

FSM SUPREME COURT TRIAL DIVISION

FEDERATED STATES OF MICRONESIA,)	CIVIL ACTION NO. 2006-1011
)	
Plaintiff,)	
)	
vs.)	
)	
KANA MARU NO. 1, a fishing vessel, TETSUMI)	
NISHI, TOSHIHIKO IKEMA, and SANKO)	
BUSSAN COMPANY (GUAM), LIMITED,)	
)	
Defendants.)	
)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Dennis K. Yamase
Associate Justice

Trial: March 23-24, 2010
Decided: March 7, 2011

APPEARANCES:

For the Plaintiff:	Pole Atanraoi, Esq. Assistant Attorney General FSM Department of Justice P.O. Box PS-105 Palikir, Pohnpei FM 96941
	Joses R. Gallen, Esq. Attorney General Office of the Chuuk Attorney General P.O. Box 1050 Weno, Chuuk FM 96942
For the Defendants:	David Ledger, Esq. Cabot Mantanona LLP Edge Building, Second Floor 929 South Marine Corps Drive Tamuning, Guam 96913

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HEADNOTES

Civil Procedure – Parties

Unless that party has been subpoenaed as a witness, a civil litigant is not required to be physically present for trial if that party is present through counsel. FSM v. Kana Maru No. 1, 17 FSM Intrm. 399, 402 (Chk. 2011).

Marine Resources

A party to a foreign fishing agreement is bound by statute and by the foreign fishing agreement to ensure that an authorized vessel complies with the FFA and all applicable FSM laws, rules, and regulations. FSM v. Kana Maru No. 1, 17 FSM Intrm. 399, 404 (Chk. 2011).

Marine Resources

"Fishery waters" includes the FSM Exclusive Economic Zone, territorial waters, and internal waters. FSM v. Kana Maru No. 1, 17 FSM Intrm. 399, 404 n.2 (Chk. 2011).

Marine Resources

A fishing boat operator must, by statute, ensure that appropriate position-fixing and identification equipment is installed and maintained in working order on each vessel, and thus, a fishing boat transponder is required to be on at all times while it is within the FSM EEZ, even while in transit. FSM v. Kana Maru No. 1, 17 FSM Intrm. 399, 404 (Chk. 2011).

Marine Resources

The act or omission of any crew member of a fishing vessel or in association with a fishing vessel, is deemed to be that of that fishing vessel's operator, and an "operator" is any person who is in charge of or directs or controls a fishing vessel, or for whose direct economic or financial benefit a vessel is being used, including the master, owner, and charterer. FSM v. Kana Maru No. 1, 17 FSM Intrm. 399, 404 (Chk. 2011).

Marine Resources

In determining the amount of a Title 24 civil penalty, the court must consider the nature, circumstances, extent and gravity of the prohibited acts committed and, with respect to the violator, the degree of culpability, any history of prior offenses, whether there are multiple violations which together constitute a serious disregard of conservation and management measures, and such other matters as justice requires. FSM v. Kana Maru No. 1, 17 FSM Intrm. 399, 404 (Chk. 2011).

Marine Resources

Congress, by setting a high minimum fine, considers a fishing boat's failure to have the ALC transponder on at all times while in the FSM EEZ to be a grave violation, but when the fishing boat's failure to have the transponder on does not appear to be intentional; when it did not have any history of prior offenses; when, even taken together with the other alleged violations, the multiple violations together do not constitute a serious disregard of conservation and management measures; when the fishing boat had a valid fishing license; and when it was not fishing at the time and had not been fishing within the FSM EEZ on that voyage, the court determines that the \$100,000 minimum penalty under 24 F.S.M.C. 611(5) is appropriate. FSM v. Kana Maru No. 1, 17 FSM Intrm. 399, 405 (Chk. 2011).

Marine Resources

The statute imposes liability for a fishing civil penalty on "any person" and "person" is defined as any natural person or business enterprise or similar entity. It does not include a vessel *in rem*. The civil penalty is thus imposed jointly and severally against the fishing vessel operators only and not against the fishing vessel. But the vessel, or rather the bond posted for the vessel's release, may be considered the property or assets of an owner or operator from which a judgment against the owner or operator may be satisfied. FSM v. Kana Maru No. 1, 17 FSM Intrm. 399, 405 (Chk. 2011).

Marine Resources

By statute, a fishing vessel's operator must ensure the continuous monitoring of the international distress and call frequency 2182 kHz (HF) or the international safety and call frequency 156.8 MHz (channel 16, VHF-FM) to facilitate communication with the fisheries management, surveillance and

enforcement authorities, and both the Foreign Fishing Agreement and the foreign fishing permit also require that the vessel continuously monitor either of two radio frequencies. FSM v. Kana Maru No. 1, 17 FSM Intrm. 399, 405 (Chk. 2011).

Evidence; Marine Resources

When the FSM proved by a preponderance of the evidence that the fishing boat's HF radio was not on and it also proved that the vessel had a VHF radio, but there was no evidence whether the VHF radio was on or off or whether it was tuned to channel 16, the FSM's claim that the vessel was not monitoring a required radio frequency fails for lack of proof because the statute, the Foreign Fishing Agreement, and the foreign fishing permit all require that the vessel monitor only one of those two frequencies and the evidence shows that the vessel had the ability to monitor the VHF channel 16 and there is no evidence that it was not being monitored. FSM v. Kana Maru No. 1, 17 FSM Intrm. 399, 405 (Chk. 2011).

Marine Resources

By statute, and as required by both the foreign fishing agreement and the fishing permit, a fishing boat operator must prominently display any permit issued for the vessel in the vessel's wheelhouse. FSM v. Kana Maru No. 1, 17 FSM Intrm. 399, 405 (Chk. 2011).

Marine Resources; Statutes – Construction

Because "display" means a fixed display such as being posted on a bulkhead, not being produced and displayed on demand, the FSM has proven a violation of the requirement to prominently display a fishing permit in the vessel's wheelhouse when the displayed permit had expired and was thus invalid, and the captain, only when asked for a current permit, promptly displayed one. FSM v. Kana Maru No. 1, 17 FSM Intrm. 399, 405-06 (Chk. 2011).

Marine Resources

When no specific civil penalty is provided for a Title 24 violation it is subject to a civil penalty of not less than \$40,000 and not more than \$100,000. FSM v. Kana Maru No. 1, 17 FSM Intrm. 399, 406 (Chk. 2011).

Evidence – Burden of Proof

When no evidence was presented at trial to support the defendants' counterclaims, those counterclaims fail and are dismissed because the defendants have not met their burden of proof. A counterclaimant has the same burden of proof as a plaintiff – to prove the counterclaim by a preponderance of the evidence. FSM v. Kana Maru No. 1, 17 FSM Intrm. 399, 406 (Chk. 2011).

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COURT'S OPINION

DENNIS K. YAMASE, Associate Justice:

This matter went to trial on March 23 and 24, 2010. Assistant Attorney General Pole Atanraoi and Chuuk State Attorney General Joses Gallen represented the plaintiff Federated States of Micronesia. David Ledger of Cabot Mantanona LLP, Guam, represented defendants Tetsumi Nishi, Toshihiko Ikema, Sanko Bussan Company (Guam), Limited, and the fishing vessel *Kana Maru No. 1*.

During the discussion of preliminary matters just before trial, Gallen raised the matter of a default judgment against the defendants since they were not present. Ledger informed the court that the

defendant Sanko Bussan Company (Guam), Limited¹ might have closed its business in Guam in 2008 or 2009, but that the parent company, Sanko Bussan Company (Japan), Limited, had instructed Ledger to represent the defendants. The whereabouts of the individual defendants and the vessel were not known. Also unknown was whether the vessel still existed. Ledger dismissed the vessel's counterclaim about another vessel striking it. Ledger noted that the other counterclaims were personal to the *in personam* defendants and that he would not be presenting any evidence supporting those claims, leaving it to the court to take the appropriate action at the end of trial.

The court denied the FSM's motion for default since the defendants were present through their counsel. Unless that party has been subpoenaed as a witness, a civil litigant is not required to be physically present for trial if that party is present through counsel. *Amayo v. MJ Co.*, 14 FSM Intrm. 355, 361 n.1 (Pon. 2006). Counsel for both sides then stated that they were prepared to go to trial. Trial thus took place as scheduled on what the parties agreed were the three plaintiff's claims still at issue: 1) whether the vessel's transponder was on; 2) whether the vessel was monitoring a distress frequency, and 3) whether the vessel's fishing permit was properly displayed in the vessel's wheelhouse.

The FSM's witnesses were: Miorida Thompson, Licensing Manager of the FSM National Oceanic Resource Management Authority (NORMA); Kodak David, FSM National Government Police Officer; Justino Helgen, FSM Marine Surveillance Officer; and Louis Malfin, FSM National Government Police Officer. The defendants put on no witnesses. Plaintiff's exhibits S1-21 were admitted into evidence.

After considering the admitted evidence and the witnesses' testimony, the court makes the following findings of fact and conclusions of law.

I. FINDINGS OF FACT

1. On October 1, 2005, Sanko Bussan Company (Guam), Limited (Sanko Bussan) entered into a Foreign Fishing Agreement (FFA) for it to utilize the fisheries resources in the FSM Exclusive Economic Zone (FSM EEZ). The FFA was admitted into evidence as plaintiff's Exhibit Nos. S-1 to S-13.

2. Foreign Fishing Permit No. F051-JPBLL-19299-02, issued pursuant to the Sanko Bussan FFA, allowed the fishing vessel *Kana Maru No. 1*, a longliner registered in Japan, to fish in the FSM EEZ. The permit's effective date was March 18, 2006 and it expired September 15, 2006. The permit holder was Toshihiko Ikema. The permit was admitted into evidence as plaintiff's Exhibit Nos. S-14 and S-15.

3. The permit operating condition No. 3 included a requirement that: "The vessel shall continuously monitor the international distress radio frequency 2182 KHz (HF) or the international safety and calling frequency 156.8 MHz (Channel 16 VHF)." The Permit Operating Conditions [the reverse side of the permit] were admitted into evidence as plaintiff's Exhibit S-15. The Sanko Bussan FFA similarly provided that "Authorized Vessels shall continuously monitor the international distress radio frequency 2182 KHz (HF) or the international safety and calling frequency 156.8 Mhz (Channel 16, VHF-FM) for the purpose of facilitating communication between such vessels and air and sea authorities of the FSM." Ex. S-4, ¶ 9.

4. The Sanko Bussan FFA required in its section V. Automatic Location Communicator Required, No. 13 that: "Each Authorized Vessel shall have installed, maintained, and fully operational

¹ This corporation appears to still exist. There is no record that it has been either voluntarily dissolved or that the Guam authorities have involuntarily dissolved it.

at all times on board an automatic location communicator ("ALC") of a kind approved by the Authority." No. 14 required that: "The Company shall ensure that appropriate position fixing and identification equipment are installed and are maintained in working order on the Authorized Vessel operating within the EEZ pursuant to this Agreement."

5. On May 19, 2006, the FSS *Micronesia* was about 70 miles north of Makur island, and approximately 130 miles inside the FSM EEZ, where it was supposed to board all fishing vessels in the area. The FSS *Micronesia* was under the command of Stewart Peter and Executive officer and second in command Kodak David.

6. While the FSS *Micronesia* was carrying out a boarding operation on one fishing vessel, a radio transmission from the Marine Surveillance headquarters at Palikir informed the FSS *Micronesia* that the VMS showed that there was only one other fishing vessel in the area. The FSS *Micronesia's* radar showed two other vessels in the area, including one about seven miles away that did not appear on the VMS.

7. The ALC or VMS [Vessel Monitoring System] is a satellite-based monitoring system used to track vessel locations. It requires that a transponder be on-board and functioning. Insofar as the terms "VMS" and "ALC" were used at trial, Officer David testified that they are the same thing.

8. At approximately 1956 hours, May 19, 2006, FSS *Micronesia* crew members boarded the foreign fishing vessel *Kana Maru No. 1*, the near-by vessel that Palikir headquarters could not locate on the VMS.

9. The boarding party was led by Executive Officer Kodak David who, upon inspection of the vessel, discovered that the ALC monitor was on but that the transmitter was not turned on. After obtaining permission, Executive Officer David turned on the ALC for the purpose of having the vessel tracked.

10. The *Kana Maru No. 1* appeared on VMS not long after Officer David turned the unit on. From then on, the VMS transponder operated normally. There was no record of the *Kana Maru No. 1* appearing on the VMS before it was boarded.

11. After boarding the *Kana Maru No. 1*, Executive Officer David also checked the radio on board and found that the HF radio was not on and that the vessel was not monitoring the HF distress channel. He also testified that a VHF radio was found behind the ALC unit. He was not asked whether that VHF radio was on or off.

12. When *Kana Maru No. 1* Captain Tetsumi Nishi was first asked for a valid foreign fishing permit he was confused. There was an FSM fishing permit posted in the wheelhouse but since it had expired it was invalid. When this was pointed out, the captain immediately produced the current valid foreign fishing permit, a copy of which was admitted into evidence as plaintiff's Exhibit Nos. S-14 to S-15.

13. When the *Kana Maru No. 1* was boarded, it was inside the FSM EEZ. The vessel was not fishing at the time. The *Kana Maru No. 1* had been in transit and had not yet started fishing. Captain Tetsumi Nishi and the *Kana Maru No. 1* crew were very cooperative during the boarding and on the later trip under arrest to port in Chuuk.

II. ANALYSIS AND CONCLUSIONS OF LAW

Sanko Bussan was bound by statute and by the FFA to ensure that the *Kana Maru No. 1* complied with the FFA and all applicable FSM laws, rules and regulations. 24 F.S.M.C. 404(4)(c) ("the party to the access agreement shall . . . ensure compliance by each fishing vessel, its operator and crew members"); Sanko Bussan FFA ¶ 32 ("Company shall ensure and guarantee strict compliance by the Authorized Vessel and its operators") [Ex. S-11, ¶ 32].

The FSM alleged three violations: 1) that the vessel's transponder was not on; 2) that the vessel was not monitoring a distress frequency, and 3) that the vessel's fishing permit was not displayed in the vessel's wheelhouse. These are addressed in turn.

A. *Transponder*

The statute allows NORMA to require, as a condition of fishing in the EEZ that

the operator of any vessel: (a) install on such vessel, at its own expense, a transponder approved by the Authority; (b) maintain such transponder in good working order at all times while in the fishery waters² . . . and (c) ensure that any information or data required by the Authority to be transmitted by the transponder is transmitted continuously, accurately and effectively to the designated receiver.

24 F.S.M.C. 611(1) (footnote added). This requirement was in place for the *Kana Maru No. 1*. The vessel's valid foreign fishing permit that provided that "[t]he vessel shall strictly comply with the Foreign Fishing Agreement and with the laws, rules, and regulations of the FSM . . ." Ex. S-15, ¶ 8. The Sanko Bussan Foreign Fishing Agreement provides that each authorized vessel must have a fully operational ALC on board at all times and that "appropriate position fixing and identification equipment [i.e., the transponder or VMS shall be] maintained in working order on the Authorized Vessel." Ex. S-5, ¶¶ 13, 14. Furthermore, the operator must, by statute, "ensure that appropriate position-fixing and identification equipment is installed and maintained in working order on each vessel" 24 F.S.M.C. 404(3)(e). Thus, the *Kana Maru No. 1*'s transponder was required to be on at all times while the *Kana Maru No. 1* was within the FSM EEZ even while in transit.

The *Kana Maru No. 1* was not in compliance with this requirement since it was inside the FSM EEZ and its transponder was off. Subsection 611(5) provides that "[a]ny person who violates subsection (1) . . . of this section, by failing to install, maintain, or ensure the transmission of information from a transponder as required, is subject to a civil penalty of not less than \$100,000 and not more than \$500,000." "[T]he act or omission of any crew member of a fishing vessel or in association with a fishing vessel, shall be deemed to be that of the operator of that fishing vessel." 24 F.S.M.C. 904. "'Operator' means any person who is in charge of or directs or controls a fishing vessel, or for whose direct economic or financial benefit a vessel is being used, including the master, owner, and charterer." 24 F.S.M.C. 102(47). Sanko Bussan Company (Guam), Limited, the FFA signatory, Toshihiko Ikema, the foreign fishing permit holder, and Captain Tetsumi Nishi, were thus all "operators" of the fishing vessel *Kana Maru No. 1*.

In determining the amount of a civil penalty, the court must consider "the nature, circumstances, extent and gravity of the prohibited acts committed and, with respect to the violator, the degree of culpability, any history of prior offenses, whether there are multiple violations which together constitute

² "Fishery waters" includes the FSM EEZ, territorial waters, and internal waters. 24 F.S.M.C. 102(31).

a serious disregard of conservation and management measures and such other matters as justice requires." 24 F.S.M.C. 901(3). Congress, by setting a high minimum fine, considers the failure to have the ALC transponder on at all times while in the FSM EEZ to be a grave violation. The *Kana Maru No. 1*'s failure to have the transponder on does not appear to be intentional. The *Kana Maru No. 1* did not have any history of prior offenses and even taken together with the other alleged violations the multiple violations together do not constitute a serious disregard of conservation and management measures. The court also notes that when it was arrested the *Kana Maru No. 1* had a valid fishing license. It was not fishing at the time. Nor had it been fishing within the FSM EEZ on that voyage. Taking these factors into account in arriving at a penalty amount, the court determines that the \$100,000 minimum penalty under 24 F.S.M.C. 611(5) is appropriate.

Subsection 611(5) imposes liability for the penalty on "any person." "Person" is defined as any natural person or business enterprise or similar entity. 24 F.S.M.C. 102(50). It does not include a vessel *in rem*. *FSM v. Koshin 31*, 16 FSM Intrm. 350, 354 (Pon. 2009). The civil penalty of \$100,000 is thus imposed jointly and severally against defendants Captain Tetsumi Nishi, Toshihiko Ikema, and Sanko Bussan Company (Guam), Limited, only and not against the fishing vessel *Kana Maru No. 1*. But the vessel, or rather the bond posted for the vessel's release, may be considered the property or assets of an owner or operator from which a judgment against the owner or operator may be satisfied.

B. Radio Frequency Monitoring

By statute, the vessel's operator must "ensure the continuous monitoring of the international distress and call frequency 2182 kHz (HF) or the international safety and call frequency 156.8 MHz (channel 16, VHF-FM) to facilitate communication with the fisheries management, surveillance and enforcement authorities." 24 F.S.M.C. 404(3)(g). As noted above at Finding ¶ 3, both the Sanko Bussan FFA and the *Kana Maru No. 1* foreign fishing permit also require that the vessel continuously monitor either of two radio frequencies – 2182 kHz (HF) or 156.8 MHz (Channel 16, VHF).

The FSM proved by a preponderance of the evidence that the *Kana Maru No. 1*'s HF radio was not on. It also proved that the vessel had a VHF radio. There was no evidence whether it was on or off or whether it was tuned to channel 16. The statute, the FFA, and the foreign fishing permit all require that the *Kana Maru No. 1* monitor only one of those two frequencies. Since the evidence shows that the *Kana Maru No. 1* had the ability to monitor the VHF channel 16 and there is no evidence that it was not being monitored, this claim by the FSM fails for lack of proof.

C. Permit Display

By statute, the operator must "display any permit . . . issued for any such vessel, pursuant to this subtitle . . . in the wheelhouse of such vessel." 24 F.S.M.C. 404(3)(d). The Sanko Bussan FFA further requires that "[d]uring such times as the authorized vessel is within the EEZ, the vessel shall have on board and prominently displayed in the wheelhouse of the Authorized Vessel, the original permit issued by the Authority." Ex. S-2, ¶ 4. The permit itself states on its face that: "PERMIT SHALL BE PROMINENTLY DISPLAYED IN WHEELHOUSE OF THE VESSEL." Ex. S-14.

The defendants contend that the permit was displayed in the wheelhouse because once Executive Officer David pointed out that the displayed permit had expired and asked for a current one, Captain Tetsumi Nishi promptly displayed it and they were in the wheelhouse at the time. The court does not read the statute that way. The court concludes that "display" means a fixed display such as being posted on a bulkhead, not being produced and displayed on demand. The added adjective "prominently" found in both the FFA and on the face of the permit itself should dispel the defendants' contention. In this case, an invalid (expired) permit was on display in the wheelhouse and the valid

(current) permit was produced and displayed only after Executive Officer David demanded to see it.

The FSM therefore has proven this violation since "[i]t is a violation of this subtitle for any person to: (a) violate any provision, condition or requirement of a permit or license issued pursuant to this subtitle . . . [or] (c) violate any provision, condition or requirement of an access agreement, including the minimum terms required in section 404" 24 F.S.M.C. 906(1). No specific civil penalty is provided for violations of 24 F.S.M.C. 404(3)(d) or of 906(1). Since a Title 24 violation "for which no civil penalty is otherwise specified . . . [is] subject to a civil penalty of not less than \$40,000 and not more than \$100,000," 24 F.S.M.C. 920(1), and since the court has already determined that the defendants' liability for the transponder violation would be set at the minimum permissible amount, the court for the same reasons imposes a civil penalty of \$40,000 for this violation.

D. Defendants' Counterclaims

Since no evidence was presented to support the defendants' counterclaims, those counterclaims fail and are dismissed because the defendants have not met their burden of proof. A counterclaimant has the same burden of proof as a plaintiff – to prove the counterclaim by a preponderance of the evidence.

IV. CONCLUSION

Defendants Tetsumi Nishi, Toshihiko Ikema, and Sanko Bussan Company (Guam), Limited are jointly and severally liable for a \$140,000 civil penalty for the *Kana Maru No. 1*'s failure to have its transponder on and its failure to have its current, valid foreign fishing permit prominently displayed in its wheelhouse. The FSM's claim based on the failure to monitor a radio frequency and the defendants' counterclaims are all dismissed for lack of proof.

Let the clerk enter judgment accordingly.

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