

APPENDICES

APPENDIX 1

NOT FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**GB Capital Holdings, LLC., a
California Limited Liability Co.**

Plaintiff/Appellee	No. 19-55104
v.	
JEFFREY GLENN HESTON,	D.C. No. 3:18-cv-00312- WQH-AGS
Claimant/Appellant	
and	
S/V GLORI B, a 1977 Sailing Vessel of Approximately 27-Feet in Length, U.S.C.G. Official No. 598405, and All of Her Engines, Tackle Accessories, Equipment, Furnishings, and Appurtenances, in rem	

**Appeal from the United States District Court
for the Southern District of California
William Q. Hayes, District Judge, Presiding**

Submitted April 7, 2020**

Before TASHIMA, BYBEE, and WATFORD, Circuit Judges.

*** This disposition is not appropriate for publication and is
not precedent except as provided by Ninth Circuit Rule 36-3**

**** The panel unanimously concludes this case is suitable
for decision without oral argument. *See* Fed. R. App. P. 34(a)(2)**

Jeffrey Glenn Heston appeals pro se from the district court's January 22, 2019 order granting plaintiff GB Capital Holdings, LLC's ("GB Capital") motion for an order of sale of the sailing vessel Glori B in GB Capital's admiralty action *in rem*. We have jurisdiction under 28 U.S.C. §1291. We review de novo the district court's conclusions of law and for clear error the district court's finding of fact. *Crowley Marine Servs. v. Marittrans, Inc.*, 530 F.3d 1169, 1173 (9th Cir. 2008). We review de novo the district court's interpretation of the Supplemental Admiralty and Maritime Claims Rules. *United States v. \$11,500.00 in U.S. Currency*, 710 F.3rd 1006, 1010 (9th Cir. 2013). We affirm.

The district court did not err by granting GB Capital's motion for an order of Supplemental Rule E(9)(a)(i)(A)-(C) (the court may order all or part of the property sold if the property is liable to deterioration by being detained in custody pending the action, the expense of keeping the property is excessive or disproportionate, or there is unreasonable delay in securing release of the property)

We reject as meritless Heston's contentions regarding the district court's alleged lack of subject matter jurisdiction.

Heston's motion for judicial notice (Docket Entry No. 22) is denied.

GB Capital's request for sanctions, set forth in the answering brief, is denied.

AFFIRMED

APPENDIX 2

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

GB Capital Holdings, LLC,
a California Limited
Liability Company,

Plaintiff

v.

S/V GLORI B, a 1977
Sailing Vessel of
Approximately 27 feet in
Length, U.S.C.G. Official
Number 598405 and All of
Her Engines, Tackle
Accessories, Furnishings
and Apputeneances, in rem
HAYES; Judge

Case No: 18cv312-
WQH-AGS

ORDER

Filed: January, 19,
2019

The matter before the court is the motion for
order of sale filed by Plaintiff GB Capital Holdings,
LLC, (ECF No 26)

I. Procedural Background

On February 2, 2018, Plaintiff GB Capital Holdings, LLC, as agent of San Diego Mooring Company, initiated this action by filing a verified complaint. (ECF No 1). Jeffrey G. Heston, proceeding pro se, filed a Statement of Interested Parties, stating "I, Jeffrey G. Heston, am the sole owner of the Sailing Vessel 'Glori B', document number 598405 and herein named Defendant in this matter before this Court."

On April 10, 2018, an arrest warrant for the Defendant Vessel was issued, and Pier 32 Marina was appointed as substitute custodian. (ECF No. 6)

On November 29, 2018 the Court denied (ECF No 25) a motion to dismiss filed by Heston (ECF No. 21).

On December 6, 2018, GB Capital filed an ex parte Motion for Order of Sale, moving the Court to order an interlocutory vessel sale and authorize a credit bid. (ECF No. 26). GB Capital requests that the court enter an order directing the United States Marshal to sell the Defendant Vessel at public auction. GB Capital further requests that the Court authorize GB Capital to credit bid an amount up to the lien amount attested to under oath in the verified Complaint (\$55,728.51), plus the actual and demonstrable costs of suit, including U.S. Marshal, substitute custodian, and other *custodia legis* expenses, at the auction of the Defendant Vessel.

On December 21, 2018, Heston filed an Answer to the Complaint, (ECF No 28). The Answer "enters a general denial of lack of jurisdiction and...submits an affirmative defense of res judicata to all allegations made in the Complaint " *Id.* at 1. the Answer states that there is no evidence of a maritime lien in this case, and "begs the Court to release the vessel from her bonds, order the Plaintiff to restore her taken value, and return to the contracted status quo prior to the resolution of this controversy." (ECF No 28).

II. FACTUAL BACKGROUND

In the verified Complaint, GB Capital alleges that San Diego Mooring Company (SDMC) supplied the Defendant Vessel, "a 1977 Sailing Vessel of Approximately 27 feet in length, U.S.C.G. Official No

598405," a berth in San Diego Bay, (ECF No.1 at 1-2) GB Capital alleges that under the moorage contract, the vessel must undergo an annual safety inspection *Id.* at 2-3. GB Capital alleges that the owner of the boat, Heston, declined the inspection. *Id.* at 3-4. GB Capital alleges that SCMC ordered Heston to remove the boat, and that Heston refused. *Id.*

GB Capital alleges that the boat was towed to an impound location on March 25, 2016, and has not been retrieved. *Id.* at 4,8. GB Capital alleges that Heston "has repeated and consistently refused to submit his claims for resolution in binding arbitration" as ordered in the prior litigation. *Id.* at 7-8. GB Capital seeks in rem relief against the vessel for breach of maritime contract, trespass, and quantum meruit. GB Capital alleges damages of \$55,728.51 in accrued wharfage fees and other costs as of February 7, 2018. *Id.* at 9. GB Capital provides the declaration of Ray Jones, President of Long Beach Yacht Sales, stating,

[I]f [the Defendant Vessel} is permitted to lay idle without routine maintenance and without proper lay-up preparation, the vessel's engines might (even if now operational) rust and freeze up, necessitating costly overhaul. I understand the engines were not, as I believe is usual in vessel arrest cases conditioned for lay-up...[I]t is unavoidable that the Defendant Vessel will deteriorate in condition and value as she sits idle in salt water, and that the longer the vessel remains under arrest an therefore idle the greater the deterioration will be, and that therefore, in the interest of preserving the value of the of the Defendant vessel, she should be sold as soon as possible.

(Decl. of Ray Jones, ECF No 26-2). The declaration further states that Jones estimates the fair market of the Defendant Vessel. to be approximately \$6000, based on "photographs taken by the Substitute Custodian" after the arrest of the Defendant Vessel, comparisons to other vessels, and "other information and evidence available to [him]." *Id.* at 4. GB Capital submits the declaration of Jimi Laughery, Assistant Marina Manager at Pier 32 Marina, filed in support of GB Capital's Appointment of Substitute Custodian. (Decl. of Jimi Laughery, ECF No. 3-1). The declaration states that the substitute custodian "provide[s] ongoing wharfage and custodial services at the rate of \$3.00 per foot of vessel length per day (i.e., 27 ft. x \$3.00 = \$81.00 per day)." *Id.* at 4.

III. THE PRIOR LITIGATION

On April 15, 2016, Heston sued GB Capital under admiralty and maritime jurisdiction to recover possession of the vessel and damages. *Heston v. GB Capital Holdings, LLC*, Civ. No. 16cv912.

On July 1, 2016, GB Capital filed a motion to compel arbitration. Heston did not file a response. On August 23, 2016, the Court ordered arbitration as to the moorage contract.

On September 13, 2016, Heston filed a motion for relief from the Court's August 23, 2016 Order, pursuant to Federal Rule of Civil Procedure 60(b)(1)-(3). On December 15, 2016, the Court denied Heston's motion for relief from judgment.

On October 23, 2017, Heston filed a second motion for relief from the Court's August 23, 2016 Order, on various grounds, including that the "Maritime Contract for Private Wharfage" is not cognizable in admiralty. On January 5, 2018, the Court denied Heston's motion for relief.

On January 26, 2018, Heston filed a notice of appeal. On August 21, 2018, the Court of Appeals for the Ninth Circuit concluded this Court did not abuse discretion by denying relief from the August 23, 2016 Order. On September 4, 2018, Heston filed a petition for panel rehearing and petition for rehearing in banc with the Court of Appeals. On January 3, 2019, the Court of Appeals denied the petition for rehearing en banc.

IV. DISCUSSION

A. Interlocutory Sale

GB Capital contends that the Court should authorize sale of the Defendant Vessel on the grounds that the statutory conditions for sale are met. GB Capital asserts that the Defendant Vessel is deteriorating in condition and value while detained in custody. GB Capital asserts that there is an unreasonable delay in this case because no person or entity has posted or sought to post security for the release of the defendant vessel or requested a hearing pursuant to Supplemental Admiralty Rule E(9)(b). GB Capital asserts that there is no realistic prospect of an attempt to secure release of the vessel in this action. GB Capital asserts that the expense of keeping the Defendant Vessel is excessive and disproportionate because at least \$18,792 in substitute custodian fees has accrued, over three times the presumed value of the Defendant Vessel.

The Answer filed by Heston contends that the contract at issue in this case is not a maritime lien, and that jurisdiction does not exist absent evidence of a maritime lien¹. The Answer asserts that GB

¹ The Court assesses the Motion For Order of Sale on the merits and does not construe any failure to file a timely response as consent to granting the Motion. See *Norog v. Certegy Check*

Capital has stripped the Defendant vessel “of any and all of the gear that makes her seaworthy and navigable” and “all the comforts that gave her character and value” (ECF No. 28 at 3). The Answer asserts that GB Capital “has repeatedly refused to honor its obligations,” “has evaded every effort to settle this matter equitably,” “refuses to mediate, and agrees to arbitrate only after profiting greatly through the unlawful application of brute force and when threatened by legal action.” *Id.* at 3-4. The Answer asserts that the issue of whether the Defendant Vessel the wharfage contract has only been raised in proceedings before this court, and was never raised in a manner consistent with either the (unapproved) mooring contract or Port District procedure.” *Id.* at 3. The Answer asserts that “[t]he Defendant has repeatedly demonstrated the willingness to resolve this matter in accordance with the law and the contractual rights of all parties” *Id.* at 3-4. The Answer asserts that “nothing has been decided, yet GB Capital always proceeds as if it is already the recipient of a favorable judgment from a competent tribunal.” *Id.* at 4.

Supplemental Admiralty and Maritime Claims Rule E(9)(a) of the Federal Rules of Civil Procedure states,

Servs., Inc., 759 F. Supp. 2d 1189, 1193 n.1 (N.D. Cal 2011)(addressing motion to dismiss on the merits “[c]onsidering the Court’s obligation to afford pro se plaintiffs the benefit of any doubt” and in the light of “the Ninth Circuit’s unequivocal pronouncement that a court may not grant a motion for summary judgment merely because the non-moving party failed to file opposition papers” (first citing *Bretz v Kelman*, 773 F.2d 1026, 1027 n.1(9th Cir. 1985), then citing *Martinez v. Stanford*, 323 F.3d 1178, 1183 (9th Cir. 2003)).

On application of a party, the marshal, or other person having custody of the property, the court may order all or part of the property sold – with the sales proceeds, or as much of them as will satisfy the judgment, paid into court to await further orders of the court – if:

- (A) the attached or arrested property is perishable, or liable to deterioration, decay, or injury by being detained in custody pending the action;
- (B) the expense of keeping the property is excessive or disproportionate; or
- (C) there is an unreasonable delay in securing release of the property.

Fed. R. Civ. P., Supp. Admiralty Rule E(9)(a)(i). The applicant is required to satisfy one of the three listed criteria to justify an interlocutory sale. *See, e.g., Cal Yacht Marina-Chula Vista, LLC v. S/V OPILY*, No. 14-cv-01215-BAS BGS, 2015 WL 1197540, at *2 (S.D. Cal, Mar. 16, 2015) (citing *Merchants Nat. Bank of Mobile v. Dredge gen. G.L. Gillespie*, 663 F.2d 1338, 1341 (5th Cir. 1981)). “The interlocutory sale of a vessel is not a deprivation of property, but rather a necessary substitution of the proceeds of the sale, with all of the constitutional safeguards necessitated by the in rem process.” *Ferrous Fin. Servs. Co. v. O/S Arctic Producer*, 567 F. Supp. 400, 401 (W.D. Wash. 1983).

GB Capital has presented evidence that Defendant Vessel was not conditioned for lay-up, “as usual in vessel arrest cases.” There are no facts in the record to the contrary. The Court finds the Defendant Vessel is liable to deterioration within the meaning of Supplemental Admiralty Rule E(9)(A)(i)(a). *Compare Cal. Yacht*, 2015 WL 1197540, at *3 (finding defendant vessel liable to deterioration

or injury based on expert evidence of possible costly overhaul, and electric equipment susceptibility to corrosion, rust, and general deterioration)(citing *Merchants*, 663 F.2d at 1342 (“The engines were not properly condition for lay-up....The court’s assessment that each of the vessels was ‘liable to deterioration...or injury by being detained in custody’ was not clearly erroneous.”)). with *Vineyard Bank v. M/Y Elizabeth I, U.S.C.G. Official No. 1130283*, No. 08cv2044 BTM WMC, 2009 WL 799304., at *1 (S.D. Cal. Mar. 23, 2009)(concluding that “a generalized assertion that idle vessels will deteriorate,” absent “other evidence that the Defendant Vessel is liable to decay,” did not satisfy Rule E(9)(a)(i)).

Courts generally allow at least four months for the provision of a bond to secure the release of a vessel before granting an interlocutory sale on grounds of unreasonable delay. *See Vineyard Bank*, 2009 WL 2330704, at * (citing *Bank of Rio Vista v. Vessel Captain Pete*, 2004 WL 2330704., at *2 (N.D. Cal. Oct. 14, 2004)). In this case, the record shows no attempts to secure the Defendant Vessel after the April 2018 arrest. There are no facts in the record to the contrary. The Court finds an unreasonable delay has occurred within the meaning of Supplemental Admiralty Rule E(9)(A)(i)(c). *See Ferrous*, 567 F. Supp. at 401 (concluding, when defendants had appeared in the action, that no attempt to secure release of the vessel within four months since arrest was unreasonable delay); *Merchants*, 663 F.2d at 1341-42 (failing to secure the release of the vessel eight months after arrest was unreasonable delay); *Vineyard Bank*, 2009 WL 799304, at *2 (concluding four-month delay was unreasonable when no person had attempted to secure the release of the vessel).

Maintenance expenses of several thousand dollars per month are excessive and disproportionate when a defendant has made no attempt to secure the vessel's release. In this case, GB Capital has presented evidence \$18,792 in accrued fees, which will increase \$2,430 each month. GB Capital has presented evidence that the estimated fair market value of the Defendant Vessel is \$6000. There are no facts in the record to the contrary. The Court finds that the accrued costs excessive and disproportionate to the estimated fair market value of the Defendant Vessel. *See Cal. Yacht*, 2015 WL 1197540 at *4 (concluding \$6000 in custodial fees, which would continue accruing, was excessive and disproportionate to the vessel's maximum fair market value of \$12,000); *Merchants*, 663 F.2d at 1342 (concluding interlocutory sale justified base on \$17,000 in monthly costs and an eight-month delay in attempting to secure release); *Ferrous*, 567 F. Supp. at 401 (concluding \$166,000 in annual maintenance costs was excessive when there was no attempt to secure the vessel's release for four months).

Taking into account the disproportionate cost of maintaining the Defendant Vessel, the unreasonable delay in securing its release, and the likelihood of deterioration, the Court finds interlocutory sale warranted under Rule (9)(a)(i) and grants Plaintiff's motion for interlocutory sale of the Defendant Vessel.

B, Credit Bid

GB Capital asserts that it is the only party who has asserted a maritime lien claim against the Defendant Vessel, and is by definition senior to all other claims in this action. GB Capital contends that the Court should authorize GB Capital to bid up to

the lien claim against the Defendant Vessel, and is by definition senior to all other claims in this action. GB Capital contends that the Court should authorize GB Capital to bid up to the lien amount in the verified Complaint (\$55,728), plus the actual and demonstrable costs of suit, include U.S. Marshal, substitute custodian, and other *custodial* *egis* expenses, pursuant to the Local Admiralty rules. GB Capital asserts it will establish the lien amount by affidavit as required by Local Admiralty Rule E.1(e)(2).

As detailed above, the Answer “enters a general denial of lack of jurisdiction, submits an affirmative defense of res judicata to all allegations in the Complaint,” states that there is no evidence of a maritime lien in this case, and “begs the Court to release from her bonds, order the Plaintiff to restore her taken value, and return to the contracted status quo prior to the resolution of this controversy.” (ECF No. 28 at 1-4).

“When a vessel is sold by order of a district court in a civil action in rem brought to enforce a preferred mortgage or lien or a maritime lien,” a “preferred mortgage lien...has priority over all claims against the vessel (except for expenses and fees allowed by the court, costs imposed by the court, and preferred maritime liens).” 46 U.S.C. §31326(a),(b)(1). A preferred maritime lien is defined as “a maritime lien on a vessel[,] (A) arising before a preferred mortgage was filed...; (B) for damage arising out of maritime tort; (C) for wages of a stevedore...; (D) for wages of the crew of the vessel; (E) for general average; or (F) for salvage, including contract salvage.” §31301(5). According to the local rules for admiralty actions,

When the court determines on the merits that a plaintiff or plaintiff in intervention has a valid claim senior in priority to all other parties, that plaintiff in intervention foreclosing a properly recorded and endorsed preferred mortgage on, or other valid security interest in the vessel may bid, without payment of cash, certified check or cashier's check, up to the total amount of the secured indebtedness as established by affidavit filed and served on all other parties no later than seven (7) days prior to the date of sale

.S.D.Cal. Civ. R.E.1(e)(2). After process has been executed, parties have fourteen days, or the time allowed by the court, to file a verified statement of right or interest. Fed. R. Civ. P. Supp. Admiralty R. C(6)(a).

In this matter, Heston disputes the wharfage contract at issue on multiple grounds. However, Heston provides no evidence that GB Capital does not hold a preferred maritime lien on the Defendant Vessel. Heston does not oppose the request to credit bid. The evidence in the record shows that GB Capital holds a preferred maritime lien on the Defendant Vessel. (Wharfage contract, Ex. A to Compl., ECF No. 1-2). No party other than GB Capital has asserted a maritime lien claim within the time allowed by Fed. R. Civ. P., Supp. Adm. R. C(6)(a). The Court finds that GB Capital has a preferred maritime lien claim with priority over all other claims against the Defendant Vessel, except for the expensed and fees allowed by the Court and costs imposed by the Court in this action. *See Vineyard Bank*, 2009 WL 799304, at *3. Provided GB Capital complies with Local Rule E.1(e)(1)-(2), the Court grants GB Capital's request to authorize a credit bid

up to the amount of secured indebtedness at the sale of the Defendant Vessel. *See id.; Bank of Rio Vista*, 2004 WL 2330704, at *2-3 (authorizing credit bid when defendants did not oppose the request to credit bid and argued only that interlocutory vessel sale was premature).

V. Conclusion

IT IS HEREBY ORDERED that the Motion for Order of Sale file by Plaintiff GB Capital Holdings, LLC (ECF No. 26) is granted.

IT IS FURTHER ORDERED that, consistent with Supplemental Admiralty Rule E(9)(B) and Local Admiralty Rule E.1(e) the United States Marshal be and hereby is directed and empowered to sell said DEFENDANT VESSEL and her engines, tackle, accessories, equipment, furnishings and appurtenances as is, were is, at public sale at the first available time and date, after having first caused notice of said sale to be published daily in a newspaper of general circulation within the City of San Diego, California for at least seven days immediately before the date of sale; and

IT IS FURTHER ORDERED that such public notice specify the date, time and location for the sale of the DEFENDANT VESSEL; and

IT IS FURTHER ORDERED that, consistent with Local Admiralty Rule E.1(e)(2), such public notice specify that the last and highest bidder of the sale will be required to deposit with the U.S. Marshal a certified check or a cashier's check in the amount of the full purchase price not to exceed \$500 dollars, and otherwise \$500 or ten percent (10%) of the bid, whichever is greater, and that the balance, if any, of the purchase price shall be paid by certified check or cashier's check before confirmation of the sale or within three days of dismissal of any opposition

which may have been filed, exclusive of Saturdays, Sundays and legal holidays; and

IT IS FURTHER ORDERD that any proceeds of said sale shall be held by it or deposited by the United States Marshal in the Registry of this Court, pending further Order of this Court; and

IT IS FURTHER ORDERED that PLAINTIFF, having secured a maritime lien interest in the DEFENDANT VESSEL pursuant to the Commercial Instruments and Federal Maritime Lien Act (46 U.S.C. § 31301, et seq,) and being the only claimant in this action asserting a maritime claim against her, is authorized pursuant to Local Admiralty Rule E.1(e)(2) to credit bid at the auction of the DEFENDANT VESSEL, without payment of cash, a sum equal to the secured interest in the DEFENDANT VESSEL as established by affidavit filed and served on all other parties no later than seven (7) days prior to sale pursuant to Local Admiralty Rule E.1(e)(2), consisting of the lien amounts specified in PLAINTIFF's Verified complaint, totaling \$55,728.51 (calculated through February 7, 2018), plus its actual costs of suit through the date of the sale, including U.S. Marshal and other custodia legis expenses, with such costs and expenses to be calculated at the rates specified and authorized in the Order appointing the Substitute Custodian. However, as PLAINTIFF's maritime necessities lien interest in the DEFENDANT VESSEL does not, as a matter of law, include attorneys' fees, such fees are not to be included in any credit bid Plaintiff makes;

IT IS FURTHER ORDERED, pursuant to Local Supplemental Admiralty Rule E.1(e)(2), that if within three days of the auction date, exclusive of Saturdays, Sundays, and legal holidays, no written

objection is filed, the sale shall stand confirmed as of course, without the necessity of any affirmative action thereon by a judge, except that no sale shall stand confirmed until the buyer has complied fully with the terms of the purchase.

Dated: January 22, 2019

/s/

Hon. William Q. Hayes
U.S. District Court

APPENDIX 3

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JEFFREY GLENN HESTON

Plaintiff-Appellant

No. 18-55125

v.

**D.C. No. 3:16-cv-00912-
WQH-AGS**

**GB CAPITAL HOLDINGS, LLC
a Limited Liability**

MEMORANDUM*

Corporation

Filed: August 21, 2018

Defendant-Appellee

**Appeal from the United States District Court
for the Southern District of California
William Q. Hayes, District Judge, Presiding**

Submitted August 15, 2018**

Before: FARRIS, BYBEE, and N.R. SMITH. Circuit Judges

Jeffrey Glenn Heston appeals pro se from the district court's January 5, 2018 post-judgment order denying relief from its order granting defendant's motion to compel arbitration and dismissing Heston's action. We have jurisdiction under 28 U.S.C. §1291.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See Fed. R. App. P. 34(a)(2)*

We review for abuse of discretion. *Sch. Dist. No. 1J, Multnomah Cty., Or. v. ACandS, Inc.*, 5 F.3d 1255, 1262 (9th Cir. 1993). We affirm.

The district court did not abuse its discretion by denying Heston's motion for relief from judgment under Federal Rule of Civil Procedure 60(b) because Heston failed to set forth any basis for relief. *See id.* at 1263 (setting forth grounds for relief under Rule 60(b)).

We do not consider the district court's order granting defendant's motion to compel arbitration and dismissing the action, or the December 15, 2016 order denying Heston's motion for relief, because the notice of appeal is untimely as to those orders. *See Fed. R. App. P. 4(a)(4)(A)* (a motion under Rule 60(b) extends the time to file an appeal if the motion is filed no later than 28 days after judgment is entered); *Hamer v. Neighborhood Hous. Servs.* 138 S.Ct. 13, 17-18 (2017)(a time limit not prescribed by Congress is a mandatory claim-processing rule and if properly invoked, mandatory claim-processing rules must be enforced); *Demaree v. Pederson*, 887 F.3d 870, 876 (9th Cir. 2018)(*Fed. R. App. P. 4(a)(4)* is mandatory claim[processing rule under *Hamer*.)

We do not consider matters not specifically and distinctly raised and argued in the opening brief. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

AFFIRMED.

APPENDIX 4

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JEFFREY G. HESTON Plaintiff	Case No. 16cv912- WQH-AGS
v. GB CAPITAL HOLDINGS, LLC., Defendant	ORDER Filed: January 5, 2018

HAYES, Judge:

The matters before the court are the motions for relief filed Plaintiff Jeffrey G. Heston. (ECF No. 14 and 16)

I. Background

On April 15, 2016, Plaintiff Jeffrey G. Heston initiated this action by filing a Complaint pursuant to the Court's admiralty and maritime jurisdiction to recover possession of Plaintiff's vessel. (ECF No. 1). The Complaint alleges that Defendant GB Capital Holdings, LLC., unlawfully took Plaintiff's vessel from its mooring, continued to exercise control over the vessel, and prevented Plaintiff from taking possession of the vessel. On June 3, 2016, Defendant filed an answer. (ECF No. 4).

On July 1, 2016, Defendant filed the motion to compel arbitration. (ECF No. 6). Plaintiff did not file a response to the motion to compel arbitration.

On August 23, 2016, the Court granted in part and denied in part Defendant's motion to compel

arbitration. (ECF No.7), The Court applied the Maritime Contract for Private Moorage ("the Contract") between Plaintiff and San Diego Mooring Company ("SDMC") containing provisions for arbitration and mediation. The Court concluded that "based on the Contract and the representations made by Defendant, a valid arbitration agreement exists and encompasses the dispute at issue." *Id.* at 3-4. The Court also noted that Plaintiff had not filed an opposition and "therefore ha[d] not met his burden to show that the claims [were] unsuitable for arbitration." *Id.* at 4. The Court denied the portion of Defendant's motion requesting that the Court compel mediation because the Court concluded that there was no legal authority for a motion to compel non-binding mediation. *Id.* at 5.

Plaintiff filed a motion for relief from the Court's order from August 23, 2016 (ECF No. 7) pursuant to Federal Rule of Civil Procedure 60(b)(1)-(3). (ECF No. 9). On December 15, 2016, this Court denied Plaintiff's motion for relief from judgment. (ECF No. 12). The Court concluded as follows:

The court concludes that Plaintiff is not entitled to relief pursuant to Rule 60(b)(2) on the basis of newly discovered evidence, the Lease Agreement. The Plaintiff does not provide any legal authority to demonstrate that SDMC's alleged violation of the Lease Agreement with the Port District would void his contract with SDMC or that he has standing to challenge SDMC's compliance with the Lease Agreement. Plaintiff fails to show that this newly discovered evidence "was of such magnitude that production of it earlier would have been likely to change the

disposition of the case." *Feature Realty*, 331 F.3d at 1093.

Plaintiff further contends that Defendant's actions regarding the newly discovered Lease Agreement constitutes fraud because Defendant failed to offer evidence failed to offer evidence of the Port District approval of this language. (ECF No. 9-1 at 6). Plaintiff contends that this entitles him to relief under Rule 60(b)(3). *Id.* Defendant contends that Plaintiff has no rights under the Lease Agreement and has no standing to challenge the Defendant's compliance with its terms. (ECF No. 10 at 6) Defendant contends that it has now submitted the Contract for approval and "no reason exists to expect the Port District will not approve it." *Id.* at 9.

Plaintiff does not demonstrate that Defendant's alleged violation of the contractual terms of the Lease Agreement with the Port District could constitute fraud justifying relief under Rule 60(b)(3). The court concludes that Plaintiff fails to establish by clear and convincing evidence that Defendant obtained a judgment by means of fraud and this "conduct complained of prevented the [Plaintiff] from fully and fairly presenting the case." *See Lafarge Conseils Et Etudes, S.A.*, F.2d at 1337-38.

The court concludes that Plaintiff has failed to carry his burden to demonstrate that he is entitled to relief under Rule 60(b)(1)-(3). (ECF No. 12 at 5-6).

Plaintiff moves the Court for relief from the December 15, 2016 order on the grounds that the

"Maritime Contract does not apply, and Plaintiff has the right to a trial over the validity of the Contract. Defendant asserts that the Contract is obviously a maritime contract, that the Court properly applied the Federal Arbitration Act, and that Plaintiff is not entitled to a trial on his claim that the contractual provision requiring arbitration is not enforceable. Defendant requests sanctions under the Court's inherent authority based upon Plaintiff's bad faith and willful disobedience of the court order.

III. Ruling of the Court

Federal Rule of Civil Procedure 60(b) provides, On a motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for...(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party... Fed. R. Civ. Proc. 60(b)(1)-(3).

In this case, the Court has fully considered and resolved all legal issues relevant to the August 23, 2016 order (ECF No. 7) and the December 15, 2016 order (ECF No. 12). The Court finds that a valid arbitration exists and encompasses the dispute at issue. The Court concludes that the order compelling arbitration is authorized under the Federal Arbitration Act, and that Plaintiff is not entitled to a trial on his claim that the contractual

provision requiring arbitration is not enforceable. There are no grounds for relief from the August 23, 2016 order (ECF No. 7) or the December 15, 2016 order (ECF No. 12).

Defendant's request to award sanctions under its inherent authority is denied at this stage in the proceedings without prejudice.

IT IS HEREBY ORDERED that the motions for relief filed by Plaintiff are DENIED. (ECF No. 14 and 16).

DATED: January 5, 2018

/s/
William Q. Hayes
United States District Judge

APPENDIX 5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JEFFREY G. HESTON	CASE NO. 16cv912-WQH-
Plaintiff	AGS
v.	ORDER
GB CAPITAL HOLDINGS, LLC	
Defendant	Filed : 12/15/16

HAYES, Judge

The matter before the court is the motion for relief from order filed by Plaintiff Jeffrey G. Heston. (ECF No. 9).

I. Background

On April 15, 2016, Plaintiff Jeffrey G. Heston initiated this action by filing a Complaint pursuant to the Court's admiralty and maritime jurisdiction to recover possession of Plaintiff's vessel. (ECF No. 1). The Complaint alleges that Defendant GB Capital Holdings, LLC unlawfully took Plaintiff's vessel from its mooring, continued to exercise control over the vessel, and prevented Plaintiff from taking possession of the vessel. On June 3, 2016, Defendant filed an answer. (ECF No. 4).

On July 1, 2016, Defendant filed the motion to compel arbitration. (ECF No. 6). Plaintiff did not file a response to the motion to compel arbitration.

On August 23, 2016, the Court granted in part and denied in part Defendant's motion to compel arbitration. (ECF No. 7). The Court applied the Maritime Contract for Private Moorage ("the Contract") between Plaintiff and San Diego Mooring

Company (“SDMC”)¹ containing provisions for arbitration and mediation. The Court concluded that “based on the Contract and the representations made by Defendant, a valid arbitration agreement exists and encompasses the dispute at issue.” *Id.* at 3-4. The Court also noted that Plaintiff had not filed an opposition and “therefore ha[d] not met his burden to show that the claims [were] unsuitable for arbitration.” *Id.* at 4. The Court denied the portion of Defendant’s motion requesting that the Court compel mediation because the Court concluded that there was no legal authority for a motion to compel non-binding mediation. *Id.* The Court ordered that the parties were “directed to proceed to arbitration in accordance with the terms of the arbitration agreement in the Maritime Contract for Private Moorage.” *Id.* at 5.

On September 13, 2016, Plaintiff filed a motion for relief from the Court’s Order from August 23, 2016 (ECF No. 7) pursuant to Federal Rule of Civil Procedure 60(b)(1)-(3). (ECF No. 9). On October 1, 2016, Defendant filed a response in opposition. (ECF No. 10). The docket reflects that Plaintiff has not filed a reply.

II. Legal Standard

Federal Rule of Civil Procedure 60(b) provides,

¹ The previous Order from this Court states, “Defendant asserts that GB Capital Holdings, LLC provides administrative support for San Diego Mooring Co. which operates and maintains vessel moorings at various locations within San Diego Bay...Defendant asserts that it is an agent for SDMC with respect to matters involving the enforcement of wharfage contract terms.” (ECF No. 7 at 2-3).

On a motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for...(1) mistake, inadvertence, surprise, or excusable neglect' (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentations, or misconduct by an opposing party... Federal R. Civ. Proc. 60(b)(1)-(3).

Motions brought under Rule 60(b)(1)-(3) must be made within a reasonable time and "no more than a year after the entry of the...order." Fed. R. Civ. P. 60(c). The burden of proof is on the party bringing the Rule 60(b) motion. *See Rufo v. Inbates of Suffolk County Jail*, 502 U.S. 367, 382 (1992).

Rule 60(b)(1) is "not intended to remedy the effect of a litigation decision that a party comes to regret." *Latshaw v. Trainer Wortham & Co.*, 452 F.3d 1097, 1101 (9th Cir 2006). "For the purposes of subsection (b)(1), parties should be bound by and accountable for the deliberate actions of themselves and their chosen counsel... includ[ing] not only an innocent, albeit careless or negligent attorney mistake, but also intentional attorney misconduct." *Id.*

Under Rule 60(b)(2), relief "on the basis of newly discovered evidence is warranted if (1) the moving party can show the evidence relied on in fact constituted newly discovered evidence within the meaning of Rule 60(b); (2) the moving party exercised due diligence to discover this evidence; and (3) the newly discovered evidence must be of 'such magnitude that production of it earlier would have

been likely to change the disposition of the case.” *Feature Realty, Inc. v. City of Spokane*, 331 F.3d 1082, 1093 (9th Cir. 2003)(quoting *Coastal Transfer Co. v. Toyota Motor Sales, U.S.A.*, 833 F.2d 208, 211 (9th Cir. 1987).

“Under Rule 60(b)(3), the moving party must establish by clear and convincing evidence that a judgment was obtained by fraud, misrepresentation, or misconduct, and that the conduct complained of prevented the moving party from fully and fairly presenting the case.” *Lafarge Conseils et Etudes, S.A. v Kaiser Cement & Gypsum Corp.*, 791 F.2e 1334, 1338 (9th Cir. 1987). Rule 60(b)(3) is aimed at judgments which were unfairly obtained, not at those which are factually incorrect.” *De Saracho v. Custom Food Mach., Inc.*, 206 F.3d 874, 880 (9th Cir. 2000)(quotations omitted).

III. Discussion

Plaintiff contends that the Court erred in compelling arbitration and is entitled to relief pursuant to Rule 60(b). (ECF No. 9-1 at 3). Defendant contends that the Court was within its discretion to regard Defendant’s motion to stay action and compel as unopposed pursuant to Local Rule 7.1(f)(3)(c). (ECF No. 10 at 3).

Plaintiff did not file any opposition to the Defendant’s motion to compel. A district court may properly grant an unopposed motion pursuant to a local rule where the local rule permits, but does not require, the granting of a motion for failure to respond. *See Ghazali v. Moran*, 46 F.3d 52, 54 (9th Cir. 1995). The Court reviewed the merits of Defendant’s arguments and the language of the

contract and determined that a valid arbitration provision existed. (ECF No. 7).

Plaintiff now contends the language in the contract exempts certain matters from mediation and arbitration, (ECF No. 9-1 at 3). Defendant contends the Contract makes clear that "that all claims by the parties, except for claims Defendant has against Plaintiff's vessel, must be resolved by way of mediation by way of mediation/arbitration." (ECF No. 10 at 5-6).

The contract states:

In the event a claim arises under or pertaining in any way to this Agreement that is not resolved by negotiation, the parties agree they shall first submit such dispute for non-binding mediation, to occur in San Diego, prior to commencing litigation...If such Mediator does not exist or is unavailable within 45 days of being requested to serve, the parties shall select a mutually acceptable individual who has prior experience serving as a mediator or arbitrator, *The obligation to mediate does not apply to any claims SDMC has against the vessel (as contrasted with her owner) for her debts or torts.* Nothing in this Agreement shall be construed to limit in any way SDMC's right to seek recovery directly against the vessel in an in rem action in a U.S. District Court for liens based on the debts an/or torts of the Vessel; unless SDMC agrees to do so in writing, such claims against the Vessel are not restricted by or subject to the mediation provision herein. The intention of this Paragraph is to require mediation only of claims the Owner(s) might have against SDMC, or claims SDMC might have against

the Owner(s), and not claims SDMC might have against the Vessel. If mediation is unsuccessful, the parties shall submit the dispute(s) heard in mediation for decision by way of binding arbitration, with the person who served as Mediator serving as the Arbitrator. (ECF No. 6-4 at 20).

Plaintiff initiated this action against Defendant. The Contract provides for mediation and arbitration of claims an owner, such as Plaintiff, may have against SDMC and claims SDMC may have against the owner. The contractual exemption for a claim SDMC has against a vessel has against a vessel has no place against a vessel has no application to this matter.

Plaintiff contends that newly discovered evidence provides grounds for relief under Rule 60(b)(2). Plaintiff contends that on July 28, 2016, Plaintiff obtained a copy of the lease agreement between the San Diego Unified Port District (the "Port District") and SDMC and amendments to the lease (the "Lease Agreement") by which the Port District "conveys the operations of the mooring buoy anchorages to the SDMC...and enunciates the rights and legal obligations of the SDMC." (ECF No. 9-1 at 6). Plaintiff contends that pursuant to the Lease Agreement, SDMC must obtain the Port Districts approval of any revisions to the language of contracts between SDMC and vessel owners, such as Plaintiff. Plaintiff contends that the SDMC has modified the standard language without approval from the Port District by including the provisions for the arbitration and mediation of disputes. *Id.*

Defendant contends that Plaintiff's "newly discovered" lease agreement between the Defendant and the Port District does not provide grounds for relief from the order because Plaintiff is not a party

to the Lease Agreement and lacks standing to challenge Defendant's compliance. (ECF No. 10 at 7). Defendant contends that the Contract between Plaintiff and Defendant is not void or voidable due to any non-compliance by Defendant with the Lease Agreement with the Port District.² *Id.*

The Court concludes that Plaintiff is not entitled to relief pursuant to Rule 60(b)(2) on the basis of newly discovered evidence, the Lease Agreement. Plaintiff does not provide any legal authority to demonstrate that SDMC's alleged violation of the Lease Agreement with the Port District would void his Contract or that he has standing to challenge SDMC's compliance with the Lease Agreement.³ Plaintiff fails to show that this newly discovered evidence "was of such magnitude that production of it earlier would have been likely to change the disposition of the case." *Feature Realty*, 331 F.3d at 1093.

Plaintiff further contends that Defendant's actions regarding the newly discovered Lease Agreement constitutes fraud because Defendant failed to offer evidence of the Port District's approval of this language. (ECF No. 9-1 at 6). Plaintiff contends that this entitles him to relief under Rule 60(b)(3). The Court concludes that Plaintiff fails to establish by clear and convincing evidence that Defendant obtained a judgment by means of fraud

² Defendant also contends that Plaintiff is required to participate in arbitration by the terms of a different contract signed in 2005. (ECF No. 10 at 7). Defendant includes a copy of this contract with its response to Plaintiff's motion. (Exhibit B, ECF No. 10-3). The Court does not consider this in its ruling.

³ Plaintiff asserts that the Lease Agreement was discovered on July 28, 2016. (ECF No. 90-1). The Court did not issue its Order compelling arbitration and dismissing the case until August 23, 2016. (ECF No. 7).

and this "conduct complained of prevented the [Plaintiff] from fully and fairly presenting the case." *See Lafarge Conseils Et Etudes, S.A.*, F2d at 1337-38.

The Court concludes to fairly carry out his burden to demonstrate that he is entitled to relief under Rule 60(b)(1)-(3).

IV. Conclusion

IT IS HEREBY ORDERED that the motion for relief filed by Plaintiff is DENIED. (ECF No. 9).

DATED: December 15, 2016

/s/
WILLIAM Q. HAYES
United States District Judge

APPENDIX 6

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JEFFREY G. HESTON (owner, Vessel 'Glori B')	Plaintiff	CASE NO. 16cv912-WQH-
v.		RRB
GB CAPITAL HOLDINGS, LLC	Defendant	ORDER

HAYES, Judge:

The matter before the Court is the motion to compel arbitration and stay action (ECF No. 6) filed by GB Capital Holdings, LLC.

I. Background

On April 15, 2016, Plaintiff Jeffrey G. Heston initiated this action pursuant to the Court's admiralty and maritime jurisdiction to recover possession of Plaintiff's vessel. (ECF No. 1). The Complaint alleges that Defendant unlawfully took Plaintiff's vessel from its mooring, continued to exercise control over the vessel, and prevented Plaintiff from taking possession of the vessel. On June 3, 2016, Defendant filed an answer. (ECF No. 4).

On July 1, 2016, Defendant filed the motion to compel arbitration. (ECF No. 6). The docket shows that no response to the motion to compel arbitration has been filed.

II. Discussion

The federal Arbitration Act ("FAA") "was enacted ...in response to widespread judicial hostility to arbitration agreements." *AT&T Mobility LLC. v. Concepcion*, 563 U.S. 333, 339 (2011)(citing *Hall*

Street Associates, L.L.C. v. Mattel, Inc., 552 U.S. 576, 581 (2008). Section 2 of the FAA provides, “A written provision in any... contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. Section 2 of the FAA “reflect[s] both a liberal federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract.” *Conception*, 563 U.S. at 339 (internal citations and quotation marks omitted). “In line with these principles, courts must place arbitration agreements on equal footing with other contracts, and enforce them according to their terms.” *Id.* (internal citations omitted).

“The basic role for courts under the FAA is to determine (1) whether the agreement encompasses the dispute at issue.” *Kilgore v. KeyBank, Nat'l Ass'n*, 718 F.3d 1052, 1058 (9th Cir. 2013)(en banc)(internal quotation marks omitted). “If the response is affirmative on both counts, then the [FAA] requires the court to enforce the arbitration agreement in accordance with its terms.” *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000). “[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration.” *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 91-92 (2000).

Pursuant to section 4 of the FAA, a party may move for a district court order compelling arbitration:

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may

SDMC, or claims SDMC might have against the Owner(s), and not claims SDMC might have against the Vessel. If mediation is not successful, the parties shall submit the dispute(s) heard in mediation for decision by way of binding arbitration with the person who served as Mediator serving as the Arbitrator. In such Arbitration, the Arbitrator shall determine a “prevailing party,” who shall be entitled to recover reasonable attorney’s fees and costs. *Id.* at 20.

The arbitration agreement goes on to detail the mechanics of arbitration agreed to by the parties. *Id.* at 20-21.

The arbitration clause in the contract is written broadly to encompass any claims pertaining to the Contract. Defendant contends that the conduct giving rise to this dispute – Defendant’s removal of its mooring in the marina – was lawful under the terms of the Contract based on Plaintiff’s refusal to comply with a contractual requirement that he submit his vessel for an annual inspection by the United States Coast Guard. Defendants contend that the Contract expressly permitted Defendant to remove the vessel from its mooring to another location. The Court concludes that based on the Contract and the representations made by Defendant, a valid arbitration agreement exists and encompasses the dispute at issue. *See Kilgore*, 718 F.3d at 1058. Plaintiff has not filed an opposition to the motion to compel arbitration and therefore has not met his burden to show that the claims are unsuitable for arbitration.¹ *See Green Tree Fin.*

¹ A district court may properly grant an unopposed motion pursuant to a local rule where the local rule permits, but does not require,

Corp., 531 U.S. at 91-92. The Court concludes that the arbitration agreement should be enforced in accordance with its terms. *See Chiron Corp.*, 207 F.3d at 1130.

The Court concludes that there is no legal authority for an order to compel non-binding mediation. *See Trujillo v. Gomez*, Case No. 14cv2483 BTM(BGS), 2015 WL 1757870, at *9(S.D.Cal. Apr 17, 2015)(finding that FAA remedies are not available for nonbinding mediation and that the California Code of Civil Procedure lacks a provision for motions to compel mediation).

When granting a motion to compel arbitration, a court may dismiss, rather than stay, the court action when all of the claims will be resolved in the arbitration. *See Trujillo*, 2015 WL 1757870 at *9

the granting of a motion for failure to respond. *See Chazoli v. Moran*, 46 F.3d 52, 54 (9th Cir. 1995)(affirming dismissal for failing to oppose a motion to dismiss, based on a local rule providing that “[t]he failure of the opposing party to file a memorandum of points and authorities in opposition to any motion shall constitute consent to the granting of the motion”). Civil Local Rule 7.1 provides: If an opposing party fails to file the papers in the manner required by Civil Local Rule 7.1.e.2, that failure may constitute consent to the granting of the motion.” S.D. Cal.Civ.Local Rule 7.1(f)(3)(c). “Although there is... a [public] policy favoring disposition on the merits, it is the responsibility of the moving party to move towards that disposition at a reasonable pace, and to refrain from dilatory and evasive tactics.” *In re Eisen*, 31 F.3d 1447, 1454 (9th Cir. 1994)(quoting *Morris v. Morgan Stanley &Co.*, 942 F.2d 648, 652 (9th Cir. 1991))(affirming dismissal for failure to prosecute).

The docket reflects that Plaintiff has failed to file an opposition as required by Civil Local Rule 7.1.e.2. Defendant obtained a hearing date of August 8, 2016, for the pending motion to compel. *See* ECF No. 6. Pursuant to the Local Rules, Plaintiff was to file any response to the motion to compel no later than July 25, 2016, fourteen days prior to the hearing date. The docket reflects that Plaintiff has failed to file a response. The Court construes Plaintiff’s failure to oppose the motion to compel as “a consent to the granting of” the motion. S.D. Cal Civ. Local Rule 7.1(f)(3)(c).

(dismissing action because all of Plaintiff's claims in the case were subject to arbitration); *Alvarado v. Pacific Motor Trucking Co.*, 2014 WL 3888184 (C.D. Cal. Aug. 7, 2014)(dismissing action under Fed. R. Civ. P. 12(b)(1) because the entire dispute was subject to arbitration). the Court dismisses the action because all of Plaintiff's claims are subject to arbitration.

III. Conclusion

IT IS HEREBY ORDERED that Defendant's motion to compel arbitration (ECF No. 6) is granted in part and denied in part. Pursuant to 9 U.S.C. section 4, the parties are directed to proceed to arbitration in accordance with the terms of the arbitration agreement in the Maritime Contract for Private Moorage. This action is dismissed.

DATED: August 23, 2016

/s/
WILLIAM Q. HAYES
United States District Judge