IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-30483
(Summary Calendar)

DIANE WILLIS,

Plaintiff-Appellant,

versus

INTEROCEAN MANAGEMENT and
USA, represented by the Secretary of
Transportation, acting through the
Maritime Administrator,

Defendants-Appellees.

Appeal from United States District Court
from the Eastern District of Louisiana
(CA-92-0304-E-4)

August 31, 1995

Before JOLLY, JONES and STEWART, Circuit Judges.

PER CURIAM:[*]

Diane Willis appeals from a judgment which dismissed her personal injury suit against the United States. After finding that Willis failed to effect timely service upon the United States pursuant to the Suits in Admiralty Act (SAA), 42 U.S.C. § 742, the

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[*] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

district court dismissed her complaint for lack of subject matter jurisdiction. We affirm.

FACTS AND PROCEEDINGS

On January 24, 1992, Diane Willis filed a personal injury suit against the United States and Interocean Management, Inc. (IOM), alleging that she sustained injuries while serving aboard the M/V DIAMOND STATE, a public vessel of the United States, during the Gulf War. The United States Attorney for the Eastern District of Louisiana was served with the complaint on April 13, 1992, but the United States Attorney General was not served until July 23, 1993. The district court dismissed IOM from the suit, and the United States answered the complaint, alleging improper service under the Suits in Admiralty Act (SAA), 46 U.S.C. App. §§ 741-52, and under Fed. R. Civ. P. 4.

The district court denied the United States's motion to dismiss for lack of forthwith service, see 46 U.S.C. § 742, reasoning that Willis had shown "good cause" for not effecting timely service. In denying this motion, the district court was apparently relying on Fed. R. Civ. P. 4 (j) which provided an exception for good cause where service was not made within 120 days of filing. The United States filed a motion to reconsider its motion to dismiss the suit for lack of subject-matter jurisdiction, citing United States v. Holmberg, 19 F. 3d 1062, 1065 (5th Cir. 1994), cert. denied, 115 S. Ct. 482 (1994). Upon reconsideration of the motion, the district court, pursuant to Holmberg, dismissed the complaint due to lack of forthwith service. The dispositive issue upon appeal is whether Willis complied with the service

requirement of the SAA in her suit against the remaining defendant, the United States, and whether her noncompliance precluded jurisdiction.

DISCUSSION

The Suits in Admiralty Act requires that, after filing his suit in the proper venue, "[t]he libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States." 46 U.S.C. § 742. In United States v. Holmberg, 19 F. 3d 1062, 1065 (5th. Cir. 1994), and most recently in Henderson v. United States, 51 F. 3d 574, 576 (5th. Cir. 1995), this court held that the conditions contained in § 742 are prerequisite to the waiver of sovereign immunity provided for by the Suits in Admiralty

Act. These conditions define the scope of the government's consent to be sued and define a litigant's right to sue the government, thus, they are substantive requirements prerequisite to subject matter jurisdiction. Henderson, 51 F. 3d at 576; Holmberg, 19 F. 3d at 1065.

Although the Rules Enabling Act of 1934, 28 U.S.C. § 2072 provides that the Federal Rules of Civil Procedure supersede all conflicting laws, that same section specifies that the rules of civil procedure will "not abridge, enlarge, or modify any substantive right." Holmberg, 19 F. 3d at 1065. Accordingly, because § 742's service requirements involve substantive rights, they are a jurisdictional prerequisite, are not superseded by the

Federal Rules of Civil Procedure, and could not have been modified by Rule 4(j). Henderson, 51 F. 3d at 576. Thus, Willis must comport with § 742's requirements, or she is jurisdictionally barred from bringing suit.

In the instant case, the United States Attorney was not served until 80 days after filing, and the Attorney General was not properly served by registered mail until approximately one-and-one-half years after filing.[1] Holmberg held that service more that 103 days after filing was not "forthwith." Holmberg, 19 F. 3d at 1065. Henderson held that the "forthwith" requirement applies to both the service of a copy of the complaint on the United States Attorney and to the mailing of a copy of the complaint by registered mail to the Attorney General of the United States. Henderson, 51 F. 3d at 577. While there has been no uniform definition of "forthwith" (Holmberg, 19 F. 3d at 1065), a delay of almost one-and-one-half years cannot be regarded as "forthwith" under any definition.

Willis also argues that Fed. R. Civ. P. 4 (i) (3), adopted after Holmberg, was designed to protect her from dismissal by allowing a reasonable time for service of process on multiple agencies of the United States if the plaintiff has effected service on either the United States Attorney or the Attorney General of the United States. Because Willis did not raise this issue in the district court, this court need not address the issue here. Varnado v. Lynaugh, 920 F. 2d 320, 321 (5th Cir. 1991). Moreover, even

[1]Willis had improperly attempted service upon the Attorney General by United Parcel Service on April 10, 1992.

were this court to consider the issue, Holmberg would mandate the same result.

Thus, because § 742's service requirements were not complied with, the district court's dismissal for lack of subject matter jurisdiction is affirmed.