

FILED

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
JACKSONVILLE DIVISION

2015 OCT 30 AM 9:51

CLERK, US DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
JACKSONVILLE FLORIDA

IN ADMIRALTY

JOANNA JOHNSON, as Personal  
Representative of the Estate of LONNIE  
JORDAN,

Plaintiff,

Case No.: 3:15-cv-1295-J-39JBT

v.

TOTE SERVICES INC., a Florida Corporation  
d/b/a TOTE MARITIME Puerto Rico, and  
MICHAEL DAVIDSON, Ship Captain,

Defendants.

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**DEFENDANT, TOTE SERVICES INC.'S NOTICE OF REMOVAL**

Defendant, Tote Services Inc. ("Tote"), pursuant to 28 U.S.C. § 1441 and § 1446, Local Rule 4.02, and Local Admiralty Rule 7.01, hereby removes the above-captioned action to the United States District Court, Middle District of Florida, Jacksonville Division, and in support hereof states as follows:

1. This admiralty action arises out of the disappearance of the SS EL FARO, a U.S. flagged cargo vessel, and the thirty-three (33) mariners on board at the time.
2. On or about October 1, 2015, the SS EL FARO tragically disappeared on the high seas, during its voyage from Jacksonville, Florida to San Juan, Puerto Rico, when Hurricane Joaquin unforeseeably changed its course and enveloped the vessel.

3. Plaintiff, as the personal representative of one of the vessel's crew members, has sued Tote and Michael Davidson, the vessel's captain, alleging three causes of action,<sup>1</sup> to wit: (1) Negligence – Wrongful Death Against Defendant Tote Services; (2) Negligence – Wrongful Death Against Defendant Tote Maritime Puerto Rico, Inc.; and (3) Negligence – Wrongful Death Against Defendant Michael Davidson. As the Complaint makes clear, “this is an action . . . brought pursuant to the general maritime law of the United States.” (Compl. ¶ 1).

4. Aside from the fact that the Complaint invokes general maritime law, the Complaint also makes clear that this is an action for a death that occurred on the high seas. (Compl. ¶ 19) (“As operator of the El Faro, Defendant owed the crewmen and seamen aboard the El Faro the highest degree of care given the circumstances and risks of navigating the El Faro through high seas . . . .”); (Compl. ¶¶ 18, 22, 25, 35, 38, 48). Although the only causes of action stated in the Complaint are for wrongful death, the Death on the High Seas Act (“DOHSA”), 46 U.S.C. § 30301 *et seq.*, preempts conflicting state wrongful death statutes and makes DOHSA the exclusive remedy. *Ridley v. NCL (Bahamas) Ltd.*, 824 F. Supp. 2d 1355, 1359-60 (S.D. Fla. 2010) (“Moreover, it is well settled that DOHSA preempts conflicting state wrongful death statutes . . . and makes the federal Act the exclusive remedy.”); see *Lasky v. Royal Caribbean Cruises, Ltd.*, 850 F. Supp. 2d 1309, 1312 (S.D. Fla. 2012) (“As a preliminary matter, it is well-settled that where DOHSA applies, it preempts all other forms of wrongful death claims under State or general

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<sup>1</sup> It is not altogether clear from Plaintiff's Complaint who Plaintiff has named as Defendants. The caption of the Complaint names Tote Services Inc. d/b/a Tote Maritime Puerto Rico and Michael Davidson as Defendants. Nevertheless, the Complaint purports to state causes of action against Tote Services Inc. (Count I), “Tote Maritime Puerto Rico, Inc.” (Count II), and Michael Davidson (Count III), separately. Accordingly, there is a discrepancy as to whether two or three Defendants have been named, as well as their proper identity. As explained herein, because none of the Defendants have been served with process, joinder in or consent to this Notice of Removal by any other Defendant is unnecessary. 28 U.S.C. § 1446(b)(2)(A) (“When a civil action is removed solely under section 1441(a), all defendants who have been properly joined and served must join in or consent to the removal of the action.” (emphasis added)).

maritime law.”); Moyer v. Rederi, 645 F. Supp. 620, 620 (S.D. Fla. 1986) (“For the reasons stated at length in this opinion, we conclude that Plaintiff is indeed entitled to partial summary judgment, that DOHSA applies to this cause of action and preempts the application of the Florida Wrongful Death Statute . . .”).

5. The Death on the High Seas Act explicitly provides admiralty jurisdiction: “[w]hen the death of an individual is caused by wrongful act, neglect, or default occurring on the high seas beyond 3 nautical miles from the shore of the United States, the personal representative of the decedent may bring a civil action in admiralty against the person or vessel responsible.” 46 U.S.C. § 30302 (emphasis added); Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 218 (1986) (“Here, admiralty jurisdiction is expressly provided under DOHSA because the accidental deaths occurred beyond a marine league from shore.”); In re Dearborn Marine Serv., Inc., 499 F.2d 263, 272 n.17 (5th Cir. 1974) (“DOHSA has been construed to confer admiralty jurisdiction . . .”);<sup>2</sup> Argandona v. Lloyd's Registry of Shipping, 804 F. Supp. 326, 327 (S.D. Fla. 1992) (“The words ‘in admiralty’ clearly indicate that DOHSA invokes a district court's admiralty jurisdiction.”).

6. This action is removed to the United States District Court, Middle District of Florida, Jacksonville Division, on the basis that this Court has original jurisdiction of this action based upon admiralty jurisdiction, pursuant to 28 U.S.C. § 1333(1).

7. After the passage of the Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, 125 Stat. 758 (2011), 28 U.S.C. § 1441(a) now states: “[e]xcept as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant

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<sup>2</sup> In Bonner v. City of Prichard, Alabama, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.” 28 U.S.C. § 1441(a). Federal district courts have original jurisdiction over claims under the Death on the High Seas as well as claims based upon General Maritime Law. 46 U.S.C. § 30302; 28 U.S.C. § 1333(1).

8. Accordingly, admiralty claims, such as claims brought under the Death on the High Seas Act or General Maritime Law, are removable under the 2011 revisions to 28 U.S.C. § 1441. Ryan v. Hercules Offshore, Inc., 945 F. Supp. 2d 772, 778 (S.D. Tex. 2013) (“Since DOHSA claims sound in admiralty and are not federal questions, they, like admiralty claims in general, would not have been removable under the former version of section 1441, but are removable under the plain language of the current version.”); see Exxon Mobil Corp. v. Starr Indem. & Liab. Co., No. CIV.A. H-14-1147, 2014 WL 2739309, at \*2 (S.D. Tex. June 17, 2014) (“As a result, after the 2011 amendment to § 1441, general maritime cases are removable.”), remanded on other grounds on reconsideration, No. CIV.A. H-14-1147, 2014 WL 4167807 (S.D. Tex. Aug. 20, 2014); Carrigan v. M/V AMC AMBASSADOR, No. CIV.A. H-13-03208, 2014 WL 358353, at \*2 (S.D. Tex. Jan. 31, 2014) (“Accordingly, for the reasons well explained in Ryan, Plaintiff’s maritime claims are removable, and Plaintiff’s Motion to Remand is denied.”); Provost v. Offshore Serv. Vessels, LLC, No. CIV.A. 14-89-SDD-SCR, 2014 WL 2515412, at \*3 (M.D. La. June 4, 2014) (“A review of the applicable statutes and cases supports finding that the current version § 1441 permits the removal of general maritime claims without requiring an additional source of federal jurisdiction.”); see also Bridges v. Phillips 66 Co., No. CIV.A. 13-477-JJB, 2013 WL 6092803, at \*5 (M.D. La. Nov. 19, 2013) (“Defendants have demonstrated that current version of § 1441(b) does not prohibit the removal of general maritime claims under § 1333. Therefore, removal of this action was proper.”).

9. This action was originally filed on October 14, 2015 in the Circuit Court for the Fourth Judicial Circuit, in and for Duval County, Florida, and styled Joanna Johnson, as Personal Representative of the Estate of Lonnie Jordan v. Tote Services Inc. and Michael Davidson, Case No. 16-2015-CA-006542 (the “State Court Action”). The United States District Court, Middle District of Florida, Jacksonville Division is the district court of the United States for the district and division embracing the place where the action is pending. M.D. Fla. R. 1.02(b)(1).

10. None of the Defendants have been served with process. As such, under 28 U.S.C. § 1446(b), this removal is timely. Tote is not required to await service of process to remove this action. Id. (“The notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading . . . .” (emphasis added)); see North v. Precision Airmotive Corp., 600 F. Supp. 2d 1263, 1270 (M.D. Fla. 2009) (“... an unserved defendant in receipt of the complaint may remove prior to service under Section 1446(b).”); Goodyear Tire & Rubber Co. v. Fuji Photo Film Co., 645 F. Supp. 37, 39 n.2 (S.D. Fla. 1986) (“It is axiomatic that a defendant who receives a copy of the complaint prior to legal service upon him may file his petition for removal then.”).

11. Because Tote has not yet been served with process, there have been no process, pleadings, or orders served upon Tote. Nevertheless, pursuant to Local Rule 4.02(b), attached hereto as Exhibit A is a copy of the Complaint filed in state court, as well as the state court’s docket sheet.

12. Joinder in or consent by any other Defendant with respect to this Notice of Removal is unnecessary because no Defendants have been served with process. 28 U.S.C. § 1446(b)(2)(A) (“When a civil action is removed solely under section 1441(a), all defendants who have been properly joined and served must join in or consent to the removal of the action.” (emphasis added));

Gowen Oil Co. v. Abraham, 511 F. App'x 930, 932 n.2 (11th Cir. 2013) (“Greenberg could remove without consent of the other defendant Gowen intended to sue, because that defendant was not served.”)

13. Pursuant to 28 U.S.C. § 1446(d), Tote will promptly give written notice of this removal to all adverse parties and will file a copy of this Notice of Removal with the clerk of the state court.

**WHEREFORE**, Tote Services Inc. prays that the state court action under Case No. 16-2015-CA-006542 now pending in the Fourth Judicial Circuit, in and for Duval County, Florida be removed to this Court for all further proceedings.

Respectfully Submitted this 30<sup>th</sup> day of October, 2015.

**HOLLAND & KNIGHT LLP**

/s/ George D. Gabel, Jr.

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*Attorneys for Tote Services, Inc.*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Willie E. Gary, Esq., GARY, WILLIAMS, PARENTI, WATSON & GARY, P.L, 221 S.E. Osceola Street, Stuart, Florida 34994 by electronic mail, this 30<sup>th</sup> day of October, 2015.

/s/ George D. Gabel, Jr.  
Attorney