

NOT DESIGNATED FOR PUBLICATION

HAROLD YOUNCE

NO. 04-CA-170

VERSUS

CONSOLIDATED WITH
04-CA-424

PACIFIC GULF MARINE, INC., HENRY T.
DART, RONNA M. STEELE, SEAN P.
ALFORTISH

FIFTH CIRCUIT

COURT OF APPEAL

FILED SEP 28 2004

STATE OF LOUISIANA

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CLERK

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 518-850, DIVISION "I"
HONORABLE JO ELLEN V. GRANT, JUDGE PRESIDING

SEPTEMBER 28, 2004

EDWARD A. DUFRESNE, JR.
CHIEF JUDGE

Panel composed of Judges Edward A. Dufresne, Jr., Sol Gothard
and Thomas F. Daley

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AFFIRMED

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The issue in these consolidated appeals is whether the trial judge erred in sustaining exceptions of prescription urged by the defendants in reconvention. Because we find that the exceptions were properly sustained, we affirm both judgments.

Because of our disposition of this matter, we need not recite the facts in detail as they are well known to the parties and are adequately set forth in *Younce v. Pacific-Gulf Marine, Inc.*, 01-546 (La. App. 5th Cir. 4/10/02), 817 So.2d 255, *reversed and remanded*, 2002-4343 (La. 10/4/02), 827 So.2d 1144. We do note the following particulars, however, as they are necessary to understand our ruling.

Harold Younce, plaintiff-appellee, claimed to have been injured while working for Pacific-Gulf Marine, Inc. (PGM) in 1995. He filed suit in 1998 asserting claims under the Jones Act and general maritime law. During the course of the litigation plaintiff's original attorney, Sean Alfortish, associated with another attorney, Wiley Beevers, to assist in the case.

The district court judge to whom the case was assigned was Ross P. LaDart who at that time had only recently been elected to the bench. During that election Wiley Beevers had represented Judge LaDart in a campaign related lawsuit. When Beevers joined Alfortish in the Younce suit on June 24, 1999, he was still counsel of record for Judge LaDart in the election suit. It was not until September 7, 1999, that Beevers formally withdrew from his representation in the election suit. Between those two dates Beevers participated in several hearings in the Younce matter, but neither he nor the judge informed opposing counsel of this overlapping representation.

On March 30, 2000, after a bench trial, but before a final judgment was rendered, PGM filed a motion to recuse Judge LaDart based on his association with Beevers. That motion was eventually heard in August 2000 by Judge Alan Green, and resulted in a judgment denying the recusal. Meanwhile, a final judgment was rendered on the merits of the original suit. Both the recusal judgment and the final judgment on the merits were affirmed by this court, but the supreme court reversed the recusal judgment and ordered Judge LaDart removed from the case. It also vacated the judgment on the merits and remanded the case to the district court for another trial.

The judgment of the supreme court was rendered on October 4, 2002. On March 19, 2003, PGM filed a reconventional demand against Younce. It further appears that after the above judgment was rendered Younce discharged his attorneys and sought other representation. Alfortish then filed an intervention in the suit to protect his right to attorney fees. In response, on May 7, 2003, PGM filed a reconventional demand against Alfortish. In both of these pleadings PGM alleged basically that plaintiff and his attorneys were guilty of abuse of process in bringing a fraudulent claim and further in failing to inform them of Beever's

representation of Judge LaDart, thus depriving them of a fair trial in violation of 28 U.S.C. sec. 1983.

Younce and Alfortish urged exceptions of prescription which were sustained by the trial judge. PGM now appeals.

PGM admits that as of March 30, 2000, it was aware of the facts underlying its reconventional demands. It also admits that the liberative prescription of one year is applicable here. What it disputes is when the prescriptive period began. Two arguments are made. First, it contends that because Younce and Alfortish litigated the issue of recusal from March 30, 2000, through October 4, 2003, that this constituted a continuing tort, i.e. an ongoing attempt to conceal the representation of Judge LaDart by Beevers. It argues that the tortuous conduct did not end until October 4, 2002, the date on which the supreme court rendered its judgment, and therefore its filings of the reconventional demands in March and May of 2004 were timely. Its second argument is that the doctrine of *contra non valentum* should be applied. Its reasoning here is that until the supreme court ruled that recusal was warranted, PGM was legally precluded from bringing the action. We reject both arguments.

PGM admits that it knew the facts underlying its demands as of March, 2000. We fail to see how Younce and Alfortish could have continued their alleged efforts to conceal facts that were already known. Moreover, there was apparently a reasonable argument to be made that even though Beevers had represented Judge LaDart in an unrelated matter and failed to disclose this fact, that this alone would not mandate recusal, and this was the conclusion reached by the district court as well as this court. Their continued litigation of the issue can hardly be deemed a continuing tort.

PGM recognizes that the doctrine of *contra non valentum* is an equitable remedy that suspends prescription when a party is prevented from asserting his

rights for reasons external to his own will. It asserts further that this case is analogous to the situation presented in indemnification suits where the right of action does not arise until the party seeking indemnification from a third party is cast in judgment, citing *Agency Rent-a Car, Inc. v. Fiberglass Insulators, Inc.*, 367 So.2d 66 (La. App. 4th Cir. 1979). Its argument is that until the supreme court reversed the recusal judgment it had not suffered any damages, and therefore it was prevented from asserting its rights until October 4, 2002. We disagree.

PGM claims that it was the victim of a tort, i.e. a conspiracy to prevent it from receiving a fair trial growing out of collusion between the trial judge and plaintiff and his attorneys. It was aware of the facts upon which it based this claim in March of 2000. That allegation, if proved, would sustain a judgment in its favor regardless of how the recusal matter was resolved. Moreover, there was no legal impediment preventing it from urging its reconventional demands at that time, even though the recusal matter and the judgment on the merits were still being litigated. We therefore reject this argument as well.

For the foregoing reasons the judgments sustaining the exceptions of prescription in favor of Sean Alfortish and Harold Younce are hereby affirmed.

AFFIRMED

EDWARD A. DUFRESNE, JR.
CHIEF JUDGE

SOL GOTHARD
JAMES L. CANNELLA
THOMAS F. DALEY
MARION F. EDWARDS
SUSAN M. CHEHARDY
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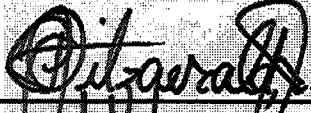
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CERTIFICATE

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN MAILED ON OR DELIVERED THIS DAY **SEPTEMBER 28, 2004** TO ALL COUNSEL OF RECORD AND TO ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:


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