

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-3555  
Summary Calendar

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ATLAS SOUTHERN CORPORATION,

Plaintiff-Appellant,  
Cross-Appellee,

versus

HOUSTON MARINE SERVICES, INC.,

Defendant-Appellee,  
Cross-Appellant.

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Appeals from the United States District Court for  
the Eastern District of Louisiana  
(CA-92-3350-H-1)

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(June 24, 1994)

Before REAVLEY, DAVIS and DeMOSS, Circuit Judges.

PER CURIAM:\*

**BACKGROUND**

Houston Marine Services, Inc. ("Houston") chartered three barges from Stranco Marine Service ("Stranco"). Atlas Southern Corporation ("Atlas") held mortgages on the barges and reclaimed the vessels from Stranco for non-payment of the purchase price. Atlas subsequently brought this action against Houston, as an

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\*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

assignee of Stranco, for damages to the barges that arose out of the charter period.

The barges were operated by Houston largely without incident for slightly over two years. Houston, however, discovered internal structural problems early in the charter period and notified Stranco. Houston paid approximately \$18,000 to have the defects cured, because Stranco allegedly had indicated that it could not afford the repairs.<sup>1</sup> In February, 1992, Houston extended the charter for an additional six months, but informed Stranco in May that it intended to terminate the charter. The parties agreed that the barges would be presented for an off-charter survey to be conducted by Sabine surveyors, the same party that had conducted the on-charter survey. Atlas became involved at this time and briefly attended the survey because Stranco had fallen behind on the barge payments.

Although Houston thought that the charter had been effectively terminated when the barges were tendered after the off-charter survey, Stranco indicated in a letter on July 2 that it considered the charter ongoing because it had not been properly terminated. Stranco's representative, Randy Jett, stated in the letter that "you have failed to return the vessels in the same order and condition described in the survey reports of Sabine

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<sup>1</sup> On June 22, Houston wrote to Stranco to confirm that it had been discussed during the charter period that Houston would pay for repairs beyond routine since Stranco was financially unable to do so, and that Houston intended to take an offset of such expenses as previously agreed. Stranco later responded that it had never agreed to such an arrangement.

Surveyors, Inc. . . . reasonable wear and tear and ordinary depreciation excepted. You attempted to tender the vessels back to me in a worse condition than that described in survey, not only for lack of repairs, but also literally unusable for lack of full and sufficient coast guard certification on all barges." Jett concluded that "[t]he charter continues at the contract rate of \$600.00 per day."

Houston's representative, Ed Grimm, responded by requesting that Sabine Surveyors, who had conducted the mutually agreed upon on-charter and off-charter surveys, issue a letter delineating which exceptions noted in the off-charter survey constituted reasonable wear and tear. Sabine then issued a letter on July 9, stating that "[t]he barges are in the same general condition as noted at On Charter." The letter concluded that "[t]he majority of conditions noted in our report are considered to have resulted from normal wear and tear." Limited repairs were finally performed on the barges at Houston's behest, but were not successfully completed because of alleged pre-existing damage to the barges which needed to be fixed before other repairs could be effectuated. The barges were finally removed from the Atlas fleet since the repairs were never completed; Atlas made its own list of repairs and improvements in October and all repairs were completed in 1993.

A non-jury trial on the merits ensued, and the following judgment was entered: Houston was ordered to pay charter-for-hire payments of \$600 per day and for the period of June 1, 1992 through August 14, 1992, and was ordered to pay \$7,500 for damage to the

barges which the court found was not the product of wear and tear; Atlas was ordered to pay \$18,870.27 dollars to reimburse Houston for repairs performed on latent defects in two of the barges. Atlas appeals and Houston cross-appeals.

#### **DISCUSSION**

As we read the record and the court's findings, the barges were returned in substantially the same condition as when first chartered. Repairs, however, were needed. Some were minor, and the court charged Houston \$7,500 for those. The other repairs were not shown by Atlas to have been necessitated by the negligence or responsibility of Houston. While the greater problems prolonged the period for recertification, they were not explained by Houston's use. We see no evidence to support the \$7,500 award to Atlas and modify that amount to \$5,000. Otherwise, we affirm.

As to the latent defects, the court granted an offset to Houston for \$18,870 dollars for damages on two of the barges (which Houston had previously repaired) based on the testimony of Houston's representative, Grimm, who stated that the damages resulted from structural defects. Atlas complains that Houston did not have the authority to do the repairs without written permission pursuant to the charter contract, but the district court found that Stranco's representative, Jett, implicitly authorized the repairs. Jett was told that repairs were being performed and never insisted that permission to perform the repairs be in writing. We agree with the district court that Stranco waived the requirement of written permission. We further do not find error in the judge's

conclusion that the evidence sufficiently demonstrated these damages were latent and due to "the age of the barges."

The judgment is modified to substitute the amount of \$5,000 for the \$7,500 awarded to Atlas. Otherwise, the judgment is affirmed.

AFFIRMED AS MODIFIED.