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FRCP 12(b) (6)
46 U.S.C. § 745
46 U.S.C. § 742
46 U.S.C. § 781

In re WS, Inc., Case. No. 394-36434-dds7
Hostmann v. U.S. Marine Management, Inc., Adv. 95-3649-dds

5/9/96 DDS Unpublished

The defendant filed a motion to dismiss the trustee's complaint on the basis that 46 U.S.C. § 745 prohibits suits against agents of the United States arising from the operation of a public vessel where a remedy is provided against the government under the Suits in Admiralty Act. In particular defendant asserted it was an agent of the United States with a remedy against the government provided in 46 U.S.C. §§ 742 and 781. The trustee asserted that a finding of agency under the Suits in Admiralty Act was precluded by the government's contrary position before the Armed Services Board of Contract Appeals.

The court determined that the decision of the Armed Services Board of Contract Appeals is not binding on the issue of agency in suits against an agent under the Suits in Admiralty Act. In his complaint the trustee alleged that the defendant was the contract operator of a vessel owned by the U.S. Navy Military Sealift Command. By the use of the term "contract operator" the trustee admitted that the defendant was an agent of the United States. Under summary judgment principles made applicable under Fed. R. Civ. P. 12(b) (6) the court dismissed for lack of jurisdiction, holding that the defendant was the agent of the government for purposes of applying the prohibition of 46 U.S.C. § 745 against suing the agent.

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:)	Bankruptcy Case No.
)	394-36434-dds7
WS, INC., dba West State, Inc.,)	
Debtor,)	Adversary Proceeding No.
)	95-3649-dds
EDWARD C. HOSTMANN, Trustee,)	MEMORANDUM OPINION
)	
Plaintiff,)	
)	
v.)	
)	
U. S. MARINE MANAGEMENT, INC., a)	
Delaware corporation,)	
)	
Defendant.)	

The defendant moved to dismiss for lack of subject matter jurisdiction. The motion should be granted.

46 U.S.C. § 745 prohibits suits against agents of the United States arising from the operation of a public vessel where a remedy is provided against the government under 46 U.S.C. § 741-752, the Suits in Admiralty Act. Such a remedy is provided in 11 U.S.C. §§ 742 and 781. There is no jurisdiction to entertain such a suit. Watts v U.S.A., 752 F.2d 406 (9th Cir. 1984).

The plaintiff, in paragraph six of the complaint, admits: "At

1 all times material herein U. S. Marine was the contract operator of
2 a vessel owned by the U. S. Navy Military Sealift Command known as
3 the 'USNS Triumph'". By this pleading, plaintiff admitted public
4 ownership of the vessel and, by use of the term "contract operator"
5 also admitted that it was an agent of the United States. Servis v
6 Hiller Systems, Inc., 54 F.3d 203, 208 (4th Cir. 1995); River and
7 Offshore Services Company, Inc. v United States and Marine Transport
8 Lines, Inc., 651 F.Supp. 276, 278 (E.D. La 1987). In the tort area,
9 there arguably could be a fact question. Nelson v Research
10 Corporation, 805 F.Supp. 837 (D. Haw. 1993).

11 The defendant did not answer the complaint or file a motion
12 for summary judgment but rather filed a motion for dismissal on the
13 pleadings under Fed. R. Civ. P. 12(b)(1) and (6). Plaintiff
14 responded to the motion by asserting that a finding of agency under
15 the Suits and Admiralty Act is precluded by the government's
16 contrary position before the Armed Services Board of Contract
17 Appeals in this case. The decision of the Armed Services Board of
18 Contract Appeals is not binding on the issue of agency in suits
19 against the agent under the Suits and Admiralty Act. River and
20 Offshore Services Company, Inc. v United States, et al, supra. The
21 case of Buck Kreihls Company v International Marine Carriers, Inc.,
22 741 F.Supp. 1249 (E.D. La. 1990) is persuasive.

23 Plaintiff went outside of the pleadings by providing the
24 affidavit of Purcell. As a consequence, the court finds, based on
25 Purcell's affidavit that the prime contract not only required
26 defendant to operate and maintain the vessel for government purposes
but also "to perform repairs and overhaul the vessels to maintain

1 them within required standards during port calls." (See, Purcell
2 Affidavit, Exhibit E, page 2, paragraphs 1 and 2). Under summary
3 judgment principles made applicable under Fed. R. Civ. P. 12(b)(6),
4 the court finds as a factual matter, aside from the pleadings, that
5 the defendant was the agent of the government for purposes of
6 applying the prohibition of 11 U.S.C. § 745 against suing the agent.

7 A separate order should be entered dismissing this action.
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DONAL D. SULLIVAN
Bankruptcy Judge

11 cc: John F. Purcell
12 John W. Weil
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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:) Bankruptcy Case No.
) 394-36434-dds7
WS, INC., dba West State, Inc.,)
) Adversary Proceeding No.
 Debtor,) 95-3649-dds
))
EDWARD C. HOSTMANN, Trustee,) ORDER DISMISSING
) ADVERSARY PROCEEDING
 Plaintiff,)
))
 v.)
))
U. S. MARINE MANAGEMENT, INC., a)
Delaware corporation,)
))
 Defendant.)

Based upon a memorandum opinion filed herein,
IT IS ORDERED that this adversary proceeding is dismissed.

DONAL D. SULLIVAN
Bankruptcy Judge

cc: John F. Purcell
 John W. Weil