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Kuehne & Nagel (AG & CO.) v. Geosource, Inc. United States Court of Appeals, Fifth Circuit, 5 June 1989 874 F.2d 283

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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

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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Kuehne & Nagel v. Geosource *(Cont.)*

Executive Jet Aviation, Inc. v. City of Cleveland, Ohio, 409 U.S. 249 (1972). *Executive Jet* provided the test to be satisfied when invoking admiralty jurisdiction for maritime torts and requires that: (1) the alleged wrong occurs on navigable waters (situs) and (2) the wrong bears a significant relationship to traditional maritime activities (nexus).

The district court found that the "impact" of the fraudulent contract "took effect" on navigable waters because the delays in unloading the cargo allowed the remaining cargo to be "at sea" waiting to be discharged. The requirement of *Executive Jet* for situs was provided with the linkage by the delay at sea. In effect, the misrepresentations were manifested at sea. *Carroll v. Protection Maritime Insurance Co., Ltd.*, 512 F.2d 4 (1st Cir. 1975).

The district court found that the intentional tort was so " '. . . interwoven with a maritime contractual relationship (at least in part) as to fall within admiralty jurisdiction.' " *Kuehne & Nagel (AG & CO) v. Geosource, Inc.*, 625 F. Supp. 794, 799 n.6 (S.D. Tex. 1986). The Fifth Circuit reversed the district court and found no basis for admiralty jurisdiction. In the instant case, the fraudulent inducement took place at the forwarders' meeting in Hamburg, FRG. The tortious acts occurred before the contract was signed. An "impact" on navigable waters with maritime consequences never happened and therefore the situs requirement of *Executive Jet* was not met, thereby invalidating any claim for admiralty jurisdiction. The court of appeals held that the parties to a contract with strong maritime ties must satisfy the *Executive Jet* situs requirment.

As to the claim for breach of a maritime contract, the district court found that Kuehne & Nagel could not invoke admiralty jurisdiction based on breach of contract. The first and foremost criterion to be fulfilled is the existence of a maritime contract. *Rea v. The Eclipse*, 135 U.S. 599 (1980). A traditional maritime contract does not include land transportation. Elements which establish a maritime contract are activities that are traditionally marine in nature with only incidental non-maritime activity being permissible. If there is a mix of elements, the admiralty court must separate the activities and enforce the maritime obligations. The bills of lading had a fixed single rate for the sea and land transportation.

The Fifth Circuit agreed and affirmed the district courts finding that there was no admiralty jurisdiction based on breach of a maritime contract. In this contract, neither of the requirements are met. Although the situation did involve transportation of goods by sea, the route included a 1000 mile overland road trip which is not an incidental portion of the contract or something easily separable.

Mark A. Taylor '92

E.A.S.T., INC. OF STAMFORD, CONN. v. M/V ALAIA
United States Court of Appeals, Fifth Circuit, 26 June 1989
876 F.2d 1168

Breach of a time charter creates a maritime lien distinct from liens based on contracts of affreightment and requires delivery of the vessel rather than the union of ship and cargo to become effective.

FACTS: E.A.S.T., Inc. ("EAST") entered into an agreement with Advance Co. ("Advance") the owners of the M/V Alaia, to time charter the vessel. The charter party acknowledged EAST's intention to carry milk carton stock and bulk soda ash from New Orleans to Venezuela. Also, the charter agreement contained an arbitration clause that specified that this contract would be arbitrated in London and governed by English law. EAST subsequently entered into two voyage subcharters, one to carry milk carton stock and another to carry soda ash. EAST paid $26,700 in advance charter hire. EAST procured ship's agents, longshoremen, bunkers, and encountered other expenses in preparation for the charter. The vessel went "on hire" on October 20, 1987. EAST and the two subcharters engaged marine surveyors to inspect the vessel. The marine surveyors concluded that the vessel was unseaworthy, was not suitable to carry the cargo and did not meet the standards of the charter party. The surveyors cited excessive dirt, rust and debris along with unseaworthy hatches as the basis for their finding.

EAST rejected the vessel and filed an *in rem* action in Federal District Court for the Eastern District of Louisiana, where it sought to invoke the charter's arbitration clause and obtain security for a possible arbitration award. Advance filed a notice of appearance *in personam*, an answer and a counter-claim. Advance sought to vacate the vessel's arrest order, claiming that the maritime lien was insufficiently based, and alleging that a valid charter party had come into existence. Alternatively, Advance stated a maritime lien is improper for breach of a charter party, where cargo had not been loaded on the ship. Advance also contested EAST's claim that the arbitration clause was not enforceable.

The district court first rejected the argument that a valid time charter did not exist. This court, relying on the reasoning of *International Marine Towing v. Southern Leasing Partners, Ltd.*, 722 F.2d 126 (5th Cir, 1983), *cert. denied*, 469 U.S. 821 (1984), noted that a martime lien was valid even though no cargo was loaded pursuant to the charter. The court also held that the enforcement of the arbitration clause based on *in rem* jurisdiction was sufficient and that any defect in jurisdiction was cured by Advance's appearance *in personam* to defend against EAST's action and to support its counterclaim.

ISSUES: (1) Did the trial court err in concluding that a maritime lien was proper for breach of a time charter even though cargo had never been loaded or placed in the possession of the vessel?

(2) Did the trial court err in finding *in rem* jurisdiction as a sufficient basis for referring parties to arbitration?

ANALYSIS: The Fifth Circuit affirmed the ruling of the district court, and concluded that the time charter between the parties was not executory because the vessel had been delivered to EAST. The court cited, G. Gilmore and C. Black, *The Law of Admiralty* 636 (2d ed. 1975), which states, "[t]he point at which the vessel itself is deemed to have commenced 'performance' sufficient to remove the contract from executory status varies with the type of contract involved." The court of appeals further cited G. Gilmore and C. Black, *supra* at 636, "[u]nder charter parties, the point of 'execution' would be the delivery of the vessel under the charter: mere refusal to deliver would only give rise to liability *in personam*... ."

The court of appeals rejected the assertion by Advance, that the time charter was a contract of affreightment and therefore remained executory until there was a union of the ship and its cargo. The court distinguished *Belvedere v. Compania Plomari de Vapores, S.A.*, 189 F.2d 128 (5th Cir. 1951), which Advance claimed controlled the issue, on the grounds that the plaintiff was both a cargo owner and a charterer. The *EAST* court stated "[w]hen, however, the charterer has, as in this case, entered into subcharters with the cargo owners, the charterer asserts a breach only of the time charter *qua* time charter and not of a contract of affreightment. ..." *E.A.S.T.*, at 1177. The court of appeals affirmed the district court's decision granting a maritime lien upon the breach of time charter.

The Fifth Circuit also agreed with the district court that *in rem* jurisdiction is an adequate basis for referring parties to arbitration. The court of appeals found the Federal Arbitration Act §8 to be persuasive:

> If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then . . . the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed wth the arbitration and shall retain jurisdiction to enter its decree upon the award.
>
> 9 U.S.C. §8

Even in the absence of this provision, 9 U.S.C. §206 authorizes the district court to refer the parties to arbitration in London as provided for in the charter party. The court further agreed that Advance's appearance *in personam* was a separate and sufficient basis on which to refer parties to arbitration.

Edward F. Kenny '90