UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
WESTERN DIVISION

BEVERLY ISENHOUR,	:	
	:	
Plaintiff,	:	CIVIL NO. 1:03-CV-40071-CFB
	:	
vs.	:	
	:	
HARVEY'S IOWA MANAGEMENT COMPANY, INC., an Iowa Corporation, d/b/a HARRAH'S COUNCIL BLUFFS, CASINO & HOTEL,	:	ORDER
	:	
Defendant.	:	

The Court held a hearing on February 18, 2009, to address the issue of whether the Court lacks subject matter jurisdiction over this case, requiring remand to state court, pursuant to 28 U.S.C. § 1447(c) (stating a federal district court must remand a case removed from a state court if "at any time before final judgment it appears that the district court lacks subject matter jurisdiction"). At the hearing, Jacob J. Peters represented Plaintiff, Beverly Isenhour, and Ross M. Kucera represented Defendant, Harvey's Iowa Management Company, Inc. The parties filed briefs concerning the Court's subject matter jurisdiction, after the Court raised the issue *sua sponte*.

Isenhour filed her Petition in the Iowa District Court for Pottawattamie County, Iowa, on October 21, 2003. In Count I, she asserted a negligence claim under the Federal Employers' Liability Act (FELA), 45 U.S.C. § 56, as extended to seamen under the Jones Act, 46 U.S.C. § 30104 (formerly 46 U.S.C. App. § 688(a)). In Count II, she asserted a claim for maintenance and cure under general maritime law.

On November 12, 2003, Harvey's filed a Notice of Removal, asserting this Court has federal question jurisdiction over Isenhour's claims pursuant to 28 U.S.C. § 1331, and that the action may be removed to this Court under 28 U.S.C. § 1441(a) and (c). Harvey's does not assert the Court has diversity jurisdiction. On March 31, 2004, the Court granted the parties' joint motion to stay the case pending the Iowa court's final decision on appeal of the underlying

worker's compensation case. The stay was subsequently lifted. On August 23, 2007, following the parties' consent, the case was referred to a United States Magistrate Judge for the conduct of all further proceedings and the entry of judgment in accordance with 28 U.S.C. § 636(c).

On August 28, 2008, Isenhour filed a Motion for Partial Summary Judgment, and on September 26, 2008, Harvey's filed a Motion for Summary Judgment. The parties filed their respective resistances by October 20; Harvey's filed a Reply on October 30. The Court held a hearing on the motions on November 7, and Isenhour filed a Supplemental Brief on November 20. On February 4, 2009, the Court entered an order raising the question of subject matter jurisdiction, and requested supplemental briefing on this issue. Both parties filed briefs by February 17, 2009.

A Jones Act claim "is an *in personam* action for a seaman who suffers injury in the course of employment due to negligence of his employer, the vessel owner, or crew members." *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 441 (2001). A claim for maintenance and cure under general maritime law "concerns the vessel owner's obligation to provide food, lodging, and medical services to a seaman injured while serving the ship." *Id.*

A Jones Act claim filed in state court is "not subject to removal to federal court even in the event of diversity of the parties." *Id.* at 455 (citing 28 U.S.C. § 1445(a)[1], incorporated by reference into the Jones Act, and citing 46 U.S.C. § 30104[2]). Similarly, while federal courts have exclusive jurisdiction over admiralty and maritime claims, the jurisdictional statute "sav[es] to suitors in all cases all other remedies to which they are otherwise entitled." *Id.* at 440 (quoting 28 U.S.C. § 1333 (1)). The saving to suitors clause grants state courts "*in personam* jurisdiction, concurrent with admiralty courts," thus preserving "remedies and the concurrent

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[1] "A civil action in any State court against a railroad or its receivers or trustees, arising under [FELA] may not be removed to any District Court of the United States." 28 U.S.C. § 1445(a) (alteration added).

[2] Under 46 U.S.C. § 30104, "A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer. Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section."

jurisdiction of state courts over some admiralty and maritime claims." *Id.* at 445; *see Romero v. International Terminal Operating Co.*, 358 U.S. 354, 372 (1959) (stating the "unquestioned aim of the saving clause of 1789" was to preserve "the traditionally exercised concurrent jurisdiction of the state courts in admiralty matters"). The Court refused to expand the scope of federal question jurisdiction under 28 U.S.C. § 1331 to include admiralty claims, "out of concern that saving to suitors actions in state court would be removed to federal court and undermine the claimant's choice of forum"). *Lewis*, 531 U.S. at 455 (citing *Romero*, 358 U.S. at 371-72).

The "policy of unremovability of maritime claims brought in the state courts was incorporated by Congress into the Jones Act." *Romero*, 358 U.S. at 372 n.29. Federal question jurisdiction under the Act of 1875, now 28 U.S.C. § 1331, "has been continuously construed and limited in the light of the history that produced it, the demands of reason and coherence, and the dictates of sound judicial policy which have emerged from the Act's function as a provision in the mosaic of federal judiciary legislation." *Id.* at 379, 379 n.51 (noting the "many limitations which have been placed on jurisdiction under § 1331 are not limitations on the constitutional power of Congress to confer jurisdiction on the federal courts").

Here, a Jones Act claim filed in state court, and therefore "not subject to removal to federal court even in the event of diversity of the parties," *Lewis*, 531 U.S. at 455, was nevertheless removed to this Court. Isenhour now asserts in a motion filed February 17, 2009, that this case should be remanded to state court, because this Court lacks subject matter jurisdiction. Harvey's argues that the Court should not remand the case, because Isenhour, through her active participation in discovery and motion practice in the federal litigation, waived her right to object to removal.

Applying the principles outlined in *Lewis* and *Romero*, considering court holdings based on, or compatible with, those principles, and taking into account cases construing 28 U.S.C. § 1445(a) in FELA actions brought by a railway employee in state court, the Court holds that the statutory proscription against removing to federal district court a Jones Act action filed in state court limits federal district courts' jurisdiction over such actions. *See Evans v. Missouri Pacific R. Co.*, 795 F.2d 57, 58-59 (8th Cir. 1986) (reversing district court's holding that it had removal jurisdiction and remanding the case to district court to remand to state court, after district court had granted the defendant's motion to dismiss; basing holding on the consideration that in

enacting 28 U.S.C. § 1445(a) Congress had prohibited removal to federal court of FELA cases filed in state court), *cert. denied*, 481 U.S. 1013 (1987); *Pate v. Standard Dredging Corp.*, 193 F.2d 498, 500 (5th Cir. 1952) (remanding after trial an action under the Jones Act, and for maintenance and cure; "actions brought by seamen in the state courts under the Jones Act are not removable to the federal courts"); *Calloway v. Union Pacific R. Co.*, 929 F. Supp. 1280, 1282, 1282 n.1 (E.D. Mo. 1996) (stating that court was treating FELA action filed in state court "as if there were no original federal question jurisdiction for purposes of removal," because although "FELA claims can be filed in federal court, they cannot be removed to federal court," citing 28 U.S.C. § 1445(a)); *J. Aron & Co. v. Chown*, 894 F. Supp. 697, 698 (S.D.N.Y. 1995) (stating the plaintiff had "made an irrevocable election to proceed at common law rather than in admiralty by filing" a state court action pursuant to the saving to suitors clause of § 1333(1), and the "effect of this election was to deprive this Court of admiralty jurisdiction," even though the action could have been pleaded as an action in admiralty rather than as a common-law action; remanding the case to state court, when no other basis for federal subject matter jurisdiction existed); *Hall v. Illinois Central R. Co.*, 152 F. Supp., 549, 551-52 (W.D. Ky. 1957) (holding FELA case was not removable, because the court lacked jurisdiction pursuant to § 1445(a); "Congress has expressly withheld from the Federal courts, as a class, jurisdiction in cases arising under [FELA] previously brought in a State court," and the plaintiff could not "waive his objection to the want of jurisdiction in this court . . . or . . . confer jurisdiction upon this court under the removal proceedings in this cause") (citation omitted; alteration added); *Rodich v. American Barge Lines*, 71 F. Supp. 549, 550 (D.C. Mo. 1947) (sustaining plaintiff's motion to remand Jones Act case to state court, on the basis that the federal court was without jurisdiction) (cited in *Wamsley v. Tonomo Marine, Inc.*, 287 F. Supp. 2d 657, 659 (S.D. W.Va. 2003) (holding Jones Act claims brought in state court were not removable to federal court; also citing *Lewis*, 531 U.S. at 455)); *Allstate New Jersey Ins. Co. v. Jersey Shore Marine Serv., Inc.*, 2007 WL 556881, at *2 (D.N.J. Feb. 15, 2007) (remanding action to state court on basis of saving to suitors clause after examining jurisdiction *sua sponte* under 28 U.S.C. § 1447(c)); *see generally Riverway Harbor Serv., St. Louis, Inc. v. Bridge & Crane Inspection, Inc.*, 263 F.3d 786, 791 (8th Cir. 2001) (following *Lewis*, 531 U.S. 438, and recognizing jurisdictional nature of plaintiff's action filed in state court under saving to suitors clause).

The cases Harvey's cites were decided before *Lewis*. *See Johnson v. ODECO Oil and Gas Co.*, 864 F.2d 40 (5th Cir. 1989); *Lirette v. N.L. Sperry Sun, Inc.*, 820 F.2d 116 (5th Cir. 1987); and *Courville v. Texaco, Inc.*, 741 F. Supp. 108 (E.D. La. 1990). The Court finds these cases unpersuasive.

The Court lacks subject matter jurisdiction over this case. Remand is mandatory. *See* 28 U.S.C. § 1447(c). The Court regrets any delay that remand may cause the parties, but recognizes that remanding now rather than later, perhaps after appeal, is preferable. Much of the delay in this case has been due to the stay to allow the resolution in state court of the worker's compensation issues. Additional time was spent on discovery that will be used for the trial, regardless of whether the trial is held in state or federal court.

This action is remanded to the District Court for Pottawattamie County, Iowa. The Clerk of Court is directed to mail a certified copy of this order, pursuant to 28 U.S.C. § 1447(c), to the Clerk of the District Court for Pottawattamie County, terminate any pending motions, and close the case. The Court cancels the Final Pretrial Conference set for April 7, 2009, and the trial set for April 20, 2009.

IT IS SO ORDERED.

Dated this 20th day of February, 2009.

Celeste F. Bremer

CELESTE F. BREMER
UNITED STATES MAGISTRATE JUDGE