

2007 WL 781899

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United States District Court,
S.D. Ohio,
Eastern Division.

Komla EDAH, Plaintiff,

v.

TRIDENT SEAFOODS CORP., Defendant.

No. 2:06-cv-554. | March 12, 2007.

Attorneys and Law Firms

Christopher D. Kuebler, Dennis M. O'Bryan, O'Bryan Baun
Cohen Kuebler, Birmingham, MI, for Plaintiff.

Christina Corl, Columbus, OH, for Defendant.

Opinion

OPINION AND ORDER

GEORGE C. SMITH, United States District Judge.

*1 This matter is before the Court on Plaintiff's objections to Magistrate Judge King's *Report and Recommendation* issued on January 24, 2007, wherein she recommended that *Defendant's Motion to Dismiss for Improper Venue*, be granted. Pursuant to 28 U.S.C. § 636(b)(1), this Court has conducted a *de novo* review of the *Report and Recommendation* and concludes that Plaintiff's objections are without merit.

Plaintiff argues that the Magistrate Judge incorrectly interpreted *Boyd v. Grand Trunk R.R. Co.*, 338 U.S. 263, 265 (1949), and that if *Boyd* were properly interpreted and applied, the venue selection provision at issue in this case is rendered unenforceable requiring denial of *Defendant's Motion to Dismiss for Improper Venue*. However, as Defendant correctly notes in its response to Plaintiff's objections, Magistrate Judge King concluded that *Boyd* is inapplicable to the case at bar. This Court agrees with the Magistrate Judge's conclusion and finds her analysis correct. Thus, for the reasons discussed in the *Report and Recommendation*, Plaintiff's objections, Doc. # 19, are **OVERRULED**. The *Report and Recommendation*, Doc. # 18, is hereby **ADOPTED** and **AFFIRMED**. *Defendant's Motion to Dismiss for Improper Venue*, Doc. # 5, is **GRANTED**.

This action is hereby **DISMISSED**.

REPORT AND RECOMMENDATION

NORAH McCANN KING, United States Magistrate Judge.

Plaintiff brings this action under the Jones Act, 46 U.S.C. § 688, and under the general maritime law for negligence, maintenance and cure in connection with the allegedly inadequate treatment of plaintiff's injured hand. This matter is before the Court for a report and recommendation on *Defendant's Motion to Dismiss for Improper Venue* ("*Defendant's Motion to Dismiss* "). Doc. No. 5. For the reasons that follow, it is **RECOMMENDED** that *Defendant's Motion to Dismiss* be **GRANTED**.

I. FACTS

In July 2004, plaintiff entered into an employment contract with defendant as a crewmember of one of defendant's ships. See *Exhibit 3 to Tiffany Sandoval*¹ *Declaration* ("*Sandoval Dec.*") attached to *Defendant's Motion to Dismiss*. The employment agreement contained a venue selection clause which, in relevant part, provides:

The parties agree that the EXCLUSIVE VENUE FOR ANY LAWSUIT between the parties arising out of or in any way related to Employee's employment by Employer, including any lawsuit arising out of this employment contract, any in rem lawsuit against the vessel, any lawsuit for maintenance, cure or unearned wages, and any lawsuit for illness, injury or death arising under the Jones Act, the General Maritime Law, or otherwise, SHALL BE ONLY IN THE FEDERAL OR STATE COURTS IN KING COUNTY, WASHINGTON.

Exhibits 1, 3 attached to *Sandoval Dec.* (emphasis in original).

Plaintiff filed the instant action on July 3, 2006, alleging negligence claims under the Jones Act and maintenance and cure claims under the general maritime law. *Complaint* ¶¶ 2, 3. On August 14, 2006, defendant filed *Defendant's Motion to Dismiss* based upon alleged improper venue. Doc. No. 5. That motion is fully at issue. See Doc. Nos. 5, 8, 11. Further, both parties have filed notices of supplemental authority to support their positions with regard to proper venue in this action. See Doc. Nos. 13, 14, 16. The Court has carefully considered all of these documents.

II. STANDARD

*2 The Federal Rules of Civil Procedure authorize a court, upon suitable showing, to dismiss an action where venue in that court is improper. Fed.R.Civ.P. 12(b)(3). Once a defendant raises the issue of proper venue by motion, the burden of proof is placed upon the plaintiff to sustain venue in that court. See *Cohen v. Newsweek, Inc.*, 312 F.2d 76, 78 (8th Cir.1963); *Beckley v. Auto Profit Masters, LLC*, 266 F.Supp.2d 1001, 1003 (S.D.Iowa 2003). See also *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972) (burden of proof on party opposing enforcement of venue or forum selection provision in maritime law).

III. ANALYSIS

The dispositive issue before the Court is whether the law that applies to venue selection clauses under the Federal Employers' Liability Act, 45 U.S.C. § 51, *et seq.* ("FELA") is incorporated into the Jones Act. It is beyond question that the Jones Act adopts for maritime employees certain rights and remedies available to railway workers under FELA. See 46 U.S.C. § 688(a). See also *Pure Oil Co. v. Suarez*, 346 F.2d 890, 892 (5th Cir.1965), *aff'd on other grounds*, 384 U.S. 202 (1966) ("Instead of devising separate standards to be applied in personal injury suits by seamen Congress adopted the expedient of incorporating by reference the more detailed provisions which govern the liability of railroads to their employees."). Further, it is undisputed that FELA has been interpreted to void venue selection clauses. *Boyd v. Grand Trunk R.R. Co.*, 338 U.S. 263, 1950 A.M.C. 26 (1949) (contract restricting the choice of venue was void as conflicting with FELA, 45 U.S.C. § 51); *Akerly v. New York C.R. Co.*, 168 F.2d 812 (6th Cir.1948) (same).

Plaintiff argues that the law related to venue selection clauses under FELA is incorporated into the Jones Act and the venue selection clause at issue is therefore unenforceable. Specifically, plaintiff argues that *Boyd, supra*, applies to this action and requires the conclusion that the venue selection clause at issue is unenforceable. Defendant, however, contends that a venue selection clause in a Jones Act action is not governed by the law interpreting venue selection clauses under FELA because, *inter alia*, the Jones Act contains its own venue provisions which are applicable to the venue selection clause at issue here. This Court agrees.

As one court has stated, 'The short answer to (appellee's) argument is that Congress has seen fit to impose different venue requirements in Jones Act cases. To now hold that the venue requirements under the Federal Employers' Liability Act are controlling would negate the plain

language of 46 U.S.C. 688.'" *Rodriquez v. United Fruit Co.*, 236 F.Supp. 680, 682 (E.D.Va.1964) [*rev'd on other grounds sub nom. Fanning v. United Fruit Co.*, 355 F.2d 147 (4th Cir.1966)].

Pure Oil Co. v. Suarez, 346 F.2d at 892.² *Pure Oil* reasoned that its conclusion conformed to "the well-recognized and eminently logical canon of statutory construction that the specific provisions of a statute control exclusively over the broader and more general provisions of another statute which may relate to the same subject matter in the absence of a clear manifestation to the contrary by the legislature." *Id.* (citing *Bulova Watch Co. v. United States*, 365 U.S. 753, 758-759 (1961) and *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228-229 (1957)). See also *Strickland v. Tyson Seafood Group, Inc.*, 1999 A.M.C. 2191, 2192-93 (Mi.Cir.Ct.1999) (FELA venue provisions are not incorporated into Jones Act); *Willard v. Fishing Co. of Alaska, Inc.*, 1995 A.M.C. 1358, 1360 (D.Alaska 1995) (same). *But see Boutte v. Cenac Towing, Inc.*, 346 F.Supp.2d 922 (S.D.Tex.2004) (declining to enforce venue selection clause in maritime employment contract).

*3 This Court also finds persuasive the opinions of two courts holding that the specific venue selection clause at issue here is enforceable even under the Jones Act. In *Grajeda v. Trident Seafoods Corporation*, Case No. 3AN-04-03778CI, (3rd Dist.Alaska Feb. 10, 2005) the Anchorage Superior Court granted Trident Seafoods Corporation's motion to dismiss under Rule 12(b)(3) for improper venue after considering the precise language at issue in the instant action. *Exhibit C* attached to *Defendant's Motion to Dismiss. Grajeda* differentiated between a forum selection clause and a venue selection clause under the Jones Act and concluded that the former, which addresses the particular forum in which jurisdiction is properly invoked, is unenforceable but that the latter, which selects the particular geographic location where suit may be brought, whether in state or federal court, is enforceable. See also *Gregorius v. Trident Seafoods Corporation*, Case No. 04-2-04822-8 (Pierce County, Wash. April 30, 2004) (enforcing the same venue selection clause). *Exhibit E* attached to *Defendant's Motion to Dismiss*.

WHEREUPON, in light of the foregoing analysis, the Court concludes that plaintiff has failed to meet his burden of establishing proper venue in this action. It is therefore **RECOMMENDED** that *Defendant's Motion to Dismiss*, Doc. No. 5, be **GRANTED** and that this action be **DISMISSED**, without prejudice to re-filing in King County, Washington.³

If any party seeks review by the District Judge of this *Report and Recommendation*, that party may, within ten (10) days, file and serve on all parties objections to the *Report and Recommendation*, and the part thereof in question, as well as the basis for the objection thereto. 28 U.S.C. § 636(b)(1); Fed.R.Civ.P. 72(b). Responses to objections must be filed within ten (10) days after being served with a copy thereof. Fed.R.Civ.P. 72(b).

The parties are specifically advised that failure to object to the *Report and Recommendation* will result in a waiver of the right to *de novo* review by the District Judge and of the right to appeal the decision of the District Court adopting the *Report and Recommendation*. See *Thomas v. Arn*, 474 U.S. 140 (1985); *Harris v. City of Akron*, 20 F.3d 1396 (6th Cir.1994); *Smith v. Detroit Fed'n of Teachers, Local 231, Am. Fed'n of Teachers, AFL-CIO*, 829 F.2d 1370 (6th Cir.1987).

Footnotes

- 1 Ms. Sandoval is the Alaska Human Resources Manager for defendant. *Sandoval Dec.* ¶ 3.
- 2 *Pure Oil, supra*, also included the issue of whether the general venue statute, 28 U.S.C. § 1391(c), can be relied upon by the Jones Act plaintiff. See *Pure Oil*, 346 F.2d at 893-97. However, this issue is of no moment in the instant action.
- 3 This Court considered transfer of this action in lieu of dismissal, but rejected that disposition because transfer would foreclose to plaintiff the option of filing the action in Washington state court. The Court also notes that neither party suggested the option of transfer.

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