Not Reported in F.Supp., 1990 WL 258885 (E.D.Mich.), 1990 A.M.C. 2849
(Cite as: 1990 WL 258885 (E.D.Mich.))

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United States District Court, E.D. Michigan, Northern Division.
Robert D. HAMACHER, Plaintiff,
v.
CANONIE OFFSHORE COMPANY and Canonie Transportation Company, Jointly and severally, Defendants.

Civ. A. No. 89–CV–10109–BC.
June 5, 1990.
Report and Recommendation Jan. 10, 1990.

Dennis M. O'Bryan, Christopher D. Kuebler, O'Bryan Law Center, P.C., Birmingham, Mich., for plaintiff.

Robert N. Dunn, Clausen, Miller, Gorman, Caffrey & Witous, P.C., Chicago, Ill., for defendants.

ORDER ACCEPTING MAGISTRATE'S REPORT AND RECOMMENDATION, GRANTING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

ROSEN, District Judge.

***1** This matter came before the Court on the Report and Recommendation filed by Magistrate Charles E. Binder on January 10, 1990 wherein the Magistrate recommended that this Court grant the Defendants' Motion for Partial Summary Judgment and dismiss Count I of the Plaintiff's "First Amended Complaint," this being Count I also of the Plaintiff's "Second Amended Complaint"; the Court having reviewed the same and the record in this case, including the Plaintiff's Objections to Magistrate's Report and Recommendation; and the Court being otherwise fully advised in the premises;

NOW THEREFORE;

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Magistrate's Report and Recommendation is adopted by this Court; and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, for the reasons set forth in the Magistrate's Report and Recommendation, the Defendants' Motion for Partial Summary Judgment is GRANTED; and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, for the reasons set forth in the Magistrate's Report and Recommendation with respect to Count I of the Plaintiff's "First Amended Complaint," Count I of the Plaintiff's "Second Amended Complaint" shall be and hereby is DISMISSED WITH PREJUDICE.

LET JUDGMENT BE ENTERED ACCORDINGLY.

MAGISTRATE'S REPORT AND RECOMMENDATION ON DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

CHARLES E. BINDER, United States Magistrate Judge.

I. *INTRODUCTION*

Pending, pursuant to an Order of Reference from United States District Judge James Churchill, is Defendants' Motion for Partial Summary Judgment. Oral argument was heard December 4, 1989.

Plaintiff was employed by the defendants as a crew member aboard a vessel which engaged in the coastwise trade on the Great Lakes. On October 10, 1983, plaintiff was working aboard defendants' tugboat, the American Viking. The American Viking was involved in pushing and towing barges up and down

the Great Lakes. As the tugboat was docking in Indiana Harbor during a storm, plaintiff was on the tugboat's deck preparing to secure it to the dock. Plaintiff jumped from the tugboat to the dock, injuring his lower extremities, back and central nervous system.

Due to his injuries, plaintiff was off work for approximately a year, from October 1983 to October or November of 1984 (Plaintiff's Deposition, p. 22). During this time, plaintiff was receiving workers' compensation payments. Plaintiff's workers' compensation payments began at $140 a week. After the payments began, plaintiff contacted Dee Smith in the defendants' insurance office; and plaintiff's payments were then increased to $200 a week, retroactive to the date of plaintiff's injury. *Id.* All plaintiff's medical bills were paid through defendants' insurance (Plaintiff's Dep., p. 24). Plaintiff's employment with the defendants was covered by a collective bargaining agreement which provided for maintenance and cure payments of $200 a week in the event of an injury (Plaintiff's Dep., p. 23). Plaintiff stated he was not aware of the collective bargaining agreement and did not believe he had joined the union, as he had been employed by the defendants for only ten days before his accident. *Id.*

***2** In the spring of 1988, plaintiff first contacted an attorney regarding his injuries after having received an advertisement in the mail (Plaintiff's Dep., p. 26–27). Until receiving the advertisement, plaintiff had never considered going to an attorney to investigate any other recourse for his injuries (Plaintiff's Dep., p. 29). Plaintiff also did not discuss any possible claims he may have had against the defendants with his brother, who was also employed by the defendants. *Id.*

On April 27, 1989, plaintiff filed a two-count complaint. Plaintiff alleged in Count I, negligence under the Jones Act, 46 U.S.C. § 688, and unseaworthiness or breach of the defendants' warranty to provide a reasonably seaworthy vessel, pursuant to general maritime law of the United States. Plaintiff alleged in Count II, defendants' breach of their duty to pay maintenance and cure during the period of plaintiff's disability.

On June 20, 1989, plaintiff filed his First Amended Complaint. The First Amended Complaint was in three counts; plaintiff realleged the same claims in Counts I and II. In Count III, plaintiff alleged fraud on behalf of the defendants through the misrepresentations of their agents to the effect that plaintiff was only entitled to workers' compensation and nothing more.

Defendants have moved for the dismissal of Count I sounding in negligence and breach of the warranty of seaworthiness as time barred under the statute of limitations.[FN1]

II. *ANALYSIS AND CONCLUSIONS*

The statute of limitations governing actions sounding in tort under the Jones Act states:

Unless otherwise specified by law, a suit for recovery of damages for personal injury or death, or both, arising out of a maritime tort, shall not be maintained unless commenced within three years from the date the cause of action accrued.

46 U.S.C. § 763a.

Defendants argue that since plaintiff's injury occurred in 1983, he had three years from that time to file suit. Therefore, plaintiff's claim ran out in 1986. Plaintiff argues that he was told by defendants' agent that he was only entitled to workers' compensation; therefore, plaintiff never discussed his injuries with an attorney to determine his rights. During his deposition, plaintiff testified:

Q Ms. Smith never said to you—Mr. Hamacher, you cannot sue us, she never said that to you?

A She told me all I was entitled to was worker compensation.

Q But Ms. Smith never said—Mr. Hamacher, you cannot sue us, she never said that to you, did she?

A No reason for her to.

Q She didn't say that to you, did she?

A No.

Q She never said, if you promise not to sue us, we will settle this claim with you—she never said that, did she?

a No.

Q You're saying all she did say was you're entitled to worker compensation.

MR. O'BRYAN: Well, he said all?

THE WITNESS: All I'm entitled to was worker compensation.

BY MR. DUNN:

Q Did you ever think of going to an attorney to investigate your injury?

***3** A No, not until 1988.

Q O'Bryan's advertisement?

A Right, I got to looking it over.

Q Ever discuss the claim with your brother?

A No.

Plaintiff's Dep., pp. 28–29.

In order for defendants to be estopped from asserting the statute of limitations defense, plaintiff must show the four elements to an estoppel *in pais*:

(1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury.

Hampton v. Paramount Pictures Corp., 279 F.2d 100, 104 (9th Cir.), *cert. denied*, 364 U.S. 882, 81 S.Ct. 170, 5 L.Ed.2d 103 (1960). Put another way, one may be "estopped from denying the consequences of his conduct where that conduct has been such as to induce another to change his position in good faith or such that a reasonable man would rely upon the representations made." *Bergeron v. Mansour*, 152 F.2d 27, 30 (1st Cir.1945). *See also SeaLand Service, Inc. v. R.V. D'Alfonso Co.*, 727 F.2d 1, 2 (1st Cir.1984); *Precious Metals Assoc. Inc. v. Commodity Futures Trading Comm'n.*, 620 F.2d 900, 908–09 (1st Cir.1980). In the present context—forfeiture of the defendant's right to repose—estoppel boils down to the idea that "the conduct of the defendant must be so misleading as to cause the plaintiff's failure to file suit." *Sanchez*, 626 F.2d at 1231 (footnote omitted).

Clauson v. Smith, 823 F.2d 660, 661–62 (1st Cir.1987).

In *Clauson*, the plaintiff was a crew member on a vessel owned by the defendant. The plaintiff sued the defendant for bodily injuries, alleging negligence under the Jones Act, unseaworthiness, as well as maintenance and cure. Plaintiff was injured in 1980 and filed his complaint in 1985. The district court dismissed plaintiff's negligence count under the Jones

Act as time barred. On appeal, the court of appeals held that the defendant was not estopped from asserting the statute of limitations to bar the claim under the Jones Act. The court stated:

By their very character, claims of estoppel tend to be case-specific. "The nature of the representations and of the conduct of the defendant are of crucial significance in determining whether the plaintiff is to be allowed to invoke this equitable principle." *Sanchez,* 626 F.2d at 1231. In these important respects, the case at bar offers up far too little. Some definite, unequivocal behavior must be shown—conduct fairly calculated to mask the truth or to lull an unsuspecting person into a false sense of security. Equally, it must be demonstrated that the party seeking to enforce an estoppel relied to his detriment on the interdicted behavior. Neither side of the equation was fulfilled here. The law does not permit the gossamer strands of generalized discussion, taken alone, to tie the defense of limitations beyond reach; nor can reliance be implied out of desultory palaver, without more. So relaxed a rule, were we to recognize it, would be no rule at all. It would serve no purpose other than to leave injured persons free to sue without time constraints of any kind. We are not prepared to bury statutes of limitations at sea in such a casual manner.

***4** *Id.* at 663.

The plaintiff's claim under the Jones Act was time barred in *Clauson* as plaintiff failed to show conduct so misleading that it induced a reasonable person to rely to his detriment. *Id.* at 662. The plaintiff stated he was misled by a conversation with the defendants' insurance broker, which contained the following lines: "As far as when I [plaintiff] wanted to settle, Mr. Snow just said that any time that I was ready that I could get together with him, but I didn't want to settle then...." *Id.* at 662 (footnote omitted). This conversation was not a basis for prohibiting a statute of limitations' defense. There was no evidence presented of deceptive conduct or of plaintiff's reliance sufficient to warrant a tolling of the statute. The court also found that the plaintiff had never changed his position, such as holding off filing suit because of what he was told, and there was nothing in the record which demanded such an inference be made. *Id.* at 662.

Unless plaintiff in this action can establish some basis for tolling the statute of limitations, his action would be barred as untimely as of October 10, 1986. Plaintiff asserts that the statements made by defendants' secretary effectively tolled the statute of limitations. Plaintiff argues that he relied upon the representations made by Ms. Smith and simply accepted as true that he was entitled only to workers' compensation without further investigation. Plaintiff then waited a period of over five years before discussing his injuries and his rights with an attorney.

Under these circumstances, I suggest that plaintiff was not justified in relying, for a period of over five years, on the statement made by defendants' agent. Plaintiff has failed to show that the defendants intended him to act upon the advice of Ms. Smith, nor is there evidence that plaintiff relied upon that advice, and therefore, never filed suit. Ms. Smith's actions, I suggest, lack the "definite, unequivocal behavior ... fairly calculated to mask the truth or to lull an unsuspecting person into a false statement of security". *Clauson*, 823 F.2d at 663. In addition, I suggest that plaintiff did not change his position or hold off filing suit due to defendants' action. From the record, it appears that plaintiff arguably might not have discussed his injury with an attorney at all had he not received an advertisement in the mail. It appears he had no intention of filing suit until well after the limitations ran. Instead, plaintiff accepted defendants' payments and did not investigate his rights any further. It should be noted that in his original complaint, plaintiff failed to allege any change in his position and did not so allege until the filing of his amended complaint.

Therefore, it appears that plaintiff's claims for negligence and unseaworthiness under the Jones Act are time barred.[FN2] The same statute of limitations does not apply in this district to claims for maintenance and cure, *Reed v. American Steamship Co.*, 682 F.Supp. 333, 338 (E.D.Mich.1988), and that claim is therefore not time barred.

III. *RECOMMENDATION*

***5** Accordingly, for the reasons stated above, IT IS RECOMMENDED that Defendants' Motion for Partial Summary Judgment be GRANTED,[FN3] and Count I be DISMISSED.

IV. *REVIEW*

The parties to this action may object to and seek review of this Report and Recommendation within ten (10) days of service of a copy hereof as provided for in 28 U.S.C. section 636(b)(1)(C). Failure to file objections constitutes a waiver of any further right of appeal. *United States v. Walters*, 638 F.2d 947 (6th Cir.1981), *Thomas v. Arn*, 474 U.S. 140, 1065 S.Ct. 466, 88 L.Ed.2d 435 (1985).

FN1. Defendants, in effect, also move for dismissal of Count III; however, they make no arguments regarding Count III, plaintiff's fraud claim. Defendants take the position, through their briefs, that no fraud occurred as plaintiff was not misled, nor did he rely, to his detriment, on the statements made by Dee Smith regarding the benefits plaintiff was entitled to receive.

FN2. The majority of cases dealing with motions to dismiss under the three-year statute of limitations in the Jones Act, 46 U.S.C. § 763a, allow for dismissal after the three years run, *Covey v. Arkansas River Co.*, 865 F.2d 660 (5th Cir.1989) (plaintiff filed twice in state court—did not toll statute of limitations); *Albertson v. T.J. Stevens & Co.*, 749 F.2d 223 (5th Cir.1984) (latent injury did not toll statute of limitations); *Grotting v. Hudson Shipbuilders*, 85 B.R. 568 (W.D.Wash.1988) (Chapter 11 bankruptcy did not toll statute of limitations); *Davis v. Newpark Shipbuilding*, 659 F.Supp. 155 (E.D.Tex.1987) (plaintiff's cause of action occurred on date of injury and statute of limitations expired three years from that date). In *Nasser v. Hudson Water Ways*, 563 F.Supp. 88 (W.D.Wash.1983), the defendant's continuing negligence tolled the three-year statute of limitations. In *Maxwell v. Swain*, 833 F.2d 1177 (5th Cir.1987), plaintiff filed suit in Louisiana State Court, and it was dismissed for improper venue; plaintiff's filing, however, tolled the statute of limitations. *Nasser* and *Maxwell* are factually distinguishable from this case. Here, plaintiff did not file suit anywhere until well after the limitations period ran out and there is no allegation or evidence of continuing negligence by defendants.

FN3. Defendants' motion was for the dismissal of Count I. Although it would appear that the dismissal of Count I would also eliminate Count III, the fraud claim in Count III affects plaintiff's claim for maintenance and cure as well.

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