FSM SUPREME COURT TRIAL DIVISION

ADAMS BROTHERS CORPORATION, Plaintiff, vs. SS THORFINN, her engines, tackle, machinery, equipment, appurtenances, etc., *In Rem* Defendant, SEAWARD HOLDINGS MICRONESIA, INC., LANCE HIGGS, and ASSOCIATED MARINE INSURERS AGENTS PTY., LTD., *In Personam* Defendants.	)	CIVIL ACTION NO. 2010-016

ORDER GRANTING SUMMARY JUDGMENT IN PART

Dennis K. Yamase
Associate Justice

Hearing: January 29, 2013
Decided: April 25, 2013

APPEARANCES:

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HEADNOTES

Civil Procedure – Summary Judgment

A trial court may grant summary judgment, viewing facts and inferences drawn from them in the light most favorable to the nonmoving party, only if the moving party shows that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. Once the moving party presents a prima facie case of entitlement to summary judgment, the burden shifts to the non-moving party to produce some competent evidence showing that a genuine issue of material fact remains for resolution. Adams Bros. Corp. v. SS Thorfinn, 19 FSM R. 1, 8 (Pon. 2013).

Admiralty – Salvage

The FSM Supreme Court has exclusive jurisdiction over admiralty and maritime matters, which include claims relating to salvage, claims for towage, and ancillary matters of admiralty and maritime jurisdiction. Adams Bros. Corp. v. SS Thorfinn, 19 FSM R. 1, 8 (Pon. 2013).

Admiralty – Salvage

A contract to assist in salvage of a vessel is a salvage contract. More than one party can simultaneously engage in the salvage of the same vessel. Adams Bros. Corp. v. SS Thorfinn, 19 FSM R. 1, 8 (Pon. 2013).

Admiralty – Salvage

In contract salvage, the salvor acts to save maritime property after entering into an agreement to use "best efforts" to do so. Adams Bros. Corp. v. SS Thorfinn, 19 FSM R. 1, 8 (Pon. 2013).

Admiralty – Salvage

In a salvage contract case, the FSM statute concerning salvage contracts is applicable regardless of whether any party pled the statute because statutory FSM salvage contract law applies to all salvage contracts performed in the FSM. Adams Bros. Corp. v. SS Thorfinn, 19 FSM R. 1, 8 (Pon. 2013).

Admiralty

With admiralty jurisdiction comes the application of substantive admiralty law. Adams Bros. Corp. v. SS Thorfinn, 19 FSM R. 1, 8 (Pon. 2013).

Admiralty – Salvage; Civil Procedure – Pleadings; Statutes

While foreign law is a fact which must be pled and proven, national (or state law) does not need to be expressly pled since the court may take judicial notice of any national (or state) law. Thus, the FSM salvage contract statute's application cannot be avoided by trying to characterize a salvage contract as some other kind of contract. Adams Bros. Corp. v. SS Thorfinn, 19 FSM R. 1, 8 (Pon. 2013).

Contracts – Third-Party Beneficiary

There is no hidden third-party beneficiary contract between an insurer and its insured for the benefit of a salvor when there is a contract between the salvor and the insurer in plain view. No discovery is needed to determine its existence and terms. Adams Bros. Corp. v. SS Thorfinn, 19 FSM R. 1, 9 (Pon. 2013).

Admiralty – Salvage; Contracts – Formation

A contract was formed by a salvor's June 16, 2007 e-mail offer and the insurer's June 19, 2007 letter acceptance with offer of additional term of an invoice, with the salvor's acceptance of the additional term by performance. Adams Bros. Corp. v. SS Thorfinn, 19 FSM R. 1, 9 (Pon. 2013).

Admiralty – Salvage; Contracts – Necessity of Writing

There is no statute of frauds in the FSM Code. The relevant statutes do not require salvage contracts, or maritime contracts of any kind, to be in writing in order to be enforceable. Adams Bros. Corp. v. SS Thorfinn, 19 FSM R. 1, 9 (Pon. 2013).

Admiralty – Salvage; Contracts – Necessity of Writing

It is generally true that salvage contracts may be oral. Adams Bros. Corp. v. SS Thorfinn, 19 FSM R. 1, 9 (Pon. 2013).

Contracts – Necessity of Writing

The Pohnpei statute of frauds covers a contract to charge any person upon any special promise to answer for the debt, default, or misdoing of another. Adams Bros. Corp. v. SS Thorfinn, 19 FSM R. 1, 9 n.3 (Pon. 2013).

Contracts – Necessity of Writing

Under a statute of frauds, writings are not required to make a contract, but to provide evidence that a contract has been made. A writing meets the statute of frauds if it contains the parties' names, terms and conditions of the contract, a reasonable description of the subject of the contract and is signed by the party to be charged. The writing need not state the contract's particulars so long as its substance or essential terms are stated, and it need not be a single document, but may be pieced together from separate writings. Adams Bros. Corp. v. SS Thorfinn, 19 FSM R. 1, 9 (Pon. 2013).

Admiralty – Salvage; Contracts

When the salvage contract between the salvor and the vessel owner did not require that an invoice be presented in order that the salvor be paid, but the contract between the salvor and the insurer, the party that everyone expected would make the actual payment, did require that an invoice be presented, payment was due after an invoice was presented. Adams Bros. Corp. v. SS Thorfinn, 19 FSM R. 1, 10 (Pon. 2013).

Contracts – Conditions

Contractual terms that provide that payment is due upon the occurrence of a stated event are generally not considered to be conditions indicating a forfeiture or a material breach of contract but are merely a means of measuring time, and, if time is not of the essence of the contract, then the payment is due after a reasonable time, and what constitutes a reasonable time depends on the attendant circumstances in each case and is often based on factual determinations. Adams Bros. Corp. v. SS Thorfinn, 19 FSM R. 1, 10 (Pon. 2013).

Contracts – Breach

The standard of materiality for the purposes of deciding whether a contract was breached is necessarily imprecise and flexible. A breach is material when it relates to a matter of vital importance, or goes to the contract's essence. Adams Bros. Corp. v. SS Thorfinn, 19 FSM R. 1, 10 (Pon. 2013).

Admiralty – Salvage; Contracts – Breach

The salvor's failure to obtain an oil/water separator and to use it to process the slops was a material breach of the salvage contract when the acquisition of an oil/water separator and its use to separate the oil from the slops and return it to the vessel was a matter of vital importance the went to the salvage contract's essence; when an essential element of any modern salvage contract is the protection of the marine environment; and when the largest component of the contract price was for processing the slops. Adams Bros. Corp. v. SS Thorfinn, 19 FSM R. 1, 10 (Pon. 2013).

Admiralty – Salvage

An essential element of any modern salvage contract is not only the rescue of maritime property in peril but also the protection of the marine environment. Adams Bros. Corp. v. SS Thorfinn, 19 FSM R. 1, 10 (Pon. 2013).

Admiralty – Salvage; Contracts

A salvage contract is, by its terms, divisible when the parties have apportioned the entire $325,000 contract price into various components and activities within the scope of work, each assigned a specific part of the overall contract price. Adams Bros. Corp. v. SS Thorfinn, 19 FSM R. 1, 11 (Pon. 2013).

Admiralty – Salvage; Contracts; Contracts – Breach

When the only component of a salvage contract that the salvor did not satisfactorily complete was the slops processing, the salvor's material breach of failing to obtain and use an oil/water separator does not excuse performance – payment – for the rest of the salvage contract components. Nor does it excuse performance (payment) for the work that the salvor was asked to do, and which it agreed to do, that was outside the salvage contract's scope of work, but it does excuse payment for the storage of the slops since that storage would have been unnecessary if the salvor had obtained and used an oil/water separator. Adams Bros. Corp. v. SS Thorfinn, 19 FSM R. 1, 11 (Pon. 2013).

Admiralty – Salvage; Statutes of Limitation

The applicable statute of limitations for a salvage contract bars any recovery after the two-year period statutory period. Adams Bros. Corp. v. SS Thorfinn, 19 FSM R. 1, 11 (Pon. 2013).

Admiralty – Salvage; Statutes of Limitation – Accrual

A cause of action on a salvage contract accrues and the statute of limitations period starts to run on the day on which the salvage operations are terminated or the vessel and any part of the cargo is delivered to a safe port. Adams Bros. Corp. v. SS Thorfinn, 19 FSM R. 1, 11 (Pon. 2013).

Admiralty – Salvage; Statutes of Limitation

The two-year statute of limitations in 19 F.S.M.C. 928 applies only to salvage contracts and does not apply to a contract between a salvor and the insurer that is not a salvage contract but is instead a contract of guaranty or a surety or to answer for the liability of another and which may be subject to the six-year statute of limitations for contracts in general. Adams Bros. Corp. v. SS Thorfinn, 19 FSM R. 1, 11 (Pon. 2013).

Contracts; Remedies – Quantum Meruit

As a matter of law, the presence of an express written contract, which clearly sets forth the parties' obligations, precludes a party from bringing a claim under quantum meruit. Adams Bros. Corp. v. SS Thorfinn, 19 FSM R. 1, 12 (Pon. 2013).

Admiralty – Salvage; Civil Procedure – Summary Judgment – Grounds – Particular Cases; Remedies – Quantum Meruit

When there are two express written contracts in which the parties' obligations are clearly set out: 1) the salvage contract between the vessel owner and the salvor and 2) the contract between insurer and the salvor that the insurer would pay the salvor the amounts due under the salvage contract on the presentation of an invoice and when there are additional, probably oral contracts for the $26,607.50 preparation work the salvor agreed to do that was outside the salvage contract's scope of work, the defendants are, with the exception of the $26,607.50 preparation work, entitled to summary judgment on the salvor's quantum meruit claims. Adams Bros. Corp. v. SS Thorfinn, 19 FSM R. 1, 12 (Pon. 2013).

Civil Procedure – Discovery

The discovery rules encourage the parties to conduct discovery with a minimum of court involvement or intervention. Adams Bros. Corp. v. SS Thorfinn, 19 FSM R. 1, 12 (Pon. 2013).

Civil Procedure – Discovery

Inadmissible evidence is still discoverable if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Adams Bros. Corp. v. SS Thorfinn, 19 FSM R. 1, 12 (Pon. 2013).

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COURT'S OPINION

DENNIS K. YAMASE, Associate Justice:

On January 29, 2013, this came before the court for hearing 1) the defendants' Motion for Summary Judgment with memorandum of points and authorities and with supporting exhibits and affidavits of Fredrick Ramp and Noel Slapp, filed October 2, 2012; 2) the defendants' Motion for Protective Order with memorandum of points and authorities with supporting affidavit of Richard L. Johnson and exhibit, filed October 2, 2012; 3) the plaintiff's Motion to Compel Answers to Interrogatories and Compliance with Discovery; Opposition to Motion for Protective Order; Opposition to Motion for Summary Judgment; Evidentiary Objections to Affidavits with supporting affidavit of Larry Adams, filed October 26, 2012; and 4) the defendants' Reply in Support of Motion for Summary Judgment and Protective Order; Opposition to Motion to Compel Answers to Interrogatories and Compliance with Discovery, filed November 13, 2012.

The summary judgment motion is granted in part. The defendants' motion for a protective order and the plaintiff's motion to compel are granted and denied respectively insofar as they relate to discovery in relation to a purported third-party beneficiary contract. The reasons follow.

I. BACKGROUND

The S.S. *Thorfinn* came to Pohnpei to load 80,000 pounds of waste oil into its fuel tanks. On June 8, 2007, while trying to depart Pohnpei, the S.S. *Thorfinn* ran aground on a reef on the west side of the shipping channel. On June 19, 2007, Seaward Holdings Micronesia, Inc. ("Seaward"), the company that owns the S.S. *Thorfinn*, contracted with the plaintiff, the Adams Brothers Corporation ("Adams"), to pump the water in the engine room and the hull into the ocean after removing the oil from the water; to provide temporary storage on a barge for the fuel and slops[1] removed from the *Thorfinn*; to process the slops through an oil/water separator; to refloat the *Thorfinn*; and to tow it to a safe port in Pohnpei. The contract also included a provision that Adams was to provide all labor and equipment to accomplish these tasks. The contract further required that the work was to be done in accordance with Pohnpei Environmental Protection Agency directives.

Adams was to be paid $325,000 for accomplishing these tasks with the first $100,000 to be paid within fourteen days of the contract's execution and the remaining $225,000 to be paid within fourteen days of the contract's completion. The $325,00 contract price was broken down as follows: $40,000 for mobilization; $50,000 for patching the *Thorfinn* and floating it off the reef; $25,000 for towing the *Thorfinn* alongside a safe berth in Pohnpei; $15,000 for pumping the stored fuel back into the *Thorfinn*; $170,000 for completion of slops disposal; and $25,000 for demobilization. Adams was also to be paid $2,000 a day for the use of its barge to store fuel if any fuel was still stored there after the first 90 days had passed. Change orders, work not included in the contract, were to be paid as negotiated separately.

Adams was concerned over Seaward's ability to pay since the *Thorfinn* was its major asset. Seaward did not have a P&I ("protection and indemnity") policy that would insure against third-party liability. Seaward had a hull and machinery insurance policy with Associated Marine Insurers Agents Pty., Ltd. ("Associated Marine") under which the insurer's obligation was to reimburse its insured, Seaward, for costs that were covered by the policy. In a June 16, 2007 e-mail to Fredrick Ramp, Seaward's attorney, Adams required that Seaward's insurance company be a party to the contract.

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[1] Petroleum-contaminated water is called slops.

Adams wanted to be paid directly by Associated Marine rather than risk that Seaward would be unable to pay. On June 19, 2007, Associated Marine's attorney, Fredrick Ramp, informed Adams that Associated Marine had confirmed that Adams "may invoice Associated Marine directly for payments under the salvage contract and Associated Marine has agreed to make payments directly to Adams Brothers Corporation for costs and expenses covered by the Thorfinn policy." Letter from Fredrick L. Ramp to Larry Adams (June 19, 2007). Adams then executed the contract with Seaward.

When Adams demanded the first $100,000 payment in early July, Associated Marine asked for an invoice. Adams did not provide one because, Adams claimed, the contract with Seaward did not require an invoice. No payment was made then.

On July 15, 2007, the *Thorfinn* was floated off the reef and towed to a safe location alongside a pier in Pohnpei harbor. On July 21, 2007, the *Thorfinn* was later towed to another location to be made ready for a tow to the Philippines where it would be dry-docked for repairs. Adams continued to patch the *Thorfinn* and help keep it afloat. On August 11, 2007, Adams billed $26,607.50 for providing these preparation services which were beyond the scope of work in the salvage contract. After further work was completed, the oil and slops that had been removed from the *Thorfinn* were pumped into her tanks on August 13-14, 2007. Since the slops had not been run through an oil/water separator (Adams had not acquired such a machine), the *Thorfinn*'s tanks were filled and there were plenty of slops left over that remained in storage, on the Adams barge and in storage facilities on shore. On August 16, 2007, Adams submitted two invoices, one for the $100,000 initial payment, and a second for the $225,000 final payment. On August 18, 2007, the *Thorfinn* left Pohnpei under tow for the dry-dock in the Philippines. The $100,000 invoice was paid on August 31, 2007. Neither the $225,000 invoice nor the $26,607.50 bill was paid.

On July 8, 2010, Adams Brothers Corporation filed suit against the S.S. *Thorfinn*; Seaward Holdings Micronesia, Inc., the *Thorfinn*'s owner; Lance Higgs, the *Thorfinn*'s master and the owner of Seaward Holdings Micronesia, Inc.; and Associated Marine Insurers Agents Pty., Ltd., the *Thorfinn*'s insurer, alleging four causes of action. Adams alleges that the defendants breached the contract by not paying the initial $100,000 installment within fourteen days of the contract's execution; by not paying Adams the $26,607.50 billed for the costs of services outside the main contract's scope; by not paying the $225,000 second installment payment; and by not paying $614,625 for storage of the waste oil in on-shore tanks from August 1, 2007 through July 8, 2008, and on the Adams barge from September 18, 2007 through July 8, 2008,[2] and for six trips to deliver the waste oil to the repaired *Thorfinn* when it returned to Pohnpei. Adams further alleges that it was a third-party beneficiary of a contract in which Associated Marine undertook to pay Adams on behalf of Seaward and Higgs for the benefit of the *Thorfinn*. And Adams alleges that the defendants are liable in quantum meruit because Adams extended services as a salvor of the *Thorfinn* and that $866,232.50 in benefits were conferred on the *Thorfinn* preventing it from becoming a total loss and from incurring further liability for environmental damages and for blocking access by other vessels in and out of Pohnpei's commercial port. And Adams claims a maritime lien on the *Thorfinn* for the above claims and demands judgment for $1,000,000.

The defendants' joint answer denies liability since, if Adams had performed as contracted, no fuel would have been left in Pohnpei to be stored there after the *Thorfinn* departed for the dry dock because Adams breached the contract by not obtaining an oil/water separator despite the defendants keeping $225,000 in an account in Pohnpei for nearly a year in order to try to induce Adams to complete the contract. Associated Marine denies that it had any contractual obligations to Adams. The

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[2] By July 2008, the oil and water had separated naturally.

defendants raise the affirmative defenses of the two-year statute of limitations for salvage contract claims and argue that regardless of whether the time period was measured from when the *Thorfinn* was delivered to a safe port on July 15, 2007, or from when salvage operations ended on August 16, 2007, this suit was filed too late. They also assert that the suit is time-barred because the contract itself requires that any suit on the contract had to be filed within one year of Adams making a claim under the contract and that that occurred on August 15, 2007 when Adams submitted the $225,000 invoice for the contract price balance. Higgs and Associated Marine assert that since neither of them were parties to the salvage contract, judgment ought to be entered in their favor on all claims. The defendants further deny liability for all storage charges because storage was needed and storage charges incurred only because Adams breached the contract by not obtaining and using an oil/water separator which would have removed the water from the slops and all the remaining oil would then have fit into the *Thorfinn*'s fuel tanks and because the salvage contract provided payment only for the storage of oil, not of slops. They also raise the affirmative defenses of laches, estoppel, and waiver; they claim that Adams failed to mitigate his damages; they raise the equitable defense of unclean hands; and, the defendants other than Seaward assert the affirmative defense of statute of frauds.

II. Parties' Motions

The defendants jointly move for summary judgment. They seek summary judgment on the quantum meruit cause of action because there is an express contract between the parties. They also move for summary judgment on the third-party beneficiary claim because Adams is not the beneficiary of any contract between any of the defendants since the only contract between any of the defendants is the hull and machinery marine insurance policy issued by Associated Marine to Seaward. The defendants move for summary judgment on Adams's breach of contract claim because Adams is precluded from recovering under the salvage contract since Adams materially breached that contract by failing to process the slops through an oil/water separator and thus did not return all of the fuel to the *Thorfinn* before it left Pohnpei for a dry dock in the Philippines. They move for summary judgment that the late payment of the $100,000 was not a breach of contract excusing Adams from processing the slops, especially since the defendants did not waive the requirement that an oil/water separator be used on the slops. The defendants also contend that Adams cannot seek damages because it was more difficult for Adams to complete the contract than Adams contemplated and that Adams's failure to process the slops through an oil/water separator and return all the fuel to the *Thorfinn* before it departed for dry dock was a material breach that, as a matter of law, excused further performance by the defendants. The defendants conclude that since they are entitled to summary judgment on each cause of action, summary judgment must be entered in their favor on the whole case.

The defendants also move for a protective order barring any further discovery while its summary judgment motion is pending since the motion is potentially dispositive and further discovery would be wasteful and unnecessarily burdensome and costly and because Adams's discovery requests are overbroad and burdensome and ask for unnecessary material not useful to oppose the defendants' summary judgment motion. The defendants contend that even partial success on their motion would reduce the amount and volume of discovery needed.

Adams moves to compel discovery. Adams asks the court to rule that it may take depositions of the persons involved in negotiating the contract and the *Thorfinn* crew members involved in preparing the *Thorfinn* for towing to the Philippines. Adams contends that the defendants improperly responded to many of its discovery requests by stating that extrinsic evidence was inadmissible to vary, alter, or to add to the terms of an integrated written instrument. Adams asks that the court order that all of what it calls its contention interrogatories propounded to date be answered fully and without objection.

III. Summary Judgment Standard

A trial court may grant summary judgment, viewing facts and inferences drawn from them in the light most favorable to the nonmoving party, only if the moving party shows that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. Congress v. Pacific Food & Servs., Inc., 17 FSM Intrm. 542, 545 (App. 2011); Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 427, 434-35 (App. 2011); Weno v. Stinnett, 9 FSM Intrm. 200, 206 (App. 1999); Nahnken of Nett v. United States, 7 FSM Intrm. 581, 586 (App. 1996). Once the party moving for summary judgment presents a prima facie case of entitlement to summary judgment, the burden shifts to the non-moving party to produce some competent evidence showing that a genuine issue of material fact remains for resolution. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 570 (Pon. 2011); Phillip v. Marianas Ins. Co., 12 FSM Intrm. 301, 308 (Pon. 2004); Ambros & Co. v. Board of Trustees, 12 FSM Intrm. 206, 212 (Pon. 2003); Fredrick v. Smith, 12 FSM Intrm. 150, 151-52 (Pon. 2003); Kyowa Shipping Co. v. Wade, 7 FSM Intrm. 93, 95 (Pon. 1995); Urban v. Salvador, 7 FSM Intrm. 29, 30 (Pon. 1995).; Alik v. Kosrae Hotel Corp., 5 FSM Intrm. 294, 295 (Kos. 1992); Federated Shipping Co. v. Ponape Transfer & Storage Co., 4 FSM Intrm. 3, 11 (Pon. 1989).

IV. Analysis

The court has jurisdiction over this case because the FSM Supreme Court has exclusive jurisdiction over admiralty and maritime matters, FSM Const. art. XI, § 6(a), which include claims relating to salvage, 19 F.S.M.C. 1303(4), claims for towage, 19 F.S.M.C. 1303(3), and ancillary matters of admiralty and maritime jurisdiction, 19 F.S.M.C. 1304(3).

A. *Nature of Contract Between Seaward and Adams*

Although the contract between Seaward and Adams describes itself as a salvage contract, Adams now contends that it was not a salvage contract and that Adams was not a salvor but that Adams was merely contracted to assist in salvage of the *Thorfinn* and did not contract to salvage the *Thorfinn* or to be the salvor of the *Thorfinn* since Adams was not a full-service salvage company. Nevertheless, the *Thorfinn* contract is a salvage contract. More than one party can simultaneously engage in the salvage of the same vessel. *Cf.* 19 F.S.M.C. 921 (apportionment of reward among salvors). Thus, even if Adams was not the principal salvor of the *Thorfinn*, its contract with Seaward was a salvage contract. "[I]n contract salvage, the salvor acts to save maritime property after entering into an agreement to use 'best efforts' to do so." 2 Thomas J. Schoenbaum, Admiralty and Maritime Law § 16-6, at 333 (2d ed. 1994).

As such, the FSM statute concerning salvage contracts, 19 F.S.M.C. 913 *et seq.*, is applicable to this case regardless of whether any party pled the statute – statutory FSM salvage contract law applies to all salvage contracts performed in the FSM. This is because it is well established that "with admiralty jurisdiction comes the application of substantive admiralty law." Floyd v. Lykes Bros. S.S. Co., 844 F.2d 1044, 1046 (3d Cir. 1988) (quoting East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 864, 106 S. Ct. 2295, 2298, 90 L. Ed. 2d 865, 873 (1986)). While foreign law is a fact which must be pled and proven, FSM Civ. R. 44.1, national (or state law) does not need to be expressly pled since the court may take judicial notice of any national (or state) law. Berman v. College of Micronesia-FSM, 15 FSM Intrm. 582, 595 (App. 2008). The statute's application cannot be avoided by trying to characterize a salvage contract as some other kind of contract.

B. *Alleged Third-Party Beneficiary Contract*

Adams contends that a contract of which it is an intended third-party beneficiary must exist

between Associated Marine and Seaward which the defendants have not disclosed in discovery. As evidence of this alleged contract Adams points to a communication by Noel Slapp, Associated Marine's marine surveyor, to his employer that Adams had earned its mobilization compensation and was therefore entitled to its initial $100,000 payment.

There is no third-party beneficiary contract hidden from view by the defendants' failure to provide discovery. There is a contract between Adams and Associated Marine in plain view. No discovery is needed to determine its existence and terms. Both its existence and material terms are apparent from the June 16, 2007 e-mail from Larry Adams to Fredrick Ramp (offer) and from Fredrick Ramp's June 19, 2007 letter to Larry Adams (acceptance with offer of additional term of an invoice) and Adams' acceptance of the additional term by performance.

Accordingly, the defendants are entitled to summary judgment on Adams' third-party beneficiary claim. That, however, does not relieve Associated Marine of all liability to Adams. Adams has alleged facts that show there is, as just described, a contract between Adams and Associated Marine on which Associated Marine may be directly liable to Adams.

The defendants assert that the affirmative defense of statute of frauds bars any contract claim against any defendant except Seaward. There is no statute of frauds in the FSM Code. The relevant statutes do not require salvage contracts, or maritime contracts of any kind, to be in writing in order to be enforceable. It is generally true that salvage contracts may be oral. *See, e.g.*, Flagship Marine Servs., Inc. v. Belcher Towing Co., 966 F.2d 602, 605-06 (11th Cir. 1992); Clifford v. M/V Islander, 846 F.2d 111, 112 (1st Cir. 1988). Nevertheless, if the court were to apply the Pohnpei state law statute of frauds, 58 Pon. C. §§1-102, 1-103, that defense would still not prevail.[3] Under a statute of frauds, writings are not required to make a contract, but to provide evidence that a contract has been made. Pohnpei v. Ponape Constr. Co., 7 FSM Intrm. 613, 620 (App. 1996). A writing meets the statute of frauds if it contains the parties' names, terms and conditions of the contract, a reasonable description of the subject of the contract and is signed by the party to be charged. *Id.* The June 19, 2007 letter from Fredrick Ramp and signed by him as Associated Marine's attorney (and thus its agent) to Larry Adams would meet these requirements. Also, the writing need not state the contract's particulars so long as its substance or essential terms are stated, and it need not be a single document, but may be pieced together from separate writings. *Id.* Thus a statute of frauds would not bar enforcement of the contract between Adams and Associated Marine.

Thus, while the salvage contract between Adams and Seaward did not require that an invoice be presented in order that Adams be paid, the contract between Adams and Associated Marine, the party that everyone expected would make the actual payments to Adams, did require that Adams present an invoice. The court finds Adams' behavior unfathomable. It is inexplicable that Adams would resist providing Associated Marine an invoice for payment when payment on invoices is a common business practice and when Adams has been engaged in reputable businesses for years. It is particularly inexplicable since, when Adams finally did submit an invoice for the $100,000, it came in the form of a simple three-sentence demand letter.

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[3] The *Thorfinn* salvage contract does not fit in any of the seven types of contracts covered by the Pohnpei statute of frauds in 58 Pon. C. § 1-103. Adams' contract with Associated Marine could be subject to 58 Pon. C. § 1-103(2) ("To charge any person upon any special promise to answer for the debt, default or misdoing of another").

C. *Was the Late $100,000 Initial Payment a Breach Excusing Performance?*

The $100,000 was paid fifteen days after the invoice's receipt. If the $100,000 invoice had been submitted earlier, the court sees no reason why the $100,000 would not have been paid earlier, and if the invoice had been submitted promptly after the salvage contract's June 19, 2007 execution, there is no reason not to believe that the $100,000 would have been paid in early July. The later (August 31, 2007) payment was due solely to Adams' refusal to submit an invoice earlier. Adams' own failure cannot excuse it from performing the contract. Adams, in fact, did continue to perform throughout July and into August 2007.

Even if an invoice were not required, the failure to pay by July 3, 2007, fourteen days after the contract's execution, would not be a material breach. Contractual terms that provide that payment is due upon the occurrence of a stated event are generally not considered to be conditions indicating a forfeiture or a material breach of contract but are merely a means of measuring time, and, if time is not of the essence of the contract, then the payment is due after a reasonable time, and what constitutes a reasonable time depends on the attendant circumstances in each case and is often based on factual determinations. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 587-88 (Pon. 2011). Given Adams' lengthy delay in submitting an invoice, the court must conclude that payment on August 31, 2013, was not unreasonable.

Accordingly, the August 31, 2007 payment of $100,000 did not excuse Adams from performing the contract.

D. *Was the Failure to Use an Oil/Water Separator a Material Breach?*

The defendants contend that Adams materially breached the contract by not acquiring an oil/water separator to process the slops and that this material breach excused them from any further performance – excused them from making any further payments on the contract. The defendants contend that the salvage contract was not divisible – that Adams was not owed anything for partial performance.

The court concludes that Adams' failure to obtain an oil/water separator and to use it to process the slops was a material breach of the salvage contract. Not every departure from a contract's literal terms is sufficient to be deemed a material breach of a contract requirement, thereby allowing the non-breaching party to cease its performance and seek appropriate remedy. GMP Hawaii, Inc., 17 FSM Intrm. at 570. The standard of materiality for the purposes of deciding whether a contract was breached is necessarily imprecise and flexible. *Id.* (citing RESTATEMENT (SECOND) CONTRACTS § 241 cmt. a (1981)). A breach is material when it relates to a matter of vital importance, or goes to the contract's essence. GMP Hawaii, Inc., 17 FSM Intrm. at 570. Whether a breach is material may be a question of fact depending on several factors, particularly when the breach deprives the injured party of the contract's benefits. *Id.* In some cases, the determination of whether the breach is material is a mixed question of law and fact, but when, as here, the facts are undisputed, the determination of whether there has been a material non-compliance with a contract's terms is necessarily reduced to a question of law. *Id.*

In this case, the acquisition of an oil/water separator and its use to separate the oil from the slops and return it to the *Thorfinn* was a matter of vital importance that went to the salvage contract's essence. An essential element of any modern salvage contract is not only the rescue of maritime property in peril but also the protection of the marine environment. *See* 19 F.S.M.C. §§915(1), 919(1)(b), 920(2); 2 SCHOENBAUM, *supra*, § 16-5, at 333; *cf.* Trico Marine Operators, Inc. v. Dow Chemical Co., 809 F. Supp. 440, 444 (E.D. La. 1992). That is particularly true in this case where not

only was the *Thorfinn* facing fines from the Pohnpei Environmental Protection Agency but the salvage contract itself specified that the salvage work was to be done in accordance with the Pohnpei Environmental Protection Agency directives and the Pohnpei Environmental Protection Agency Site Action Plan had already been prepared and provided to Adams before the contract was executed on June 19, 2007. Additionally, the largest component of the $325,000 total contract price was for processing the slops – $170,000 of the $325,000 – 52.3%.

The defendants contend that the material breach in failing to process the slops through an oil/water separator excuses all further performance – further payment – on their part because, in their view, the contract is not divisible. The court concludes that the contract was, by its terms, divisible. Otherwise, the parties would not have apportioned the entire $325,000 contract price into various components and activities within the scope of work – $40,000 for mobilization; $50,000 for patching the *Thorfinn* and floating it off the reef; $25,000 for towing the *Thorfinn* alongside a safe berth in Pohnpei; $15,000 for pumping the stored fuel back into the *Thorfinn*; $170,000 for completion of slops disposal; and $25,000 for demobilization. The only component that the defendants contend that Adams did not satisfactorily complete was the slops processing ($170,000). Thus Adams' failure to obtain and use an oil/water separator does not excuse performance – payment – for the rest of the salvage contract components. Nor does it excuse performance (payment) for the work that Adams was asked to do, and which it agreed to do, that was outside the salvage contract's scope of work (the $26,607.50 billed for preparation work). It does excuse payment for the storage of the slops at $2,000 a day after September 18, 2007, since that storage would have been unnecessary if Adams had obtained and used an oil/water separator.

Accordingly, the defendants are entitled to summary judgment only on Adams' claims for storage fees and for the $170,000 for processing the slops.

E. *Does the Statute of Limitations Bar Recovery?*

The defendants contend that if the *Thorfinn* contract is a salvage contract the applicable statute of limitations bars any recovery since the two-year statutory period had elapsed before Adams filed suit on July 8, 2010. Under 19 F.S.M.C. 928(1), a cause of action on a salvage contract accrues and the statute of limitations period starts to run "on the day on which the salvage operations are terminated or the vessel and any part of the cargo [is] delivered to a safe port." Since the court has insufficient information before it to determine if the continued storage of the slops until July 8, 2008, when the *Thorfinn* picked them up, constituted continuing the salvage operation or whether, and for how long, the statute of limitations might have been tolled (suspended) by 19 F.S.M.C. 1314(4)(b), the court cannot grant summary judgment on the basis of the 19 F.S.M.C. 928(1) statute of limitations ground at this time.

Furthermore, 19 F.S.M.C. 928 applies only to salvage contracts such as the one between Adams and Seaward. The contract between Adams and Associated Marine, however, is not a salvage contract but is instead a contract of guaranty or a surety[4] or to answer for the liability of another and therefore may be subject to the six-year statute of limitations for contracts in general.[5]

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[4] A court does not need to determine whether an instrument is a guaranty or a surety when the result would be the same. FSM Dev. Bank v. Arthur, 13 FSM Intrm. 1, 12 (Pon. 2004).

[5] Contracts in general have a six-year statute of limitations, 6 F.S.M.C. 805; FSM Dev. Bank v. Chuuk Fresh Tuna, Inc., 16 FSM Intrm. 335, 338 (Chk. 2009), which might apply to the Associated Marine contract.

F. *Quantum Meruit*

Adams also pleads a quantum meruit cause of action. The defendants assert that they are entitled to summary judgment on this claim because all of Adams' alleged damages are based on express contracts. As a matter of law, the presence of an express written contract, which clearly sets forth the parties' obligations, precludes a party from bringing a claim under quantum meruit. E.M. Chen & Assocs. (FSM), Inc. v. Pohnpei Port Auth., 9 FSM Intrm. 551, 558 (Pon. 2000); Esau v. Malem Mun. Gov't, 12 FSM Intrm. 433, 436 (Kos. S. Ct. Tr. 2004); *see also* Actouka Executive Ins. Underwriters v. Simina, 15 FSM Intrm. 642, 651-52 (Pon. 2008); Adams v. Island Homes Constr., Inc., 11 FSM Intrm. 218, 232 (Pon. 2002).

In this case, there are two express written contracts in which the parties' obligations are clearly set out: 1) the salvage contract between Seaward and Adams and 2) the contract between Associated Marine and Adams that Associated Marine would pay Adams the amounts due under the salvage contract on the presentation of an invoice. There are additional, probably oral contracts for the $26,607.50 preparation work Adams agreed to do that was outside the salvage contract's scope of work. Accordingly, with the exception of the $26,607.50 preparation work, the defendants are entitled to summary judgment on Adams' quantum meruit claims.

G. *Discovery*

The defendants sought a stay of all discovery while their summary judgment motion was pending and an order prohibiting further discovery that relates to any matter on which their summary judgment motion has prevailed.

The discovery rules encourage the parties to conduct discovery with a minimum of court involvement or intervention. FSM Dev. Bank v. Adams, 14 FSM Intrm. 234, 248 (App. 2006); Mori v. Hasiguchi, 18 FSM Intrm. 188, 190 (Chk. 2012); People of Tomil ex rel. Mar v. M/C Jumbo Rock Carrier III, 17 FSM Intrm. 64, 68 (Yap 2010). The parties are therefore instructed to consult and determine which of Adams' pending discovery requests are not barred by this order's grant of partial summary judgment. The parties should keep in mind not only that the defendants have been granted summary judgment on the third-party beneficiary claim and almost all of the quantum meruit claim, but also that inadmissible evidence is still discoverable "if the information sought appears reasonably calculated to lead to the discovery of admissible evidence," FSM Civ. R. 26(b)(1). The parties therefore shall submit, no later than May 29, 2013, their joint plan for the completion of discovery and their proposal for further proceedings. The parties shall also, no later than June 14, 2013, confer and discuss settlement possibilities and shall file and serve a report on the likelihood of settlement and on the efforts made toward settlement, mediation, or arbitration (but omitting the specific details of any offers or counteroffers).

IV. Conclusion

The contract between Adams and Seaward is a salvage contract to which the relevant FSM admiralty law applies. None of the defendants materially breached the salvage contract by not paying the first $100,000 until August 31, 2007. Adams materially breached the salvage contract by not obtaining and using an oil/water separator to process the slops. This material breach does not excuse the defendants from payment to Adams for contracted work other than for the part of the contract related to Adams' failure to process the slops in an oil/water separator and the consequences of that failure (the storage charges). The defendants are granted summary judgment on Adams' third-party beneficiary claim and on its quantum meruit claim except for the preparation work outside the salvage contract's scope. Adams' discovery requests that go to those claims are disallowed.