IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *New World Expedition Yachts LLC v. P.R. Yacht Builders,* 2011 BCSC 78

Date: 20110125
Docket: S107233
Registry: Vancouver

Between:

New World Expedition Yachts, LLC

Plaintiff

And

F.C. Yachts Ltd.,
P.R. Yacht Builders Ltd., and
Ron Rayburn and Paul Rayburn carrying on business as Rayburn Yachts a.k.a. Rayburn Custom Yachts

Defendants

Before: The Honourable Mr. Justice Myers

Reasons for Judgment

Counsel for the Plaintiff:	R. Shore B. Promislow
Counsel for F.C. Yachts Ltd. and Ron Rayburn:	C.J. Giaschi
Counsel for P.R. Yacht Builders Ltd. and Paul Rayburn	W. G. Wharton
Place and Date of Hearing:	Vancouver, B.C. January 10 and 12, 2011
Place and Date of Judgment:	Vancouver, B.C. January 25, 2011

I. INTRODUCTION AND BACKGROUND FACTS

[1] The defendants seek to strike this fraud action under Rule 9-5(1)(d) as an abuse of process. The basis for the motion is that the action re-litigates matters which were or could have been the subject of arbitration between the parties. In the alternative the defendants seek, pursuant to an amendment which I granted at trial, a stay of the proceeding because it is subject to further arbitration.

[2] This action, commenced on October 29, 2010, is the latest of several actions that have been commenced in this Court and the Federal Court with respect to the construction of a yacht. In addition there has been a series of completed arbitrations. As will be discussed further below, the plaintiff New World Expedition Yachts, LLC ("New World") signed a contract with the defendant P.R. Yacht Builders Ltd. ("PRYB") for PRYB to build a yacht for the plaintiff. PRYB sub-contracted the labour to F.C. Yachts Ltd. ("FCY"). The defendants Ron and Paul Rayburn – father and son – own or control the defendant corporations.

[3] One of the prior proceedings was a petition commenced on June 15, 2010, in which New World sought to set aside several arbitral awards on the grounds of bias. I dismissed the petition on October 25, 2010: 2010 BCSC 1496. The background facts in that judgment are equally applicable to this motion and I set them out again, in part, here:

> [3] The underlying commercial dispute concerns the construction of a 95 foot yacht by P.R. Yacht Builders Ltd. ("PRYB") pursuant to a 2008 contract between it and New World. I will refer to that contract as the "Yacht Construction Agreement". In turn, by way of an oral agreement, PRYB engaged the co-respondent, F.C. Yachts Ltd. ("FCY") to provide labour for the vessel's construction.
>
> [4] The ultimate purchaser of the vessel was Mr. Olsen, a U.S. citizen. He was not a party to the arbitrations, and I was not told about the contractual arrangements between him and, presumably, New World. I only mention him now because he figures in to one of the allegations of bias that I will deal with later.
>
> [5] A dispute arose between PRYB and New World during the time the vessel was being constructed. On April 14, 2009, PRYB served a notice to

arbitrate, as it was entitled to do under the Yacht Construction Agreement. Mr. McIntyre was appointed as arbitrator.

[6] It was eventually agreed that the PRYB-New World arbitration would be conducted in stages:

- Phase 1 would determine whether PRYB was in fundamental breach of the Yacht Construction Agreement because it sub-contracted the construction to FCY.
- Phase 2 would determine which of the parties was in breach of the Yacht Construction Agreement.
- Phase 3 would assess damages.

[7] Because payments were not made by PRYB to FCY, on April 16, 2009, FCY commenced an *in personam* and *in rem* action in federal court against PRYB and the vessel and arrested the vessel.

[8] On July 17, 2009, Mr. McIntyre rendered a decision on Phase 1 of the PRYB-New World arbitration. He determined that PRYB had not breached the Yacht Construction Agreement by sub-contracting the construction to FCY.

[9] Phase 2 of the PRYB-New World arbitration proceeded from July to September 2009.

[10] In September 2009, New World, PRYB and FCY agreed to have Mr. McIntyre mediate an agreement between them to obtain the release of the vessel from arrest. …

[11] During the period from November 16, 2009, to January 13, 2010, counsel for New World, PRYB and FCY negotiated an agreement for the release of the vessel from arrest which was signed on January 13, 2010 (the "Security Agreement"). Under it, New World was to obtain a letter of credit to secure the claims of PRYB, FCY and other suppliers to the vessel. The letter of credit was eventually issued by Scotiabank.

…

[13] On February 2, 2010, FCY, PRYB and New World agreed to arbitrate the FCY claim and any issues of priority before Mr. McIntyre (the "FCY-PRYB-New World arbitration"). The agreement, among other things, gave New World the right to challenge the entitlement and amount of compensation due to FCY by PRYB. New World also had the right to present evidence, cross-examine witnesses and make submissions.

[14] Evidence was presented at the FCY-PRYB-New World arbitration during the month of February, 2010.

[15] On March 8, 2010, Mr. McIntyre issued an interim decision relating to the payment of suppliers to the vessel, including FCY.

[16] On April 30, 2010, Mr. McIntyre issued his decision in the FCY-PRYB-New World arbitration. He held that FCY was entitled to an award in the amount of $1,289,784 plus interest. He further held that the claim of FCY was a valid *in rem* claim.

[17] Another issue arose which Mr. McIntyre was asked to decide. GST would be refundable when the vessel was exported from Canada, and Mr. McIntyre was asked to determine who was entitled to the refund. New World recognised that this was a separate issue from the other arbitrations, its counsel stating in an email to Mr. McIntyre: "The GST Refund issue is entirely unrelated to the Arbitrations and is a matter relating exclusively to the Agreement re Security."

[18] On May 3, 2010, Mr. McIntyre released his decision in Phase 2 of the PRYB-New World arbitration. He held that New World was in breach of the Yacht Construction Agreement since March 13, 2009, for failing to fund the labour and materials account.

[19] This petition was filed on June 15, 2010. On June 16, 2010, I heard an application by New World for a stay of the ongoing arbitration proceedings and for an injunction restraining the arbitrator from drawing on the letter of credit. The application was dismissed on terms that the arbitrator could draw on the letter of credit but the funds were to be held in trust pending further order of the court.

[4] The arbitration clause in the Yacht Construction Agreement stated:

> 18. GOVERNING LAW; ARBITRATION
>
> (a) This Agreement shall be interpreted, administered and enforced under the laws of the Province of British Columbia and the laws of Canada applicable therein.
>
> (b) The parties shall submit to arbitration any dispute arising out from [*sic*] this Agreement. Either party may initiate arbitration by sending written notice to the other of election of the right of arbitration and specifying the dispute to be arbitrated.
>
> (c) The arbitration shall be conducted in accordance with the rules of the British Columbia International Commercial Arbitration Centre before a single arbitrator, and the arbitration hearings shall be held at a place designated by the arbitrator in Vancouver, Canada. The parties shall advance on an equal basis any arbitration costs, such as reporter's fees and arbitrator fees. The prevailing party shall be entitled to recover as part of the award all such advanced costs and reasonable, not actual, attorney's fees and costs, including expert witness fees and costs, and any other reasonable costs, fees or expenses of the arbitration.

[5] In addition to the prior proceedings which I have mentioned, there are two further related proceedings:

a. an action commenced on September 13, 2010, in which Mr. Olsen alleged that the letter of credit was tainted by fraud. Mr. Justice

Bowden currently has an application to prevent the funds held in trust from being released to FCY; and

b. an action by New World's former counsel for payment of his legal fees and a counterclaim by New World for negligence.

II. THE PLAINTIFF'S CLAIM

[6] The plaintiff claims that it was the victim of a fraudulent scheme orchestrated by the Rayburns. The notice of civil claim is 37 pages in length. The essence of the fraudulent scheme is set out in the summary section, part of which is as follows:

> 13. The Defendants Ron Rayburn and Paul Rayburn (the "Rayburns"), utilizing their various corporations, implemented a scheme, said scheme, with variations, having been implemented in the past against other wealthy Americans.
>
> 14. Ron Rayburn and Paul Rayburn (father and son respectively) have engaged in an ongoing and continuing pattern of conduct wherein they undertake the following:
>
> a. Contract with a boat purchaser (typically a wealthy American) for the construction of a luxury motor yacht with one of the Rayburns' alter ego corporations;
>
> b. Advise the purchaser that the yacht should be titled in the name of one of the Rayburns' alter ego corporations so as to avoid tax;
>
> c. Have mortgages implemented so as to provide comfort and security for the owner's deposit and progress payments (millions of dollars) made towards the yacht (the Rayburns then dispute these very same mortgages as being invalid, after the owner has paid millions of dollars into the yacht).
>
> d. the yacht construction becomes a dispute between the Rayburns and the boat owner;
>
> e. the Rayburns then seize the yacht;
>
> f. the Rayburns (through their alter ego corporation) make extortionist, oppressive and abusive demands for security to stand as replacement for the vessel so as to place the owner in an impossible situation.
>
> 15. The Rayburns' scheme has been refined and modified over time based upon the prior experiences of Ron Rayburn and Paul Rayburn.
>
> 16. The Rayburns' scheme has many facets, the foundation and corner stone of the Rayburns' scheme is the Yacht Construction Agreement which creates the basis for the other facets of the scheme to be implemented. The Yacht Construction Agreement is the written

contract executed between one of the Rayburns' alter ego corporations and the yacht purchaser's corporations. The misrepresentations made by the Rayburns to have the yacht purchaser enter into the yacht construction agreement are fundamental to the Rayburns' scheme. The damages to the yacht purchaser flow from and derive directly from the yacht construction agreement.

17. The facets of the Rayburns scheme include, but are not limited to:

    a. Creating and utilizing alter ego corporations;

    b. The Rayburns' making face to face oral in person misrepresentations to the purchaser and the purchaser's agent;

    c. Making untrue representations as to which corporation will undertake the work and has the facilities and man power to undertake the work,

    d. Making representations on the Rayburns' website;

    e. Advising the purchaser to title the yacht in the name of one of the Rayburns' companies during the course of construction so as to avoid tax;

    f. Promising to construct the yacht in a workman like manner;

    g. Having the yacht purchaser and the Rayburn alter ego corporation execute the Yacht Construction Agreement which is the foundation of the Rayburns scheme;

    h. In certain instances, including, an arbitration clause in the Yacht Construction Agreement;

    i. Promising in the Yacht Construction Agreement to defend and protect the title to the vessel, then failing to do so;

    j. Implementing a mortgage and a General Security Agreement so as to provide comfort and security for the millions of dollars the purchaser pays towards the construction of the yacht, then subsequently, after millions of dollars have been paid, attacking the validity of the very same mortgages and the very same security;

    k. failing to provide proper accounting;

    l. improper and sham manufacturing techniques;

    m. obtaining credit from third party suppliers that are not paid;

    n. After receiving millions of dollars, alleging that the purchaser breached the Yacht Construction Agreement;

    o. Seizing the yacht, by utilizing another one of the Rayburns' alter ego corporations;

    p. Having one Rayburn alter ego company purport to attack the other Rayburn alter ego company. In the instant case, Ron Rayburn's (the father) company purport to attack the title to the yacht and having the son's company cooperate with the attack;

q. In the instant case, making misrepresentations so as to have NWEY enter into an Agreement Re Security;

r. In the instant case, misrepresenting the percentage completion of the yacht so as to defraud the purchaser into making very substantial payments based on misrepresentations;

s. In the instant case, utilizing sham manufacturing so as to fraudulently obtain payments from the purchaser;

t. Litigating in British Columbia Supreme Court, Federal Court and in some instances, also undertaking arbitration; *and*

u. Demanding unfounded and extortionist amounts of money from the yacht purchaser.

[7] The notice of civil claim details the facts the plaintiff says fits into the above scheme. Needless to say, the Rayburn companies it alleges were involved in the scheme are the two defendant companies. It alleges that the transactions between them – namely the supply of and payment for labour – were sham transactions.

[8] The following paragraphs give the flavour of what the plaintiff pleads is the legal basis of its claim:

5. The Yacht Construction Agreement was founded on fraud and was the basis for numerous further facets of the Rayburns scheme, including the arbitration, which would have never occurred had the Rayburns not made misrepresentations to have NWEY enter into the Yacht Construction Agreement. Further, the Federal Court proceedings would have never occurred, had the Rayburns not made misrepresentations so as to induce NWEY to enter into the Yacht Construction Agreement. NWEY has suffered damages as a result of the misrepresentations made regarding the Yacht Construction Agreement.

10. The Yacht Construction Agreement was the foundation and the cornerstone of the Rayburns' scheme and formed the basis for the following facets of the scheme which included utilizing alter ego corporations, making untrue representations, having the yacht titled in the name of one of the Rayburns' companies, misrepresenting the corporations functions and capabilities, undertaking the critical step of having a Yacht Construction Agreement executed, failing to provide a proper accounting, misrepresenting the percentage completion of the yacht, undertaking sham manufacturing, making misrepresentations to have the Agreement Re Security executed, undertaking arbitration based upon the Yacht Construction Agreement which was founded on fraud, undertaking litigation which was pursuant to the Yacht Construction Agreement, said agreement founded on fraud, demanding extortionist amounts of money for the release of the yacht

> and acting in a continuing and multifaceted manner so as to defraud NWEY, Gary Olsen and RS&I.

[9] The only remedies sought are damages for fraud, tracing and an accounting. There is no claim to the right of rescission or that the Yacht Construction Agreement was vitiated by fraud, presumably because the plaintiff and Mr. Olson do not want to return the boat.

III. THE POSITION OF THE PARTIES

[10] The defendants say that the arbitration clause is wide enough to cover the disputes raised in the current litigation and that all of the matters have, in fact, been canvassed in the prior arbitrations. Therefore this action should be struck because it is *res judicata*.

[11] The plaintiff's interpretation of the arbitration clause is that it is not broad enough to encompass the issue of whether the contract exists; in other words, whether it has been vitiated by fraud. It argues that all of the issues it seeks to canvass in this litigation were not canvassed in the arbitration. Further, the plaintiff says that it has discovered fresh evidence of fraud and that the case should be re-considered, not by the arbitrator, but by this Court.

IV. THE APPLICABILITY OF THE ARBITRATION CLAUSE

[12] The plaintiff first argues that it would not have entered into the contract were it not for the fraudulent scheme of the defendants which is the subject of his action. It argues that "fraud unravels everything"; if it can show that the contract is vitiated by fraud, the arbitration clause falls with the contract. It should therefore not prevent the plaintiff from bringing the claim in this Court.

[13] I do not accept that argument. Even if a contract is vitiated by fraud, the arbitration clause within it is not necessarily invalid. This conclusion was reached by Wedge J. in *James v. Thow*, 2005 BCSC 809, in which she adopted the judgment of the House of Lords in *Harbour Assurance Co. (U.K.) Ltd. v. Kansa General*

International Insurance Col Ltd., [1993] I Lloyd's Law Reports 455. She took that case to stand for the proposition that:

> [92] … an allegation of fraud does not put the matter outside an arbitration agreement if the allegation does not directly impeach the arbitration agreement itself. The doctrine of separability requires that the arbitration clause be analyzed as a separate contract. That being the case, the allegation of fraud must relate directly and specifically to the arbitration agreement rather than to the contract as a whole.

[14] This approach is also mandated by s. 16(1) of the *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233, which is the applicable statute for the arbitration:

> 16 (1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,
>
> > (a) an arbitration clause which forms part of a contract must be treated as an agreement independent of the other terms of the contract, and
> >
> > (b) a decision by the arbitral tribunal that the contract is null and void must not entail ipso jure the invalidity of the arbitration clause.

[15] There is no allegation, and no evidence, that there was any fraud with respect to the arbitration agreement itself. The expression "fraud unravels everything" is no answer to this.[1]

[16] The plaintiff's next argument deals with the construction of the arbitration clause. It submits that the arbitration agreement is not drafted widely enough to cover a claim which seeks to avoid a contract on the ground of fraud, because that is not, to quote the arbitration clause, "any dispute arising out from this agreement".

[17] In my view, the wording of the arbitration clause is wide enough to encompass the question of whether the contract was vitiated by fraud. That is a dispute arising out of the agreement: were it not for the agreement there would be

[1] This phrase was quoted by the Supreme Court of Canada in *Farah v. Barki*, [1955] S.C.R. 107 at 115 from *May v. Platt*, [1900] 1 Ch. 616 at 623.

no boat-building contract or arrangement, no relationship between the parties for the building of the vessel and no dispute. If the plaintiff was correct, in order for the arbitrator to have jurisdiction, the arbitration clause would have had to include words along the lines of: "... including a dispute as to the validity of this agreement." I do not think that is necessary.

[18] The plaintiff relies heavily on *Cut & Run Holdings v. Booze Bros. Holdings*, 2005 BCSC 167. However each arbitration clause must be construed on in its wording. Unlike the case at bar, *Cut & Run* involved an operating agreement for a store that did not govern the shareholder rights or status of the parties, which was the dispute before the court.

[19] I conlcude that the arbitration clause is valid and extant and is applicable to the issues raised in this action.

[20] Having reached this conclusion on the above basis, I need not address the further issue of whether the plaintiff has affirmed the contract together with the arbitrion clause within it. As I pointed out above, the plaintiff participated and completed several arbitrations, it has the vessel which it does not seek to return, it has relied on the contract in its claim for reimbursement of overpayments and it has not claimed the right to recission.

V. *RES JUDICATA*

[21] The conclusion I have reached with respect to the applicability of the arbitration clause would ordinarily result in an order for a stay of this proceeding under s. 8 of the *International Commercial Arbitration Act*. However, in this case the defendants claim that these matters were addressed in arbitrations that have already taken place and therefore the defendants go further and seek a declaration that the matters in this action are *res judicata*. If they are correct, that would result in a striking of the action, because it would be an abuse of process.

[22] Given the applicability of the arbitration clause, this raises the question as to whether I should consider this matter at all, a point not raised by any of the parties. I

have concluded that since this is an action in this Court, I should determine whether the action should be struck on the basis of *res judicata* and abuse of process without making a declaration which might be seen to bind the arbitrator. In other words, I am addressing the issue only as it affects the proceedings in this Court.

[23] In *Chapman v. Canada (Minister of Indian and Northern Affairs)*, 2003 BCCA 665 at para. 17, the Court of Appeal reiterated its earlier statement of the doctrine of *res judicata* in *Lehndorff Management Ltd. v. L.R.S. Development Enterprises Ltd.* (1980), 19 B.C.L.R. 59. That in turn applied the principles set out in the 1843 decision of Vice-Chancellor Wigram in *Henderson v. Henderson* (1843), 3 Hare 100 at 114-15, 67 E.R. 313 at 319. Two key points made in that decision are germane to the case at bar. First, as stated by Vice-Chancellor Wigram:

> … where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

[24] Second, as stated in *Lehndorff*:

> The maxim *res judicata* does not apply to distinct causes of action, but it does apply where the second action arises out of the same relationship, and the same subject matter, as the adjudicated action, although based upon a different legal conception of the relationship between the parties. It also applies not only to points on which the court in the first action was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of the first litigation and which the parties, exercising reasonable diligence, might have brought forward at the time. The principle of *res judicata* would also apply if the issue in the present action was one of several issues essential for the determination of the whole of the first case, though merely a step in that decision rather than the main point of it. [Internal citations omitted.]

[25] This action attempts to do what the doctrine of *res judicata* prevents. Every element of the claim at bar was advanced by the plaintiff at the arbitrations.[2] This includes the allegations with respect to the arrest of the vessel in the Federal Court action. That was an action between FCY and PRYB in which FCY arrested the vessel. The plaintiff sought to intervene in the action, but the motion was never heard because of the agreement to arbitrate the matters in dispute in that litigation.

[26] In the arbitrations, the plaintiff may not have characterised the defendants' conduct as amounting to fraud, but the same conduct was at issue under different guises. For example, much of the conduct now alleged to be fraudulent was, at the arbitrations, alleged to have amounted to fundamental breach or misrepresentations. Even if I am wrong, and some of the elements of the current claim were not argued and decided at the arbitrations, all the elements are, as I have said, subject to the arbitration clause and could have been raised. This includes whether the contract was vitiated by the alleged fraudulent scheme. They are therefore also *res judicata*.

[27] The plaintiff argues that it has discovered new evidence with respect to fraudulent conduct. It argues that evidence in prior litigation with respect to work done by another Rayburn-owned company, North Border Management Ltd., on another vessel, the *Splash,* for another buyer, did not come to its attention until after the litigation. That argument must be rejected on the facts: the evidence discloses that the plaintiff's former counsel examined the court file with respect to that action prior to or during the arbitrations and the affidavits it now seeks to rely on were in the file. The arbitrator canvassed the *Splash* litigation in his reasons. Even if the plaintiff did not fully canvass the *Splash* litigation in the arbitration, or research the facts thoroughly, it could have done so through the exercise of reasonable diligence.

[28] Furthermore, the plaintiff's characterisation of the evidence that it obtained from the court file (the only "new" evidence brought forward) is inaccurate. In the *Splash* proceedings, Ron Rayburn swore an affidavit stating that:

[2] The plaintiffs prepared several tables matching the issues in this litigation to those dealt with in the arbitration proceedings or pleadings. I do not set these out here.

> 5. In order to construct vessels, FCY rents space and rents or buys goods, services and licenses [*sic*] and intellectual property.
>
> 6. North Border commonly provides goods and services to companies other than FCY and has recently agreed to supply goods and services to another company to construct a yacht without use of the "Rayburn" name, molds or other intellectual property associated with the "Rayburn" name.

The plaintiff says that this amounts to a statement by Mr. Rayburn that, contrary to the evidence the defendants presented at the arbitration, it was North Border that supplied the labour to construct the yacht and not FCY. However, the affidavit does not mention labour and, in any event, it speaks in general, non-exclusive terms about the relationship between FCY and North Border.

[29] In its oral argument, the plaintiff alluded to its ability to re-litigate the matter in this Court on the basis of freshly discovered evidence. That is something that has not been pled but, in any event, the argument has no merit since it hinges on the same evidence that I just addressed.

[30] In short, in this action the plaintiff seeks to re-litigate the matters that were or could have been decided in the arbitrations. As with the petition based on bias that I heard and dismissed, this action seeks to avoid the arbitration results not through the mechanism contemplated by the *International Commercial Arbitration Act* (which is strictly limited) but, rather, by collateral attack.

[31] There is one further point to deal with, which I raised with the parties on the first day of the hearing, giving them an opportunity to return with any authority they wished to argue on the second day. Scattered throughout the notice of civil claim are references to misrepresentations made to the arbitrator by the defendants. There is no allegation of manufactured documents and these allegations must be taken to refer to oral evidence. Witnesses are protected from claims for giving false evidence in prior proceedings. As Southin J.A. explained in *Workum v. Olnick*, 2006 BCCA 528:

> 7 The question for the Court is whether the pleas of the plaintiff now before it are such as are within the rule - a rule of public policy - that no action

> will lie for the giving of false testimony in any legal proceeding, generally called the "witness immunity" rule. The rule includes conspiring to give false evidence. It does not preclude an action for planting evidence which is subsequently put before the court, or manufacturing documents, whether those documents are or are not adduced in evidence. See *Cabassi v. Vila* (1940), 64 C.L.R. 130 (H.C.A.); *Darker v. Chief Constable of the West Midlands Police*, [2001] 1 A.C. 435 (H.L.); *Surzur Overseas Ltd. v. Koros*, [1999] 2 Lloyd's L.R. 611 (C.A.); and, in this Court, *Hung v. Gardiner*, 13 B.C.L.R. (4th) 298, 2003 BCCA 257.

[32] That aspect of the claim must also be struck.

VI. CONCLUSION

[33] The plaintiff’s claim is struck as being an abuse of process.

[34] The defendants are entitled to their costs.

[35] As I indicated at the hearing, I have seized myself of all matters in dispute between the parties, whether the subject of current actions or not. Obviously this does not include the injunction application currently under reserve by Bowden J.

“E.M. MYERS, J.”