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Article 5

Glissman v. Eklof Marine Corp. United States District Court, Eastern District New York No. 85 CV 4339, 1989 WL 88058 (E.D.N.Y.) 28 July 1989

B.J. Calamari '92

GLISSMAN v. EKLOF MARINE CORP.
United States District Court, Eastern District New York
No. 85 CV 4339, 1989 WL 88058 (E.D.N.Y.)
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One may be considered an employer for the purposes of the Jones Act if it orders, instructs or otherwise exerts control over the seaman. One who exerts possession and control over a vessel may be liable for claims of unseaworthiness irrespective of lack of ownership.

FACTS: In his complaint, plaintiff alleged that he suffered injuries while employed by the defendant Eklof Marine Corporation ("Eklof"), as a seaman on Barge E-17. Plaintiff argues that the injuries were caused by the defendant's negligence and the unseaworthiness of the vessel. Eklof contended that the plaintiff cannot maintain an action against it under the Jones Act because it is not the plaintiff's employer; and that no claim of unseaworthiness lies because it does not own the barge.

The defendant maintained that the A & C Ship Fueling Corporation ("A & C") employed the plaintiff. Eklof produced 1983 and 1984 W-2 income tax forms issued by A & C to the plaintiff. Eklof also asserted that A & C owns the E-17 and offered an inspection certificate issued by the United States Coast Guard indicating that A & C is the owner. Eklof did not produce a certificate of title.

The plaintiff maintained that Elkof was his employer, offering his pension fund statements from New York Marine Towing and Transportation Industry Pension Fund ("Marine Towing") listing Eklof as the plaintiff's employer. Plaintiff also produced union dues receipts issued by Marine Towing designating Eklof as employer. Plaintiff also asserted that all his orders and duties pertaining to the E-17 were given by Mr. Eklof, head dispatcher for the defendant. Eklof did not dispute this fact.

In support of his contention that the defendant owns the E-17, plaintiff submitted as evidence a violation from the Coast Guard issued in January 1986, (two years after his injuries) indicating that Eklof owns the E-17.

ISSUES: (1) Does a question of fact exist in this case as to who the plaintiff's employer was for purposes of the Jones Act?

(2) May a claim of unseaworthiness be asserted against a party in possession and control of a vessel, or only against an owner?

ANALYSIS: An action brought under the Jones Act, 46 U.S.C. §688 may only be brought by a seaman against his employer. *Karvolis v. Constellation Lines, S.A.*, 806 F.2d 49, 52 (2d Cir. 1986) In order to determine who is a seaman's employer, a court must look to "the plain and rational meaning of employment and employer'." *Mahramas v. American Export Isbrandsten Lines, Inc.*, 475 F.2d 165, 171 (2d Cir. 1973), (*quoting Cosmopolitan Shipping Co. v. McAllister*, 337 U.S. 783, 791 (1949)).

The court must also consider who exercises control over the seaman and who instructs the seaman as to his duties and obligations of the vessel. This court cited with approval the Fifth Circuit's decision in *Guidry v. South Louisiana Contractors, Inc.*, 614 F.2d 447, 452 (5th Cir. 1980), that held that an entity that borrows a worker may become his employer for purposes of a claim under the Jones Act if that employer exerts control over the worker.

The court believed that the plaintiff produced sufficient evidence to create a jury question as to whether Eklof controlled him, and therefore denied defendant's Jones Act motions.

On the claim of unseaworthiness the court noted that case law makes it clear that it is not necessary that a defendant have title to or be the record owner of the vessel to be held liable. *Karvolis v. Constellation Lines, S.A., supra.* One who operates, manages or charters a vessel exercises such control and possession of the vessel to be its owner *pro hac vice. Reed v. The Yaka*, 373 U.S. 410, 412-413 (1963).

Although the court was faced with conflicting Coast Guard documents of ownership of the E-17, the court found a material question of fact as to whether Eklof did possess and control the E-17 so as to be considered the owner *pro hac vice.* The defendant's motion for summary judgment on the claim of unseaworthiness was therefore denied.

B.J. Calamari '92

KUEHNE & NAGEL (AG & CO.) v. GEOSOURCE, INC.
United States Court of Appeals, Fifth Circuit, 5 June 1989
874 F.2d 283

Admiralty jurisdiction does not exist for a claim of breach of a contract to transport goods on through bills of lading over land and sea, as this is not a contract for a traditional maritime activity. There is no admiralty jurisdiction for a claim for the tort of fraudulent misrepresentation unless the Executive Jet requirements are met.

FACTS: The action involved a cargo shipment that became stranded in Turkey during its journey from Western Europe to the Middle East. The parties to the action include the three freight forwarders - Kuehne & Nagel (AG & Co.) ("Kuehne & Nagel"), Panalpina Welttransport Gmbh ("Panalpina"), and SGS Controll Co., mbH ("SGS"), who made an agreement with Geosource, Inc. ("Geosource"), a Houston based company which owned all of Geosource Co., and also owned one-half of Ucamar Shipping & Transportation (Cayman) Ltd. ("Ucamar"), and, Ristram Seetransport Management Gmbh (Ristram (Germany)) ("Ristram") which owned the other half of Ucamar, to ship cargo. The parties intended to form a consolidated shipping line under the auspices of Ucamar.

To facilitate this goal and obtain business from European freight forwarders, a promotional meeting was sponsored by Geosource for Ucamar in November 1982. After the presentations were made, the three freight forwarders contracted with Geosource to ship cargo on Ucamar's through bills of lading.

The commercial advantage which Ucamar possessed enabling it to attract customers was its ability to draw upon the combined expertise of Geosource and Ristram which covered both segments of the targeted route. Ristram contracted to provide Ucamar with licenses, stevedoring services and facilities to receive cargo in Turkey. Ucamar was to obtain bills of lading for the cargo to be transported and utilize local contracts to guarantee delivery to Iran via overland shipment from Turkey.

The forwarders' cargo was loaded in late 1982 but while in port in Turkey in March 1983, Ucamar was unable to unload some of the cargo and clearance through Turkish customs severely delayed the initial deliveries. Each party involved blamed the other for the difficulties which ensued and the end result was a breakdown of the entire arrangement.

ISSUE: Whether the plaintiff has a cause of action in admiralty based upon the maritime tort of fraudulent inducement to contract and a cause of action for breach of a maritime contract based upon the through bills of lading?

ANALYSIS: The district court decided that admiralty jurisdiction did exist for the question of fraudulent inducement to contract. The court based its opinion on the two pronged test of

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