

**MARINE TERMINALS CORPORATION, Libelant**

v.

**M/S "LOTTE REITH", her engines, boilers, etc., Respondent**

**Civil Action No. 18-74**

**Trial Division of the High Court**

**Mariana Islands District**

**December 2, 1974**

Vessel was arrested by court order upon filing of libel in rem. The Trial Division of the High Court, Burnett, Chief Justice, held that party which filed its claim to the vessel under a restricted appearance as allowed by maritime rule could not file a counterclaim for abuse of process because the counterclaim did not arise out of the same transaction or occurrence as the original claim.

**1. Civil Procedure—Admiralty Rules—Restricted Appearance**

Maritime claims rule that an appearance to defend against an admiralty and maritime claim with respect to which there has issued process in rem or process of attachment and garnishment may be expressly restricted to the defense of such claim does not prohibit a counterclaim arising out of the original transaction or occurrence. (Supplemental Rules for Certain Maritime Claims, Rule E(8), Federal Rules of Civil Procedure)

**2. Civil Procedure—Admiralty Rules—Counterclaims**

In actions under the Supplemental Rules for Certain Maritime Claims, Federal Rules of Civil Procedure, a counterclaim must arise out of the same transaction or occurrence as the original claim, and a counterclaim for abuse of process, malicious or otherwise, does not arise out of the same transaction or occurrence as the original claim and is thus barred.

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FRIEDMAN)

*Counsel for Claimant:*

TIMOTHY A. STEWART

**BURNETT, Chief Justice**

Respondent vessel was arrested by Order of this Court upon filing of Libel (In Rem), and subsequently released pursuant to instructions of the libelant and further order of the court. Thereafter, Partenreederei m.s. "Lotte Reith" filed its claim to the vessel under a restricted appearance in

accord with Supplemental Rule E(8), and at the same time filed its answer to the Libel, incorporating therein a counterclaim grounded on an alleged malicious abuse of process.

Both Libelant and Claimant have moved for a determination whether the proffered counterclaim will be permitted. The same question is presented in separate companion cases, involving libel and arrest of the Lotte Reith: Civil Action No. 19-74, Saipan Stevedore Company; Civil Action No. 20-74, Saipan Shipping Company; and Civil Action No. 21-74, Mobil Petroleum Company, Inc. All appeared by counsel and jointly argued against permitting allowance of the counterclaims.

[1] Libelant urges that the restricted appearance entered by Claimant pursuant to Rule E(8) Supplemental Rules for Certain Maritime Claims, Federal Rules of Civil Procedure, restricts Claimant to defense of the initially asserted claim, and thus precludes assertion of a counterclaim. I do not so read Rule E(8), so long as the counterclaim arises out of the same transaction or occurrence with respect to which the action was originally filed. Rule E(8) reads:

*Restricted Appearance.* An appearance to defend against an admiralty and maritime claim with respect to which there has issued process in rem, or process of attachment and garnishment whether pursuant to these Supplemental Rules or to Rule 4(e), may be expressly restricted to the defense of such claim, and in that event shall not constitute an appearance for the purposes of any other claim with respect to which such process is not available or has not been served.

Rule E(8) is a rule designed for the purpose of allowing a claimant to defend a maritime or admiralty claim where process in rem or quasi in rem has been served without subjecting himself to the court's jurisdiction with respect to other claims where process has not been served or is not

available. See: Notes of Advisory Committee on Rules, 28 U.S.C.A., Rule E, page 173.

While I find no reported decisions on the point, I cannot conceive of this rule as prohibiting a counterclaim arising out of the original transaction.

It does seem clear, however, in actions covered by the Supplemental Rules, that a counterclaim must arise out of the "same transaction or occurrence" as to which the action was originally filed. Rule E(7) Security on Counterclaim. It is for this reason that the proffered counterclaim must be denied.

[2] A counterclaim for abuse of process, malicious or otherwise, does not arise out of the original cause of action, whether in admiralty practice or under the general civil rules.

It is well settled that, under Admiralty Rule 50, only if a claim arises out of the same contract or cause of action for which the original libel was filed may it be consolidated by cross-libel with the original claim. *United States v. Isthmain S. S. Co.*, 359 U.S. 314, 79 S.Ct. 857, 3 L.E.2d 845. . . .It is difficult to find a claim for abuse of process in bringing an original libel as arising out of the original "cause of action" under the restricted approach here stated, for the claim for abuse of the original proceeding. Even under the Civil Rules, which permit counterclaims arising out of wholly unrelated transactions, F.R. 13(b), a claim for abuse of process in initiating an action is held premature and not available even as a permissive counterclaim to that action. *Bach v. Quigan*, D.C.E.D.N.Y., 5 F.R.D. 34; 1A *Barron and Holtzoff*, *Federal Practice and Procedure* 562, 563 (Wright Ed. 1960) ; 3 *Moore's Federal Practice* ¶ 13.13, p. 36 (2d Ed. 1948).

*Solomon v. Bruchhausen*, 305 F.2d 941 (1962).

*Solomon* was distinguished on other grounds, but the question here at issue reaffirmed, in *Bancroft Nav. Co. v. Chadade Steamship Co.*, 349 F.2d 527 (1965). The court noted that the District Court, in *Solomon*, by requiring

libelants to post security under former Admiralty Rule 50 (now supplemental Rule E(7)) to respond to a counterclaim resting on an alleged abuse of process, had "attempted exercise of a power which the court did not have."

I conclude that a counterclaim, based on an alleged malicious abuse of process in institution of the initial libel, is not appropriate and should not be allowed.

It is, therefore, ordered:

1. Claimant's claim to the libeled vessel, and answer to the libel is allowed.
2. Any reply, by libelant to the answer of claimant, may be filed within 20 days of this order.
3. Claimant's counterclaim against Libelant is disallowed.