such unanticipated force and severity as would fairly preclude charging a party with responsibility occasioned by that party's failure to guard » Page 8

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Sandy

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against it in the protection of property committed to its custody.[13]

Many lawsuits have been filed for damage to property caused by vessels that broke free from their docks or floated away from shore due to Sandy's hurricane-force winds and unprecedented tidal surge. When only a mooring is provided by a marina or yacht club, or the vessel owner otherwise has full access to the vessel, the relationship between the marina and the vessel owner is typically that of a lessor and lessee, not bailment.[14] However, if a bailment is created, then the marina (or yacht club) will owe a duty of ordinary care to the boat owner, and there will be a rebuttable presumption of fault in case of loss or damage to the boat subject to the act of God defense. A bailment can be created when a vessel is held for repairs or long-term storage.[15] But, when the vessel is berthed at a marina or yacht club for regular access by the vessel owner, and the marina does not have exclusive control over the boat, then a bailment is not created and the presumption of fault is not triggered.[16]

While initially there may be a "presumption of fault" operating against the vessel that causes damage, the vessel owner (yacht club or marina) will invoke the "act of God" defense and attempt to show that (i) the damage was solely caused by an extreme force of nature, and (ii) that the vessel owner (yacht club or marina) had acted reasonably under the circumstances. This defense applies as forcefully in the recreational boating context as it does in commercial marine setting involving tugs, barges and ships. For example, a vessel owner was found not liable when its vessel broke free of a mooring during a hurricane because the damage was caused "solely by the extraordinary, unforeseeable, and catastrophic character of Hurricane Betsy, an Act of God."[17] It was found to be a storm of such magnitude as to overcome all reasonable precautions, a classic case of an act of God defense.[18]

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A sampling of act of God defense cases, 'successful' and 'unsuccessful,' are discussed in a law review article by the author titled "Hurricanes and Act of God: When the Best Defense Is a Good Offense."[19]

Conclusion

The first reported ruling on Superstorm Sandy damage offers a road map of how a court will evaluate the politically correct "act of Nature" defense in cases resulting from damage caused by the "Storm of the Century." It remains to be seen if Superstorm Sandy, also known as 'Frankenstorm,' will fall into the category where courts will infer (as Judge Straniere did) that no reasonable preparations would have prevented damage.

1. *Pietrangelo v. S&E Customize It Auto*, 39 Misc.3d 1239(A), 2013 N.Y. Slip Op. 50933(U), *1 (Civ. Ct., Richmond County 2013).
2. Id. *4.
3. Id. *2.
4. *ICC Metals v. Municipal Warehouse*, 50 N.Y.2d 657 (1980).
5. *Pietrangelo* *4.
6. Id. *4.
7. Id. *4..
8. *Lehman v. Fischzang*, 52 Misc.2d 80 (1966).
9. *Pietrangelo*, id. *3.
10. Id. *3.
11. See, e.g., *Gibbs v. Hawaiian Eugenia*, 966 F.2d 101, 103-04; 1993 AMC 43 (2d. Cir. 1992).
12. Mercante, James E., "Hurricanes and Act of God: When the Best Defense Is a Good Offense," 18 U.S.F. Mar. L.J. 1, 38-39 (2005-2006).
13. Id.; *Compania de Vapores Insco S.A. v. Missouri Pac. R.R.*, 232 F2d 657, 660 (5th Cir. 1956).
14. *Security National Ins. v. Sequoyah Marina*, 246 F.2d 830, 1958 AMC 143 (10th Cir. 1957).
15. *Stegelman v. Miami Beach Boat Slips*, 213 F.2d 561 (5th Cir. 1954).
16. *Royal Ins. v. Marina Industries*, 34 Mass.App.Ct. 349 (1993).
17. *Dammers & Van der Heide Shipping & Trading v. S.S. JOSEPH LYKES*, 300 F.Supp. 358 (E.D. La. 1969), aff'd, 425 F.2d 991, 996 (5th Cir. 1970).
18. Id. 300 F.Supp. 358 at 366.
19. Mercante, James E., "Hurricanes and Act of God: When the Best Defense Is a Good Offense," 18 U.S.F. March L.J. 1, 38-39 (2005-2006).