United States District Court
for the
Southern District of Florida

American Tugs, Incorporated, Plaintiff,	))	
	)	Civil Action No. 20-23095-Civ-Scola
v.	)	**In Admiralty**
	)	
3HD Supply, LLC, Defendant.	)	

Verdict and Order Following Non-Jury Trial

Plaintiff American Tugs, Incorporated ("ATI"), complains Defendant 3HD Supply, LLC, breached the parties' oral maritime charter agreement by failing to pay $802,655.99 for work performed, port charges, and by failing to provide proper notice of termination. (Compl., ECF No. 1.) ATI also sought recovery from two individual Defendants, Humberto Diaz and Soraya Valero, but has since voluntarily dismissed them from this case. (*See* Order, ECF No. 18). 3HD disputes ATI's claims, maintaining that the parties never agreed to a termination notice provision and that ATI was the one who breached the parties' agreement, not 3HD. (Def.'s Prop. Findings & Concs., ECF No. 46.) Although it did not file a counterclaim, 3HD says that, if anything, ATI's actions resulted in damages to 3HD. (*Id.* at 3.)

The Court held a one-day, non-jury trial, on December 13, 2021.[1] Prior to trial, the parties submitted a joint pretrial stipulation (ECF No. 43), as well as their proposed findings of fact and conclusions of law (ECF Nos. 46, 47). The Court has carefully reviewed these submissions in addition to the trial testimony and evidence. After considering the credible testimony and evidence, and the applicable law, the Court finds 3HD is liable to ATI for the $802,655.99, plus interest, based on the parties' oral agreement.

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[1] With the agreement of the parties, the entire trial on this matter was conducted virtually, by videoconference and without issue. This relieved the litigants and many witnesses from the burdens of expensive and inconvenient travel to the courthouse in downtown Miami. The Court highly recommends conducting hearings and nonjury trials using a virtual platform. There are many advantages and few downsides.

1. Summary of the Testimony

A. Pedro Rivera

Rivera was born in Puerto Rico and lives in San Juan, Puerto Rico. He has a bachelor's degree in education and completed two years of law school but did not finish.

Beginning at age eighteen, he worked a total of fourteen years for Crowley Marine in various capacities. In 1990 he became a consultant and in 2002 he formed ATI.

Originally, the company performed docking and undocking services on the south coast of Puerto Rico, but later ATI purchased more tugs and vessels to do more offshore work. At the beginning, ATI had one tugboat and six employees. Now, the company has 11 tugboats and four barges and fifty-five employees. ATI's boats have done work in New York, on the Mississippi River, Jamaica, Central America, Cuba and elsewhere. Overall, Rivera has been involved in maritime hauling for forty-four years.

All the ATI boats fly under U.S. flags and are subject to the Jones Act.

ATI operates from ports in the south coast of Puerto Rico.

Rivera is, and has always been, the president of ATI. He is involved in the operation as a whole: from procurement of the tugboats through billing.

ATI started hauling aggregates in 2009. Aggregates include sand, stone and cement. ATI also hauls scrap metal, equipment, and debris.

At any one time, at least eight tugboats are in service. Usually there is maintenance and/or dry docking of two to three tugboats at any one time.

In the industry, it is standard for a tugboat to be out of service for repairs for three days per month.

ATI gets its business through word of mouth – referrals from others in the industry. Rivera also travels to all the locations where the tugs and barges are working and meets other people there who have seen the tugs working and may want to engage ATI's services.

A charter agreement is used between someone who needs transportation (the charterer) and someone who has the boats to conduct the transportation.

In this case, the parties operated under an oral agreement. There are times in ATI's experience when a written agreement is utilized but it is common to operate under oral agreements.

There are no dry docks in Puerto Rico, so Rivera needs to send his boats to Cartagena, Colombia for dry docking. Hernando Jose Martinez Bustamante, a pilot in Cartagena, became a friend of Rivera. Martinez recommended Diaz to Rivera and provided Diaz's phone number to Rivera. Rivera called Diaz and made arrangements to meet Diaz at Diaz's home in Weston, Florida. Rivera had emailed Martinez some provisions of a proposed agreement such as price and other terms which Martinez may have shared with Diaz.

Diaz and Rivera met in mid-December 2014 at Diaz's home for several hours. The purpose of the meeting was to get to know each other. Diaz indicated he wanted to meet in-person because he always wants to get a feel for someone with whom he may be doing business. Diaz told Rivera that he had a contract in Trinidad and Tobago to deliver construction materials. Diaz said he wanted to start with one tug and one barge and depending on how the business progressed they would increase the number of vessels. Diaz said he hoped to work together for five years but wanted to start with a deal for two-and-a-half years.

They ended up agreeing to use one tug (the El Morro) and one barge (the Sofia). The barge is a dumb barge, meaning it has no engine, no propulsion. The Sofia is also a deck barge, meaning the cargo is carried above deck. The tug is used to propel the barge.

Diaz and his crew were responsible for loading and unloading the aggregates onto and off the barge. ATI's crew would give guidance as to how to load the barge, but ATI did not have equipment to load and unload the barge.

Rivera sent Diaz hydrostatic tables and documents with the loading capacity of the barge to assist Diaz in understanding how much cargo could be hauled at any one time.

Rivera and Diaz discussed the termination clause. The clause protects both parties. When Rivera enters into a long-term contract, he needs an early termination clause because his equipment is out of service and not available for other short-term clients. In his deposition, Rivera testified at one point that the termination clause was 90 days but at another point said he was not sure if it was for 90 days or 60 days.

When Rivera was first discussing this proposed business transaction with his friend Martinez, Rivera sent an email to Martinez which included many details concerning the proposed transaction but there was no provision for a termination clause; however, the email does state that payment of the equipment is from the day the ships leave the port until the day they return to the port. The email also discussed the use of a BIMCO charter agreement which does include a termination clause.

After meeting with Diaz, Rivera sent him a BIMCO contract which included a 90-day termination clause. Even though Diaz did not sign the BIMCO agreement, Diaz used the same BIMCO contract with his client in Trinidad. Rivera advised Diaz that in Diaz's contract with his client in Trinidad, a 60-day termination clause should be included.

Both parties benefitted from a termination clause and, according to Rivera, Diaz wanted to be protected himself from ATI terminating the agreement.

Diaz and Rivera also discussed invoicing. Rivera wanted to get paid monthly in advance. Diaz asked to be allowed to be billed weekly in advance. Rivera agreed to the one-week-in-advance billing.

Diaz and Rivera discussed and agreed that payment of the fuel and oil was the responsibility of 3HD. ATI provided the tug, barge, crew and lines and paid for insurance. Generally, in these contracts the company who charters the boat, in this case 3HD, pays for fuel and oil.

Port expenses are also always paid by the charterer, not ATI. Diaz agreed to pay the port expenses.

Diaz and Rivera agreed upon a daily charter rate of $6,750 and a mobilization fee of $103,000. The mobilization fee was for the costs of transporting the tug and barge from their present destinations to Trinidad.

Rivera does not recall discussing with Diaz the fact that the boats would be out of service for repairs approximately three days per month, but that fact was included in the BIMCO agreement that Rivera sent Diaz. According to Rivera, the charterer is still responsible for paying the daily rate during those three days. But, Rivera testified that he never charged 3HD for any days that the tug or barge were out of service.

In addition to the three days per month for maintenance, each tug or barge must go through certification twice every five years. Rivera told Diaz that ATI would be responsible for the payment of sending the tug and barge to dry dock during the contract period.

Diaz and Rivera never discussed consequential damages and it is customary in the industry that consequential damages are not available.

Diaz agreed to all the terms Rivera proposed during the meeting – except for payment in advance for one month. And Rivera conceded to Diaz's request to bill for only one week in advance.

The BIMCO is a pre-printed, standard maritime agreement. Rivera completed a BIMCO charter agreement. Rivera can't remember if he prepared the agreement before or after the meeting with Diaz. The BIMCO agreement included all the terms to which he and Diaz had agreed during their in-person meeting. Rivera sent Diaz the contract, but it was not signed by Diaz. Diaz told Rivera that he wanted to first sign a contract with his client.

3HD paid the mobilization fee a few days before the vessels sailed. Upon receipt of payment, the tug and barge headed to Trinidad. The first trip, they were told they were going to take the barge to Guyana. There was not enough fuel in the tug to make it to Guyana and back and Rivera told Diaz there was not enough fuel.

Rivera reviewed all the invoices sent to 3HD for accuracy before they were sent. The invoices were sent by email.

The first couple of months, the invoices were paid on time. After the first couple of months, 3HD fell behind in its payments. ATI continued to work, regardless of the status of the account.

ATI also granted certain credits to 3HD. Some of the credits were for days the tug or barge were out of service. There were 14 days the tug or barge was out of service during the six months of the contract, or 2.4 days per month. One credit was due to a limited cargo capacity for 67 days at $281.45 per day. Even though the barge was able to accommodate a full load, many times when sand or rock are loaded, they are wet, so they weigh more than when dry. By way of example ATI introduced a survey showing that on one load from November 15, 2015, the barge was loaded with 4869 metric tons in Georgetown Harbor which is 69 metric tons over its capacity. By the time the sand and rock are transported by the barge, they have dried and weigh much less. Diaz's client complained that he had not delivered 4800 metric tons because the dry sand and stone weighed less than 4800 metric tons when delivered. Diaz complained to Rivera and so Rivera agreed to reduce his daily rate, even though he was not legally required to do so.

Exactly six months to the day since the inception of the agreement, Diaz wrote to Rivera "I decided not to continue working in the way we've been working. You can have your equipment today." Diaz also wrote that to continue working on a going forward basis Diaz would pay on a per ton basis ($12 per ton) versus a per diem rate. Diaz also proposed that ATI would bear all expenses including fuel, oil, and agency and port in Trinidad.

Diaz later asked ATI to pay monies ($53,000) for customs and immigrations for port charges. ATI had to pay those amounts.

As of today, 3HD owes ATI $749,655.99 for unpaid invoices. This is comprised of $167,000 for unpaid past services and $582,187.50 for the daily charges during the 90-day termination period. There is also an additional $53,000 which ATI paid for the port expenses according to Rivera. Thus, the total amount owed to ATI is $802,655.99.

In August 2015 ATI received invoices from 3HD which were intended to net the debt that was owed. Rivera did not pay attention to the invoices because ATI had not performed any services for 3HD other than providing the tug and barge. Diaz and Rivera had never discussed any arrangement under which 3HD would be sending invoices to ATI.

During the 90 days period following the termination, ATI was able to rent the tug and barge for some of the time, but Rivera does not recall how much money ATI earned during the 90 days.

B. Humberto Diaz

Diaz and his wife are owners of 3HD Supply, LLC. 3HD was created for the sale of transformers from Mexico to the rest of Latin America. Later, the company got into the business of maritime trade. It failed in that business. 3HD had a business proposal to take material from Port of Spain, Trinidad to Tobago. Rivera contacted Diaz over the phone and requested that they meet to speak about the rental of Rivera's equipment.

Diaz and Rivera met at Diaz's house on December 14, 2014. They had a couple of whiskeys and spoke. Rivera made several proposals: some Diaz agreed with and some Diaz did not agree with.

The Trinidadian government wanted $100,000 to allow for operation of any ship which did not have a Trinidad flag.

Rivera said his equipment was in Puerto Rico and to transfer to Trinidad would cost $160,000 which included $56,000 in fuel and $103,000 or $104,000 in other expenses.

They kept drinking whiskey and ended up drinking almost a whole bottle.

The daily charge for the equipment was $6,700 and Rivera wanted payment of one month of fees in advance (approximately $210,000) which was a lot of money to pay someone he did not know.

The barge had a capacity of 4800 metric tons. Diaz's business was to transport aggregates at a rate of $12.75 per metric tons.

According to Diaz, during the meeting, there was no discussion about the length of the contract or about any termination clause. Diaz believes Rivera had wanted to do business in Trinidad for a while and Rivera was looking to use this opportunity as an entry to further business opportunities there. Diaz told Rivera he wanted to get started first on a day-to-day basis and once they saw how things were working out, they would decide whether to continue to do business. It was his and Rivera's hope the business would go on for a long time.

No written contract was provided to Diaz that day.

The tugboats were from the year 1966 and the barges were damaged because of a collision. Rivera never told Diaz about these facts. Because of the collision, water was entering the barge. Diaz's clients told him that he was transporting too much water and not enough aggregates. Diaz was not able to make money transporting the aggregates because he could not use the full capacity of the barge. But Diaz offered to continue working with Rivera and his tug and barge for a different payment arrangement in spite of these complaints.

Diaz told Rivera about the client complaints and Rivera communicated by email with Diaz's client. Rivera also called and spoke to Diaz's client.

According to Diaz, Rivera acknowledged he had lied to Diaz and admitted the capacity was not 4800 but was much less. Rivera offered a credit of 200 tons per load.

During the first trip to Guyana, the equipment broke down in Trinidad and it could not leave on time. The exit was four days after it was scheduled, and the captain took a longer route around the island using more fuel and taking more time because he had never been to Guyana before. And, Rivera had to purchase a Guyana flag for the ship to be able to dock in Guyana. Rivera also sent the wrong coordinates to his captain which caused further delays. Diaz sent an email to Rivera complaining about the condition of the equipment and the inexperience about the crew.

Once the business relationship with ATI ended, Diaz sent an invoice to ATI for $160,000 for the cost of transferring the tug and barge from Puerto Rico to Port of Spain, Trinidad. He paid $103,000 directly to ATI but separately paid $57,000 to the company that fueled the tug in Puerto Rico. Diaz did not produce the invoice for the fuel as an exhibit for the trial and Diaz testified that he did not have the invoice but could get it.

Diaz was under the belief the equipment was in good working condition and the crew was knowledgeable in the area. But during the first trip, Diaz realized the crew did not know the area and the equipment was breaking down a lot. Diaz believes Rivera took advantage of Diaz by making Diaz pay for the transfer of the equipment to Trinidad so Rivera could later use the equipment there.

Diaz claims that Rivera is not owed $53,000 for port charges because Diaz's naval agent paid those charges and Diaz later paid the naval agent. Diaz claims he has documents to prove this payment was made, but he did not produce any such documents during the trial.

Prior to the commencement of their business relationship, Rivera sent the technical specifications and the loading capacity and the certificate of documentation for the barge Sofia and for another barge with the capacity of 5200 metric tons.

When Diaz complained about the loading capacity of the barge, Rivera agreed to reduce the daily fee and made it retroactive to the beginning of the relationship.

2. Findings of Fact

Resolution of the critical factual disputes in this trial necessarily required the Court to evaluate the credibility of Rivera and Diaz. The main factual disputes are whether:

a. The parties agreed to a 30-month term for the agreement;

b. The parties agreed to a 90-day termination clause;

c. The barge provided by ATI was able to hold its stated capacity or whether pre-existing damage to the barge reduced its capacity;

d. ATI's equipment failures were so prevalent they constituted a breach of the agreement;

e. ATI "used" 3HD to pay for the costs of transporting its vessels to Trinidad so ATI could then operate services there for other potential clients;

f. ATI or 3HD paid the $53,000 in port charges following the termination of the agreement.

On all these factual disputes, the Court accepts the testimony of Rivera as more credible and rejects the testimony of Diaz as not credible.

3HD, through its officer Humberto Diaz, first met Pedro Rivero, the president of ATI, in mid-December 2014. Diaz inquired about chartering a tugboat and barge from ATI to transport construction material between Trinidad and Tobago. Diaz and Rivera negotiated the terms of the oral contract at that meeting. Based on the credible testimony and evidence presented, the Court finds the parties agreed to the following material terms:

- The start date for the charter was January 20, 2015.
- 3HD agreed to pay a daily rate of $6,750.
- The charter period was for thirty consecutive months.
- ATI was to provide fully crewed and seaworthy tugboats and barges to transport construction equipment.
- 3HD was to make payments by wire transfer one week in advance for each week of the charter period, beginning before the tugboat and barge were mobilized from their homeport in Puerto Rico.
- 3HD was responsible for the mobilization costs of transporting the vessels from their present destination to Trinidad.
- 3HD was responsible for all fuel, oil, and potable water for the vessels during the charter period.

- ATI was required to maintain insurance for hull and machinery and protection and indemnity during the charter period.
- 3HD was responsible for all port expenses, including customs and taxes.
- Each party was required to provide ninety days' notice in the event they elected to terminate the charter before the end of the thirty-month period.

The Court finds that the parties did not agree that 3HD would be responsible for paying the daily fee for approximately three days per month when the vessels were out of service for anticipated repairs.

In January 2015, the day the charter period began, 3HD paid $103,000 to ATI to mobilize a tug and a barge. During the first two months of the charter, 3HD made timely payments. Thereafter, however, 3HD's payments were either late or short of the full amount due.

In April 2015, Diaz requested an adjustment of the daily rate after complaining about the load capacity of the barge. As a result of the request, he and Rivera negotiated a reduction, from $6,750 to $6,468.75, retroactive to the beginning of the charter, resulting in a credit for payments 3HD had already made. Despite the agreement, 3HD again fell behind in its payments.

On July 16, 2015, Diaz sent Rivera an email, saying 3HD would make a $120,000 payment by wire transfer on July 19. 3HD did not make the payment and, instead, Diaz sent Rivera an email, advising that 3HD was terminating the contract, effective immediately. As an alternative, however, 3HD also proposed continuing the charter, according to a different arrangement, under which 3HD would pay ATI a flat rate of $12 per metric ton but ATI would be responsible for fuel, oil, and potable water. ATI declined the offer and 3HD refused to pay the balance due, citing, among other reasons, breakdowns of the tugboats and barges.

3HD breached the parties' agreement by failing to pay ATI $167,468.49 for amounts due up until July 20, 2015, the date of 3HD's termination of the contract. 3HD also failed to pay port expenses in Trinidad totaling $53,000. Finally, 3HD failed to provide ninety days' notice before terminating the charter, thereby owing ATI an additional $582,187.50, based on the daily charter rate of $6,468.75.

3. Conclusions of Law

It is undisputed that the parties entered into an oral maritime contract. Oral charter agreements are enforceable contracts under maritime law. *See Kossick v. United Fruit Co.*, 365 U.S. 731, 734 (1961). In a claim for breach of contract, admiralty law provides that "a plaintiff must prove (1) the terms of a maritime contract; (2) that the contract was breached; and (3) the reasonable value of the purported damages." *Am. Marine Tech., Inc. v. M/Y Alchemist*, 526 F. Supp. 3d 1236, 1247 (S.D. Fla. 2021) (Singhal, J.), *aff'd sub nom. Am. Marine Tech, Inc. v. World Group Yachting, Inc.*, 21-11336, 2021 WL 4785888 (11th Cir. Oct. 14, 2021) (quoting *Sweet Pea Marine, Ltd. v. APJ Marine, Inc.*, 411 F.3d 1242, 1249 (11th Cir. 2005).

ATI has met its burden of establishing, by a preponderance of the evidence, that the parties agreed to the following relevant terms:

- 3HD agreed to pay $6,468.75 per day, starting in April 2015, after the rate was renegotiated;
- 3HD agreed to pay port expenses in Trinidad and Tobago, including customs and taxes;
- 3HD was required to provide ninety days' notice in the event it elected to terminate the contract before the end of the thirty-month charter period.

ATI has also established that 3HD breached the terms of the contract by failing to pay the daily rate for past invoices; that 3HD did not pay the required port expenses; and that 3HD did not provide ninety days' notice before terminating the charter. Based on the evidence presented, the Court finds that 3HD is responsible for the following in damages: $167,468.49 for unpaid past services; $582,187.50 for the daily charges during the 90-day termination period; and $53,000 which ATI paid for the port expenses. Thus, the total amount owed to ATI is $802,655.99.

The Court specifically finds that 3HD has failed to establish the following: ATI breached the agreement, 3HD paid the $53,000 in port charges, ATI "used" 3HD to pay for the transport of ATI's vessels to Trinidad to be used for other, future clients, and that ATI's damages should be mitigated.[2]

Accordingly, the Court awards judgment in ATI's favor on its breach-of-contract claim and against 3HD in the amount of $802,655.99, plus interest at the legal rate. The Clerk is directed to **close this case** and any pending motions are **denied as moot**.

Done and ordered at Miami, Florida on December 14, 2021.

Robert N. Scola, Jr.
United States District Judge

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[2] Although Rivera admitted on cross-examination that ATI had rented its vessels to other clients during the 90-day termination period, 3HD never established by testimony or documentary evidence either how many days they were rented or any monetary value of those rentals. Thus, it has failed to establish an amount of mitigation to offset the damages from breach of the termination clause.