

87407-7
No. 66075-6

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I**

IAN DEAN,

Plaintiff/Appellant,

v.

THE FISHING COMPANY OF ALASKA, INC.
and
ALASKA JURIS, INC.,

Defendants/Respondents

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2011 JUN 28 AM 10:38

STATEMENT OF ADDITIONAL AUTHORITY

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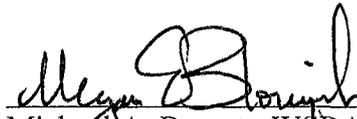
Attorneys for Respondents

COMES NOW Respondent Fishing Company of Alaska, by and through its counsel of record, and files the present Statement of Additional Authority pursuant to RAP 10.8.

In Collick v. Weeks Marine, Inc., 397 Fed. Appx. 762, 2011 AMC 603 [LTD], 2010 U.S. App. LEXIS 21034 (3d Cir. 2010), the Third Circuit vacated the trial court's granting of a preliminary injunction awarding the plaintiff seaman pre-trial maintenance and cure on the grounds that disputed issues of fact regarding the seaman's entitlement to maintenance and cure required resolution at trial, such that a pre-trial award of maintenance and cure was inappropriate.

RESPECTFULLY SUBMITTED this 27th day of June, 2011.

HOLMES WEDDLE & BARCOTT, P.C.



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JOSEPH COLLICK v. WEEKS MARINE, INC., ET AL.

[LIMITED OPINION--See Editor's Note]

Editor's Note: This court has not designated this disposition for publication. The methods of making it available when it is cited to a court are therefore governed by Federal Rule of Appellate Procedure 32.1. Counsel who wish to cite it to a court should consult that rule and those of the courts that issued it and in which it is to be cited. In citing it, counsel are requested to include [LTD] at the end of the AMC citation, thus: *2005 AMC 3500* [LTD].

No. 09-4222

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

2011 AMC 603

397 Fed.Appx. 762

October 12, 2010

JUDGES:

Scirica, Rendell and Fisher, Ct.JJ.

HEADNOTES:

DAMAGES--124. Maintenance, Cure and Wages--PERSONAL INJURY--141. Maintenance, Cure and Wages--PRACTICE--128. Stay and Injunctive Relief.

The granting of a preliminary injunction is not appropriate when the party seeking the injunction is unable to draw a reasonable probability of eventual success in the underlying litigation. The district court here granted plaintiff's motion for a preliminary injunction in his action for maintenance and cure benefits, pursuant to which the defendant was ordered immediately to pay those benefits pending the outcome of trial. Held: In light of substantial record facts on both sides of the argument, the district court erred in concluding preliminarily that plaintiff would be successful in proving he was a seaman entitled to maintenance and cure. The injunction was improper, the order is vacated, and the matter must proceed to trial forthwith.

COUNSEL:

Matthew J. Cowan and Nicholas P. Giuliano (Bennett, Giuliano, McDonnell & Perrone) for Collick
Ronald Betancourt and Virginia A. Harper (Betancourt, Van Hemmen & Greco) for Weeks Marine

APPEAL-STATEMENT:

Appeal from the United States District Court for the District of New Jersey, Mary L. Cooper, D.J., vacated.

OPINIONBY: RENDELL

OPINION:

[*604] MAJORIE O. RENDELL, Ct.J.:

Appellant Weeks Marine, Inc. appeals from the District Court's grant of a preliminary injunction in favor of Joseph Collick. Collick was injured while working for Weeks on the construction of a finger pier. He sued in the United States District Court for the District of New Jersey for, among other things, maintenance and cure benefits under general maritime law. The District Court, upon a motion by Collick, ordered Weeks Marine, Inc. to immediately pay maintenance and cure benefits pending the outcome of trial. We will vacate the preliminary injunction issued by the District Court and remand for further proceedings for the reasons discussed below.

Background

Collick is a marine construction worker and a member of the dockbuilders union since 1999. At the time of his injury, Collick was employed by Weeks Marine, Inc. and was assigned to the construction site of a finger pier at the Earle Weapons Station, a United States Naval station located in Leonardo, New Jersey. The pier is used to load and unload munitions for the Navy and, thus, extends two miles long into the Sandy Hook Bay. Due to the location of the construction, the job was supported by a number of barges, that were utilized as work and/or crane platforms and to store supplies.

On November 17, 2006, while working in conjunction with a crane barge for the purpose of lifting large pieces of pre-cast concrete onto the pier, Collick was injured. Collick had been tasked to bend a piece of rebar which was impeding the way of the concrete. While attempting to do so and walking out along a narrow piece of concrete already in place, he slipped and fell approximately 12 to 15 feet, sustaining a severe fracture to his leg. The fracture has required a number of surgeries and his doctors have declared that he will be unable to do this type of physically demanding work ever again. He is in constant pain and requires medication regularly.

Prior to the filing of this litigation, Weeks was voluntarily paying benefits under the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901-950. Once Collick filed this lawsuit, Weeks discontinued paying the LHWCA benefits to Collick, [*605] stating that by filing a suit for maintenance and cure, he raised a question as to whether he was eligible to receive the LHWCA benefits. After a number of procedural starts and stops, on August 6, 2009, Collick filed a motion for order to show cause seeking a preliminary injunction from the Court to require Weeks to pay him maintenance and cure. Following a hearing, on October 28, 2009, 680 F. Supp.2d 642, the District Court granted Collick's motion and issued a preliminary injunction ordering Weeks to pay the maintenance and cure benefits. Weeks timely appealed the District Court's order.

The District Court had jurisdiction pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1333. We have jurisdiction over this matter pursuant to 28 U.S.C. § 1292. We review a district court's grant of a preliminary injunction for abuse of discretion. *ACLU of New Jersey v. Black Horse Pike Regional Bd. of Ed.*, 84 F.3d 1471, 1476 (3 Cir. 1996). "An abuse of discretion exists when the district court's decision rests upon a clearly erroneous finding of fact, an errant conclusion of law, or an improper application of law to fact." *Id.* Thus, while an appellate court reviews the grant of a preliminary injunction for abuse of discretion, it reviews the district court's underlying factual determinations under a clearly erroneous standard and considers the district court's determinations on questions of law de novo. *Acierno v. New Castle County*, 40 F.3d 645, 652 (3 Cir. 1994).

Discussion

We conclude that Collick failed to meet the burden required to qualify for a mandatory preliminary injunction. The standard for the issuance of a preliminary injunction requires "the moving party to show: (1) a reasonable probability of eventual success in the litigation, and (2) that it will be irreparably injured *pendente lite* if relief is not granted to prevent a change in the status quo." *Acierno* at 653. Additionally, the district court "should take into account, when they are relevant, (3) the possibility of harm to other interested persons from the grant or denial of the injunction, and (4) the public interest." *Id.*

[*606] We cannot agree with the grant of the preliminary injunction because we cannot conclude that Collick met the first prong of the standard, namely, that he had shown "a reasonable probability" of success in his claim for maintenance and cure. To qualify for maintenance and cure under maritime law, one need only prove that he is a "seaman", and that he sustained an injury in the employ of a vessel. *The Osceola*, 189 U.S. 158, 2000 AMC 1207 (1903).

For Collick to meet this prong, he must demonstrate that he will most likely be able to prove he is, in fact, a seaman. The test for seaman status has two components: (1) the employee's duties must contribute to the accomplishment of the vessel's mission; and (2) the employee's relation to the vessel must be substantial in duration and nature. *Foulk v. Donjon Marine Co., Inc.*, 1998 AMC 2926, 2932, 144 F.3d 252, 256 (3 Cir. 1998). Collick argues that he meets the test for seaman status because he was assigned by Weeks to work on a crane barge which had a mission to support the construction of the pier; that he spent nearly 75% of his time on the crane barge; that he reported to work, changed into work clothing and, took lunch and other breaks on the barge; that the type of work he did, from driving piles from the barge, cutting piles on the deck of the barge, maintaining equipment on the barge, and even handling lines when the barge was moved, was all in support of the mission of the crane barge. All of Collick's factual offerings are currently supported by declaration of Collick alone.

Weeks urges that Collick's work was substantially related to the construction of the pier and unrelated to the mission of the barge; Collick was a dockbuilder; his hiring paperwork states he was a dockbuilder; he is a member of the dockbuilders union. Collick's supervisor, Daniel Mowers, stated in a declaration that Collick spent far less time on the barge than he stated in his declaration. Mowers stated that Collick was not assigned to a barge and that he mainly worked on the pier itself constructing various portions. Weeks supported these assertions with contractor production reports and daily time sheets, which Weeks argues negate all of the statements that Collick made about the nature of the work he did.

In light of the presence in the record of substantial facts on both sides of the argument, and particularly the relatively thin record [*607] evidence presented by Collick, we find that the District Court erred in concluding preliminarily that Collick would likely be successful in proving he was a "seaman". The nature of the maritime doctrine of maintenance and cure is straightforward, but the application of law to the facts in this case is not. In light of the factually intensive nature of the doctrine of maintenance and cure and the abundance of contradictory facts on both sides of the record, this matter should have proceeded to trial and the entry of a preliminary injunction was inappropriate n1.

n1 We recognize, as did the District Court, Collick's predicament. A prompt trial would likely allow receipt of benefits under either general maritime law or under the LHWCA.

Accordingly, we will vacate the order of the District Court and remand for the Court to proceed to trial, forthwith, on Collick's complaint.

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of June, 2011, I caused a true and correct copy of the Respondent's Statement of Additional Authority to be served on the following in the manner indicated below:

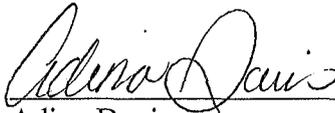
***Via Electronic Mail
and U.S. Mail***

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***Via Hand Delivery/
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Adina Davis