



29 of 66 DOCUMENTS

**CHRISTOPHER A. STOUGH versus DAMPSKIBSSELSKABET NORDEN
AKTIESELSKAB, ET AL.**

CIVIL ACTION NO: 11-2785 SECTION: "S" (4)

**UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
LOUISIANA**

2013 U.S. Dist. LEXIS 147673

**September 25, 2013, Decided
September 25, 2013, Filed**

COUNSEL: [*1] For Christopher A Stough, Plaintiff: George P. Vourvoulias, III, LEAD ATTORNEY, Vourvoulias Law Firm, LLC, New Orleans, LA; Dennis M. O'Bryan, PRO HAC VICE, O'Bryan, Baun, Cohen & Kuebler, Birmingham, MI.

For Dampskibsselskabet Norden Aktieselskab, Defendant, Cross Defendant, Cross Claimant: Patrick J. McShane, LEAD ATTORNEY, Lara N. DiCristina, R. Patrick Ray, Frilot L.L.C., New Orleans, LA.

For STX Pan Ocean Co., Ltd., Defendant, Cross Defendant: Robert Hugh Murphy, LEAD ATTORNEY, Michael Letourneau, Murphy, Rogers, Sloss & Gambel (New Orleans), New Orleans, LA.

For Progressive Barge Line, Inc., Defendant, Third Party Plaintiff, Cross Claimant: John Fredrick Kessenich, LEAD ATTORNEY, Jon A. Van Steenis, Ryan M. Bourgeois, Daigle & Fisse, Covington, LA.

For Intership Services, Inc., incorrectly named International Ship Services, Inc., Defendant: Bertrand M. Cass, Jr., LEAD ATTORNEY, Hannah B. Salter, Paul D. Hale, Deutsch, Kerrigan & Stiles, LLP (New Orleans), New Orleans, LA.

For Agri Port Services, LLC, Third Party Defendant,

Cross Defendant: Adam P. Sanderson, Georges M. Legrand, Mouledoux, Bland, Legrand & Brackett, LLC, New Orleans, LA.

For Biehl & Co., L.P., incorrectly referred to [*2] as New Biehl & Co., L.P., Third Party Defendant: Robert Hugh Murphy, LEAD ATTORNEY, Michael Letourneau, Murphy, Rogers, Sloss & Gambel (New Orleans), New Orleans, LA.

For Intership Services, Inc., Cross Claimant: Bertrand M. Cass, Jr., LEAD ATTORNEY, Hannah B. Salter, Paul D. Hale, Deutsch, Kerrigan & Stiles, LLP (New Orleans), New Orleans, LA.

For Norton Lilly International, Inc., Third Party Defendant: Gary Alan Hemphill, Jeremy T. Grabill, LEAD ATTORNEYS, Meredith W. Blanque, Raymond T. Waid, Phelps Dunbar, LLP (New Orleans), New Orleans, LA.

JUDGES: MARY ANN VIAL LEMMON, UNITED STATES DISTRICT JUDGE.

OPINION BY: MARY ANN VIAL LEMMON

OPINION

ORDER AND REASONS

IT IS HEREBY DECREED that Progressive Barge Lines, Inc.'s tender of Norton Lilly International, Inc. and Agri Port Services, L.L.C. to plaintiff pursuant to *Rule 14(c) of the Federal Rules of Civil Procedure* was effective.¹

1 In their September 25, 2013, correspondence to the court, plaintiffs' counsel indicate that "this litigation is over for us," and that they are not planning on attending the pretrial conference. Pursuant to this representation, plaintiff must either dismiss his claims against Norton Lilly and Agri Port, with prejudice, or attend the pretrial [*3] conference on September 26, 2013, at 10:00 a.m. Norton Lilly and Agri Port's motions for summary judgment (Docs. #113 & 120) will be rendered moot if plaintiff elects to dismiss his claims against Norton Lilly and Agri Port.

BACKGROUND

This matter is before the court on the issue of the effectiveness of Progressive Barge Lines, Inc.'s tender of Norton Lilly or Agri Port to plaintiff, Christopher Stough, under *Rule 14(c) of the Federal Rules of Civil Procedure*, which results in Norton Lilly and Agri Port being treated as direct defendants.

On September 13, 2011, Stough was employed as a tankerman aboard a bunker barge and the M/V LIBERTY, a tug boat owned and operated by Progressive Barge Lines, Inc., when the tug was assigned to deliver bunkers to the M/V NORD NEPTUNE, a vessel owned by Dampskibsselskabet Norden Aktieselskab ("DNA"). At the time of the delivery, STX Pan Ocean, Co., Ltd. was the charterer of the M/V NORD NEPTUNE, and Intership Services, Inc. was cleaning the vessel's holds with muriatic acid and bleach at STX's request in preparation for surrendering the vessel to the oncoming charterer, MDS Freight. Stough alleges that he was injured when he inhaled noxious fumes emanating [*4] from the cleaning of the M/V NORD NEPTUNE's holds when the M/V LIBERTY and bunker barge approached the vessel.

MDS hired Agri Port to act as its husbanding agent, and Agri Port entered into a sub-agency agreement with its related company, Norton Lilly. The husbanding agent was charged with the responsibility of acquiring bunkers

for the M/V NORD NEPTUNE at the beginning of the MDS charter. MDS's charter party with DNA specified that MDS's charter would not begin until the vessel's holds were cleaned.

Stough filed this action on November 9, 2011, alleging maritime tort claims against DNA and STX. In the complaint, Stough alleged the citizenship of the parties, and stated that the amount in controversy exceeded \$75,000. He cited *28 U.S.C. § 1331*, which confers federal question subject matter jurisdiction on this court.

On December 5, 2011, Stough filed his first amended complaint adding Progressive as a defendant. He alleged that this court had jurisdiction over his claims against Progressive pursuant to the **Jones Act** for negligence, and the general maritime law for unseaworthiness and **maintenance and cure**. He further alleged that jurisdiction regarding his claims against DNA and STX was [*5] "based on the general maritime law." Thereafter, Stough filed two more amended complaints in which he added Intership as a defendant and alleged that jurisdiction regarding his claims against Intership was "based on the general maritime law." Stough requested a jury trial in all of his complaints.

On September 27, 2012, Progressive filed a third-party complaint against Agri Port and Intermare Agency Services, Inc. Thereafter, Progressive filed an amended third-party complaint asserting claims against Norton Lilly and New Biehl & Co., L.P. In both of the third-party complaints, Progressive alleged that "[t]his is an admiralty and maritime claim . . . within the meaning of *Rule 9(h) of the Federal Rules of Civil Procedure*; and this Third Party Complaint is brought pursuant to *Rule 14(c) of the Federal Rules of Civil Procedure*."

ANALYSIS

A. *Rule 14(c) Tender*

All of the claims in this litigation have been settled, except for Stough's purported claims against Agri Port and Norton Lilly by virtue of Progressive's *Rule 14(c)* tender. Stough argues that the *Rule 14(c)* tender was defective because he did not designate this case as an admiralty proceeding within the meaning of *Rule 9(h)*. Agri Port [*6] and Norton Lilly argue that the *Rule 14(c)* tender was proper, and they seek resolution of Stough's claims against them.

Section 1333(1), Title 28, United States Code provides that federal district courts have original jurisdiction over "[a]ny civil case of admiralty or maritime jurisdictions, saving to suitors in all cases all other remedies to which they are otherwise entitled." 28 U.S.C. § 1333(1). The "saving to suitors" clause permits a plaintiff to bring his claim "at law" in either the federal court or state court if his claim is not within the exclusive admiralty jurisdiction of the federal courts. *Luera v. M/V ALBERTA*, 635 F.3d 181, 188 (5th Cir. 2011). "When a plaintiff's claim is cognizable under admiralty jurisdiction and some other basis of federal jurisdiction, the Federal Rules of Civil Procedure allow the plaintiff to expressly designate [his] claim as being in admiralty." *Id.* *Rule 9(h) of the Federal Rules of Civil Procedure* provides:

If a claim for relief is within the admiralty or maritime jurisdiction and also within the court's subject-matter jurisdiction on some other ground, the pleading may designate the claim as an admiralty or maritime claim for the purposes [*7] of *Rule 14(c)*, *38(e)*, and *82*, and the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions. A claim cognizable only in the admiralty or maritime jurisdiction is an admiralty or maritime claim for those purposes, whether or not so designated.

"Numerous and important consequences flow from a plaintiff's decision to file [his] claim under the federal court's admiralty jurisdiction or its diversity jurisdiction," and "[o]ne of the most important consequences relates to the rules of procedure that will apply to the case." *Luera*, 635 F.3d at 188 (citations and quotations omitted). "If a claim is pleaded under diversity jurisdiction, the rules of civil procedure will apply," but, "[i]f the claim is pleaded under admiralty jurisdiction, . . . , the plaintiff will invoke those historical procedures traditionally attached to actions in admiralty." *Id.* (citations and quotations omitted).

Rule 9(h) does not require the plaintiff to make an affirmative statement to invoke the admiralty rules for claims cognizable under admiralty and some other basis of jurisdiction. *Id.* Instead, "the mere assertion of admiralty jurisdiction as a dual or an alternate basis of

subject matter [*8] jurisdiction for a claim is sufficient to make a *Rule 9(h)* election to proceed in admiralty for that claim." *Id.* at 188-89 (citing *T.N.T. Marine Serv., Inc. v. Weaver Shipyards & Dry Docks, Inc.*, 702 F.2d 585, 588 (5th Cir. 1983)) (Where the complaint alleged both diversity and admiralty as alternate bases for the court's jurisdiction without specifying whether the plaintiff asserted a separate jurisdictional basis for each claim, the "simple statement asserting admiralty or maritime claims" was sufficient to invoke admiralty jurisdiction and procedures even without an explicit reference to *Rule 9(h)*). Thus, "in [the Fifth Circuit] a plaintiff who asserts admiralty jurisdiction as a basis for the court's subject matter jurisdiction over a claim has automatically elected under *Rule 9(h)* to proceed under the admiralty rules, even if [he] states that [his] claim is also cognizable under diversity or some other basis of federal subject matter jurisdiction." *Id.* at 189. Moreover, "by its plain language, *Rule 9(h)* applies to 'claims' and not to the entire case." *Id.* at 190.

Rule 14(c) of the Federal Rules of Civil Procedure is a procedural rule of admiralty, and provides that, when a plaintiff [*9] asserts an admiralty claim under *Rule 9(h)*, the defendant may, as a third-party plaintiff, bring in a third-party defendant who may be wholly or partly liable to the plaintiff or to the third-party plaintiff, and may demand judgment in the plaintiff's favor against the third-party defendant. The third-party defendant must defend against the plaintiff's claim and the third-party plaintiff's claim, and the action proceeds as if the plaintiff had directly sued the third-party-defendant. *Id.*

In his amended complaints, Stough alleged that, as to his claims against Progressive, "jurisdiction is founding under the **Jones Act** (46 USCA 30104), for negligence and general maritime law for unseaworthiness, **maintenance and cure**." Thus, Stough clearly invoked the court's admiralty jurisdiction for his unseaworthiness and **maintenance and cure** claims against Progressive, and automatically elected to proceed under *Rule 9(h)* as to those claims.² Progressive's third-party demand against Norton Lilly and Agri Port states that it is brought pursuant to *Rule 14(c)*, and alleges that Norton Lilly and Agri Port are directly liable to Stough. Therefore, Progressive properly tendered Norton Lilly and Agri Port [*10] to Stough under *Rule 14(c)*, and the action proceeds as if Stough had sued Norton Lilly and Agri Port directly.

² Further, Stough's election of a jury trial in

accordance with his rights under the **Jones Act** does not defeat his automatic election to proceed under *Rule 9(h)* as to his unseaworthiness and **maintenance and cure** claims against Progressive. In *Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 83 S.Ct. 1646, 10 L. Ed. 2d 720 (1963), the Supreme Court of the United States held a jury may try unseaworthiness and **maintenance and cure** claims that are joined with **Jones Act** claims. The court reasoned that there is no prohibition of jury trials in admiralty cases, and that, although admiralty claims are traditionally tried to the bench, when such claims are joined with a **Jones Act** claim and arise out of one set of facts "[o]nly one trier of fact should be used for the trial of what is essentially one lawsuit to settle one claim split conceptually into separate parts because of historical developments." *Id. at*

1646.

CONCLUSION

IT IS HEREBY DECREED that Progressive Barge Lines, Inc.'s tender of Norton Lilly International, Inc. and Agri Port Services, L.L.C. to plaintiff pursuant to *Rule 14(c) of the Federal Rules of Civil Procedure* [*11] was effective.

New Orleans, Louisiana, this 25th day of September, 2013.

/s/ Mary Ann Vial Lemmon

MARY ANN VIAL LEMMON

UNITED STATES DISTRICT JUDGE