

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

SUMMARY ORDER

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1 At a stated Term of the United States Court of Appeals for the Second Circuit, held at the  
2 Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York on the  
3 10<sup>th</sup> day of July, two thousand eighteen.

4  
5 Present: BARRINGTON D. PARKER,  
6 RICHARD C. WESLEY  
7 DEBRA ANN LIVINGSTON,  
8 *Circuit Judges.*  
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11 ING Bank, N.V.,

12 *Plaintiff-Appellant,*

13  
14 v.

16-4023-cv

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16 M/V VOGUE FIESTA,

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18 *Defendant-Appellee.*  
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21 Appearing for Appellant: Bruce G. Paulsen, Brian P. Maloney, Seward & Kissel, LLP, New  
22 York, N.Y.

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24 James D. Bercaw, Robert J. Stefani, King Krebs & Jurgens, PLLC,  
25 New Orleans, LA.

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27 Appearing for Appellee: James H. Power, Marie E. Larsen, Holland & Knight LLP, New  
28 York, N.Y.  
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1           **ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED,**  
2 **AND DECREED** that the judgment of the District Court is **VACATED IN PART,**  
3 **AFFIRMED IN PART, AND REMANDED.**

4           ING Bank, N.V. (“ING”) appeals from a judgment of the United States District Court for  
5 the Southern District of New York (Forrest, *J.*) dismissing its maritime lien against M/V VOGÉ  
6 FIESTA (the “Vessel”), granting *sua sponte* judgment to the Vessel, and reducing the amount of  
7 security posted to permit the Vessel’s release from arrest. *See ING Bank, N.V. v. M/V TEMARA*,  
8 No. 16-cv-95, 2016 WL 6156320 (S.D.N.Y. Oct. 21, 2016) (“Maritime Lien Order”); *ING Bank*  
9 *N.V. v. M/V VOGÉ FIESTA*, No. 16-cv-2051, 2016 WL 8136300 (S.D.N.Y. Oct. 20, 2016)  
10 (“Reduced Security Order”). ING asserts that, as the purported assignee of O.W. Denmark’s  
11 receivables, it is entitled to assert a maritime lien against the Vessel because O.W. Denmark  
12 provided necessaries to the Vessel within the meaning of the Commercial Instruments and  
13 Maritime Lien Act (“CIMLA”). *See* 46 U.S.C. § 31342. It also asserts that the District Court  
14 erred when it reduced the amount of security the Vessel was required to post and reduced to  
15 3.5% the 6% per annum the interest rate initially imposed in the Southern District of Texas. We  
16 agree with the first contention and disagree with the second, and we therefore vacate the entry of  
17 summary judgment in the Vessel’s favor and affirm the reduction in security. We assume the  
18 parties’ familiarity with the underlying facts, procedural history, and specification of issues for  
19 review.

#### 20 **I. ING’s Maritime Lien Claim**

21           A maritime lien is a “special property right in the vessel, arising in favor of the creditor  
22 by operation of law as security for a debt or claim,” which “arises when the debt arises.” *Itel*  
23 *Containers Int’l Corp. v. Atlantrafik Exp. Serv., Ltd.*, 982 F.2d 765, 766 (2d Cir. 1992) (internal

1 quotation marks and citation omitted). Under CIMLA, a party asserting a maritime lien against a  
2 vessel must show that it (1) provided (2) necessaries to a vessel (3) upon the order of the owner  
3 of a vessel or a person authorized by the owner. 46 U.S.C. § 31342(a). “Necessaries” include  
4 bunkers. *See Hapag-Lloyd Aktiengesellschaft v. U.S. Oil Trading LLC*, 814 F.3d 146, 151 n.13  
5 (2d Cir. 2016). As to the third requirement, CIMLA defines persons presumed to have authority  
6 to procure necessaries for a vessel as “(1) the owner; (2) the master; (3) a person entrusted with  
7 the management of the vessel at the port of supply; or (4) an officer or agent appointed by—(A)  
8 the owner; (B) a charterer; (C) an owner pro hac vice; or (D) an agreed buyer in possession of  
9 the vessel.” 46 U.S.C. § 31341(a).

10           Whether ING is entitled to assert a maritime lien depends on whether its purported  
11 assignor, O.W. Denmark, is entitled to assert such a lien. The key to this inquiry is whether O.W.  
12 Denmark “provided” necessaries under CIMLA when it initially agreed to supply necessaries  
13 and subsequently subcontracted with intermediaries to supply them. We held in *ING Bank N.V.*  
14 *v. M/V TEMARA*, 892 F.3d 511 (2d Cir. 2018), that “the answer, guided by straightforward  
15 principles of contract law, is yes. . . . a supplier may provide necessaries to a vessel indirectly  
16 through a subcontractor because when a subcontractor does so pursuant to its contract with a  
17 contractor, the subcontractor’s performance is attributable to the contractor.” *M/V TEMARA*, 892  
18 F.3d at 519. That is what occurred here. O.W. Denmark agreed to supply bunkers to the Vessel  
19 on the order of Primetransport LTD (“Primetransport”), the charterer of the Vessel. O.W.  
20 Denmark then subcontracted its obligations to O.W. Bunker Fast East (S) Pte. Ltd. (“O.W. Far  
21 East”), which, in turn, subcontracted with local suppliers, Russley Overseas Traders Pte. Ltd.  
22 (“Russley”), Cathay Marine Fuel Oil Trading Pte. Ltd. (“Cathay”), and Impex Marine (S) Pte.  
23 Ltd. (“Impex”), for the actual delivery of the bunkers. The bunkers were delivered. Accordingly,

1 we hold that O.W. Denmark was a provider of necessities under CIMLA and is therefore  
2 entitled to assert a maritime lien against the Vessel, and that the District Court erred in  
3 dismissing ING’s maritime lien claim against the Vessel.

## 4 **II. *Sua Sponte* Judgment in Favor of the Vessel**

5 We also conclude that the District Court erred when it, *sua sponte*, granted summary  
6 judgment to the Vessel. *See* Maritime Lien Order, 2016 WL 6156320, at \*9. Federal Rule of  
7 Civil Procedure 56(f) requires “that a court may grant summary judgment *sua sponte* only  
8 ‘[a]fter giving notice and a reasonable time to respond’ and ‘after identifying for the parties  
9 material facts that may not be genuinely in dispute.’” *In re 650 Fifth Ave. and Related Prop.*, 830  
10 F.3d 66, 96 (2d Cir. 2016) (quoting Fed. R. Civ. P. 56(f)). “A district court’s failure to provide  
11 adequate notice is almost always reversible error.” *M/V TEMARA*, 892 F.3d at 524.

12 The District Court’s notice-free *sua sponte* grant of summary judgment was improper. It  
13 concluded that the record before it did not contain documentation regarding the arrangement  
14 between O.W. Denmark and the other entities down the contractual chain. It then concluded that  
15 this lack of documentation was fatal to ING’s assertion of a maritime lien by failing to establish  
16 a “traceable and intact” contractual chain that would ultimately place O.W. Denmark, ING’s  
17 purported assignor, at financial risk for the bunkers. *See* Maritime Lien Order, 2016 WL  
18 6156320, at \*6. The record before the District Court cast doubt on these conclusions. *See M/V*  
19 *TEMARA*, 892 F.3d at 524. Rather than basing its decision to grant summary judgment to the  
20 Vessel on a record that may have been incomplete, the District Court should have provided  
21 notice and an opportunity for ING to be heard. *See id.* By granting summary judgment, *sua*  
22 *sponte*, the District Court denied ING the procedures to which it was entitled under Rule 56.

1 **III. Security Reduction**

2 As to the District Court’s order reducing security, there was no abuse of discretion. The  
3 District Court reduced the security in this case pursuant to Supplemental Admiralty Rule E(6) of  
4 the Federal Rules of Civil Procedure, which provides that “[w]hen security is taken the court  
5 may, on motion and hearing, for good cause shown, reduce the amount of security given[.]”  
6 Supp. Adm. Rule E(6). ING argues that this reduction was erroneous as a matter of law because  
7 Supplemental Admiralty Rule E(5)(a) requires that the interest be set at 6% and fixing it at any  
8 other rate was an error of law and an abuse of discretion. But, we held in *Chemoil Adani Pvt.*  
9 *Ltd. v. M/V Maritime King*, No. 16-3944, 2018 WL 3339788 (2d Cir. July 9, 2018) (per curiam),  
10 that Rule E(6) broadly permits the District Court, in its discretion, to reduce a security interest  
11 rate, including one imposed under Rule E(5)(a). *Chemoil Adani*, 2018 WL 3339788, at \*2-3.  
12 Accordingly, the District Court did not abuse its discretion in reducing the interest rate from 6%  
13 to 3.5%.

14 We have considered the remainder of ING’s arguments and find them to be without  
15 merit. Accordingly, the judgment of the District Court is **VACATED IN PART, AFFIRMED**  
16 **IN PART, and REMANDED FOR FURTHER PROCEEDINGS.**

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FOR THE COURT:  
Catherine O’Hagan Wolfe, Clerk