

Not Reported in F.Supp.2d, 2008 WL 3271243 (N.D.Ind.)
(Cite as: **2008 WL 3271243 (N.D.Ind.)**)

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United States District Court,
N.D. Indiana,
Hammond Division.
Catherine RODRIGUEZ, Plaintiff
v.
TRUMP CASINO and/or TRUMP INDIANA, INC.,
Defendants.

No. 2:02 cv 254.
Aug. 7, 2008.

[Dennis M. O'Bryan](#), [Howard M. Cohen](#), O'Bryan
Baun Cohen & Kuebler, Birmingham, MI, for Plain-
tiff.

[John A. O'Donnell](#), [Kim R. Kardas](#), [Patrick J. Culli-
nan](#), [Steven B. Belgrade](#), Belgrade & O'Donnell PC,
Chicago, IL, for Defendants.

OPINION AND ORDER

[ANDREW P. RODOVICH](#), United States Magistrate
Judge.

*1 This matter is before the court on the Motion
for Leave to File Second Amended Complaint filed by
the plaintiff, Catherine Rodriguez, on May 29, 2008.
For the reasons set forth below, the motion is
GRANTED.

Background

The plaintiff, Catherine Rodriguez, while em-
ployed as a dealer on a gaming boat owned by the
defendant, Trump Casino, was injured in a cafeteria
provided for employee use. The location of this facil-
ity and its relation to Rodriguez's allegation that her
claim arises under the Jones Act, [46 U.S.C.A. §
30104](#), is the subject of a separate motion for summary

judgment filed prior to a stay entered in this matter
upon the defendant's bankruptcy. The summary
judgment motion remains pending.

Returning to the case after the close of the bank-
ruptcy proceeding, Rodriguez seeks leave to file a
second amended complaint adding allegations that,
since the injury, the defendant's conduct has "pro-
longed, worsened and/or aggravated" Rodriguez's
injury. Rodriguez alleges that Trump's conduct, in-
cluding failing to authorize prompt payment for
maintenance and cure, was a separate violation.

Discussion

[Federal Rule of Civil Procedure 15\(a\)](#) provides
that "a party may amend the party's pleading only by
leave of court or by written consent of the adverse
party; and leave shall be freely given when justice so
requires." See generally [Foman v. Davis](#), [371 U.S.
178](#), [182](#), [83 S.Ct. 227](#), [230](#), [9 L.Ed.2d 222](#) (1962).
Because the complaint merely serves to put the de-
fendant on notice, it should be freely amended as the
case develops, as long as amendments do not unfairly
surprise or prejudice the defendant. [Jackson v. Rock-
ford Housing Authority](#), [213 F.3d 389](#), [390](#) (7th
Cir.2000). The decision of the court to deny leave to
amend a complaint is reviewed for abuse of discretion.
[Ajayi v. Aramark Business Services](#), [336 F.3d 520](#),
[530](#) (7th Cir.2003).

The court may deny leave because the amend-
ment is futile. [Bethany Phamacal Company, Inc. v.
QVC, Inc.](#), [241 F.3d 854](#), [861](#) (7th Cir.2001). Futility
generally is measured by whether the amendment
would survive a motion to dismiss under [Federal Rule
of Civil Procedure 12\(b\)\(6\)](#). However, if a summary
judgment motion is pending, futility may be shown
with reference to the entire summary judgment record.
[Peoples v. Sebring Capital Corp.](#), [209 F.R.D. 428](#), [430](#)
(N.D.Ill.2002). If the proposed amendment is not

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clearly futile, denying leave to amend on this ground would be improper. See Wright & Miller, [6 Federal Practice & Procedure § 1487](#), at 637-642 (2d ed. 1990) (“If the proposed change clearly is frivolous or advances a claim or defense that is legally insufficient on its face, the court may deny leave to amend.”).

Leave to amend also may be denied for untimeliness. Such reasons include “undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.” [Foman](#), 371 U.S. at 182, 83 S.Ct. at 230. The denial of a motion to amend pleadings is proper if the discovery and dispositive deadlines have passed and the motion is filed near the trial date.

*2 Trump objects to the amendment on the sole basis that the recovery sought by the amendment already is encompassed by the prior complaint. Consequently, Trump infers that the amendment is sought only to delay a ruling on the motion for summary judgment or to re-open discovery. However, Rodriguez has sought neither relief.

The court further concludes that the plaintiff's amendment can be read to state a claim separate from those stated in the prior complaint. The obligation of maintenance and cure arises separately from Jones Act liability. [Greenwell v. Aztar Indiana Gaming Corporation](#), 268 F.3d 486, 489 (7th Cir.2001) (“Had Greenwell's back pain been caused by an injury sustained at work, as she originally charged, and had the malpractice in treating her been committed by a doctor employed by Aztar, her employer, Aztar would have been liable in accordance with standard principles of respondeat superior. It would have been liable under both the Jones Act and the doctrine of maintenance and cure.”).

In addition, the scant reference to maintenance

and cure in the earlier complaint may not be sufficient to state this claim under basic pleading standards. Though a short plain statement is the minimum requirement, “in practice, a complaint ... must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory.” [Bell Atlantic Corporation v. Twombly](#), --- U.S. ---, 127 S.Ct. 1955, 1969, 167 L.Ed.2d 929 (2007) (internal citations and quotations omitted); [E.E.O.C. v. Concentra Health Services, Inc.](#), 496 F.3d 773, 776 (7th Cir.2007) (“allegations must plausibly suggest that the plaintiff has a right to relief, raising that possibility above a ‘speculative level’; if they do not, the plaintiff pleads itself out of court.”). It is far from clear that Rodriguez's single mention in her prior complaint of “maintenance and cure” would be seen to raise a claim alleging that, after the filing of that complaint, Trump's conduct constituted separate violations of this doctrine. Accordingly, to the extent that Trump's objection is construed to argue that amendment is futile, it is not accurate. Rodriguez's motion for leave to file an amended complaint is **GRANTED**.

For the foregoing reasons, the Motion for Leave to File Second Amended Complaint filed by the plaintiff, Catherine Rodriguez, on May 29, 2008, is **GRANTED**. The plaintiff is **DIRECTED TO FILE** separately the amended complaint attached as an exhibit to her motion.

N.D.Ind.,2008.

Rodriguez v. Trump Casino

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