MONTY HOUSEHOLDER v. AMERICAN COMMERCIAL BARGE LINES, ET AL.

No. 5:97CV-117(R)

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF KENTUCKY
(PADUCAH DIVISION)

1999 AMC 982

April 27, 1998

HEADNOTES:

CONTRACTS - 136. Warranty of Workmanlike Performance - PERSONAL INJURY - 13112. Vessels Covered - 13131. Owner - 13138. Miscellaneous Persons.

When a seaman is being transported to his vessel on another vessel, under the Jones Act he may recover from his employer for the negligence of the owner of the transporting vessel if that owner is an agent of his employer, but he may not recover from his employer for unscaworthiness of the other vessel when she is not owned by his employer. He is not entitled to recover from the owner of the transporting vessel for negligence under the Jones Act or unseaworthiness as those claims are only against his employer, nor can he recover based on the transporter's warranty of workmanlike performance which runs only to his employer; but he may recover for negligence under the general maritime law.

COUNSEL:

Dennis M. O'Bryan and Christopher D. Kuebler (O'Bryan Baun Cohen) for Householder

Gary T. Sacks (Goldstein & Price) for Hickman

Raymond Massey (Thompson Coburn) for Amer. Comm. Barge

OPINIONBY: RUSSELL

OPINION:

[*982] THOMAS B. RUSSELL, D.J.:

This matter is before the Court on Defendants' motions for summary judgment and Plaintiff's motion to amend the complaint. For the reasons that follow, Defendant ACBL's motion for summary judgment is denied as to claims asserted under the Jones Act, and granted as to claims asserted under the general maritime doctrine of unseaworthiness. Defendant Hickman Harbor and Marine's motion for summary judgment is denied. Plaintiff's motion to amend the

complaint is granted to the extent that it clarifies the negligence charges asserted against Defendant Hickman Harbor and Marine under general maritime law, and denied to the extent that it states a new claim for breach of warranty of workmanlike performance.

I. Facts and Claims

Plaintiff was injured while being transported on a vessel owned by Defendant Hickman Harbor and Marine ("Hickman") to a vessel owned by his employer, American Commercial Barge Line ("ACBL"). There is no dispute that Plaintiff was only employed by Defendant ACBL and not [*983] by Defendant Hickman. There is no dispute that the vessel on which Plaintiff was injured was owned only by Defendant Hickman, and not by Defendant ACBL.

Plaintiff was injured when he fell through a hole in the deck of Defendant Hickman's vessel. The hole had been covered by a sheet of linoleum. There are a number of fact questions surrounding the incident, including whether Plaintiff had been warned of the hole or whether the hole had been roped off or otherwise marked.

II. Defendant ACBL's motion for Summary Judgment

Defendant ACBL claims that it is subject to no Jones Act or general maritime liability because it did not own the vessel on which Plaintiff was injured. Defendant argues that it cannot be liable if it did not have notice and/or opportunity to fix the unsafe condition. Plaintiff responds that Defendant Hickman was working as an agent for Defendant ACBL at the time of the accident, so liability does incur on Defendant ACBL.

A. *Jones Act*

The Supreme Court established in *Hopson v. Texaco, Inc., 383 U.S. 262, 263, 1966 AMC 281, 282-83* that the Jones Act incorporates the standards of the Federal Employers Liability Act [FELA], and that FELA "renders an employer liable for the injuries negligently inflicted on its employees by its officers, agents or employees." The Supreme Court determined that the word "agents" was to be given "an accommodating scope," and held that "when [an] . . . employee's injury is caused in whole or in part by the fault of others performing, under contract, operational activities of his employer, such others are 'agents' of the employer within the meaning of [FELA]." *Id. citing Sinkler v. Missouri Pac. R. Co., 356 U.S. 326 (1958).* The imputing of liability for an agent's negligence under the Jones Act has been referred to by courts as the "Hopson/Sinkler Doctrine." *Craig v. Atlantic Richfield Co., 1994 AMC 1354, 1360, 19 F.3d 472, 477 (9 Cir. 1994) cert. denied 513 U.S. 875, 1995 AMC 2998.*

In *Hopson*, two seamen became ill in a foreign port and were unable to continue their voyage. The Court found the employer liable for their injuries suffered during their transport in a local taxi cab to the U.S. Consul.

To recover under the Jones Act, a seaman must establish that his employer or one of his employer's agents was negligent, and that this negligence was a cause of his injuries. *Ribitzki v. Canmar Reading & Bates, LTD. Partnership, 1997 AMC 1841, 1845, 111 F.3d 658, 662 (9 Cir. 1996).* A [*984] number of courts have found liability under the Jones Act where a seaman was injured by the negligence of his employer's agent in transporting the seaman to or from the employer's vessel. In *Williamson v. Western Pacific Dredging Corp., 1971 AMC 2356, 2359, 441 F.2d 65, 67 (9 Cir. 1971) cert. denied 404 U.S. 851,* the court held that where a seaman employed aboard a dredge was required to live at home, and commuting could be said to be part of the job he was hired to perform, his employer was liable under the Jones Act for the negligent driving of the seaman's coworker during their commute that resulted in the seaman's death. The Court held that the defendant "was liable under the Jones Act only because the injuries resulted from the negligence of one of its employees, the driver." *Id. See also Thier v. Lykes Bros., Inc., 900 F.Supp. 864, 878 (S.D. Texas 1995)* (employer liable under the Jones Act where seaman was killed due to negligent driving of agent while driving into town for shore leave.).

In *Hamilton v. Marine Carriers Corp., 1971 AMC 2454, 2459, 332 F.Supp. 223, 227 (E.D. Pa. 1971),* a seaman was injured when he stepped into an ice-covered hole on a dock at which his ship was docked. The hole was located

along the only available route from the vessel to the public highway. The Court held that "providing a means of ingress and egress from the [vessel] to shore constitutes an 'operational activity' of the defendant, and if there is a contractual relationship between the Port and the defendant, then the jury could find that an agency relationship is established." *Id.*

Courts have determined that considerations include the existence of a contract, the employer's choice of the third party, and the employer's ownership or other financial interest in the third party. *Tim v. American President Lines, Ltd., 1969 AMC 959, 409 F.2d 385 (9 Cir. 1969).* In *Tim*, a seaman employee of the defendant shipowner was injured by the alleged negligence of an employee of a stevedore company who was unloading the ship. The stevedore company had been hired by the owner of the cargo, not the shipowner. The Ninth Circuit held that where the shipowner had not selected the stevedore company or had any oral or written contract with the stevedore company, the employee of the stevedore company was not an agent of the shipowner under the Jones Act.

Defendant ACBL asserts that Defendant Hickman was not its agent and was not performing an "operational activity" of Defendant ACBL when Plaintiff was injured, "Hickman simply gave rides to [ACBL] crew members as an incidental to its harbor services." However, Defendant also states in its cross complaint against Defendant Hickman that Hickman "performed harbor and marine services" for Defendant ACBL including [*985] "assisting in the transportation of crewmembers to and from vessels on the river."

Therefore, Plaintiff has successfully raised a question of fact as to whether Defendant Hickman was an agent of Defendant ACBL, and summary judgment would not be appropriate on the Jones Act claim against Defendant ACBL.

B. *Unseaworthiness*

Unseaworthiness is a cause of action under general admiralty law, and is distinguishable from the statutory cause of action created by the Jones Act. *Cook v. American Steamship Co., 1995 AMC 2815, 2824, 53 F.3d 733, 740 (6 Cir. 1995).* The Sixth Circuit has defined the doctrine of unseaworthiness as imposing "an absolute, nondelegable duty on a ship owner to provide a vessel and her equipment, appurtenances, and crew reasonably suited for their intended purpose." *Cook, 1995 AMC at 2815, 53 F.3d at 741 citing Usner v. Luckenbach Overseas Corp., 400 U.S. 494, 1971 AMC 277 (1971).* Therefore, it is clear that an unseaworthiness claim can only be brought against an owner of a vessel.

Defendant ACBL asserts that it cannot be liable under the unseaworthiness doctrine because it was not the owner of the vessel on which plaintiff was injured. Plaintiff claims that since it had arranged with Defendant Hickman to transport Plaintiff to Defendant ACBL's vessel, then Defendant Hickman's vessel was an "appurtenance" of Defendant ACBL's vessel. Plaintiff relies on *McGraw v. States Marine Lines, 1971 AMC 1701, 324 F.Supp. 118 (E.D. Pa. 1971),* in which the Court found as a matter of law that a boat provided by the third-party owner of the cargo to transport crewmembers from the employer's vessel to shore was an appurtenance of the employer's vessel. The Court held that if the jury found that the boat provided by the third party was unseaworthy, then the employer's vessel was unseaworthy. However, the *McGraw* Court does not cite to any authority as to why a third-party vessel is an appurtenance to another vessel, and at least one circuit has explicitly rejected this proposition.

In *Garrett v. United States Lines, Inc., 1978 AMC 2372, 2375, 574 F.2d 997, 999 (9 Cir. 1978),* the Ninth Circuit held that "the unseaworthiness of a Navy launch ferrying a seaman to shore from his employer's ship does not render the ship unseaworthy." *Id. citing Flunker v. United States, 1978 AMC 2378, 2388, 528 F.2d 239, 246 (9 Cir. 1975).* Courts have also held that airplanes and helicopters were not appurtenances of the vessels to which they were transporting crew members. *Craig v. Atlantic Richfield* [*986] *Co., 1994 AMC 1354, 1362, 19 F.3d 472, 478 (9 Cir. 1994) cert. denied 513 U.S. 875, 1995 AMC 2998; Herbert v. Air Logistics, Inc., 1984 AMC 1512, 1516-17, 720 F.2d 853, 857 (5 Cir. 1983).* Therefore, since Defendant Hickman's vessel is not an appurtenance of Defendant ACBL's vessel, summary judgment is appropriate for its claim against Defendant ACBL under the general maritime doctrine of unseaworthiness.

III. Defendant Hickman's Motion for Summary Judgment

A. *Negligence under General Maritime Law*

Defendant Hickman moves for summary judgment on the basis that the complaint only asserts claims under the Jones Act and unseaworthiness/maintenance and cure. Defendant Hickman asserts that there is only liability for these claims for employers.

Plaintiff does not dispute that liability for Jones Act and unseaworthiness/maintenance and cure only attaches to employers, but responds that the complaint states a claim for "pure negligence under general maritime law" against Defendant Hickman. Plaintiff moved for a second amended complaint that would clarify that Plaintiff has stated a pure negligence claim under general maritime law against Defendant Hickman.

While the first amended complaint does not explicitly state that Defendant Hickman is being sued for negligence under general maritime law, it does use the language of a negligence claim by asserting that Defendant Hickman breached its duty to Plaintiff. Defendant Hickman should have been on notice that negligence was being asserted against it. Therefore, Plaintiff's motion to file a second amended complaint will be granted to the extent that it clarifies its cause of action against Defendant Hickman for negligence under general maritime law. Since the record sufficiently supports a question of fact as to whether Defendant Hickman breached the duty owed to Plaintiff under general maritime law, summary judgment on this claim is not appropriate.

B. *Warranty of Workman Like Performance*

Defendant ACBL filed a cross claim against Defendant Hickman for breach of warranty of workmanlike performance. Plaintiff moved to amend his complaint to assert the same claim against Defendant Hickman. While Defendant has failed to demonstrate how it would be prejudiced by such an amendment since it had to prepare a defense to ACBL's cross claim, the amendment should not be allowed because it would be futile.

[*987] The discretion of the trial court to permit amendment of the pleadings is limited by "Rule 15(a)'s liberal policy of permitting amendments to ensure the determination of claims on their merits." *Goldman Services Mechanical Contracting, Inc., v. Citizens Bank & Trust of Paducah, 812 F.Supp. 738, 743 (W.D. Ky. 1992) aff'd 9 F.3d 107 (6 Cir. 1993), citing Marks v. Shell Oil Co., 830 F.2d 68, 69 (6 Cir. 1987).* Futility of the amendment is one of the factors to be considered. *Id.*

The warranty of workmanlike performance was created as a tool of indemnification. *Garrett v. United States Lines, Inc., 1978 AMC 2372, 2376, 574 F.2d 997, 1000 n.4 (9 Cir. 1978).* "The warranty of workmanlike performance was developed to ameliorate the harshness of shipowners' liability without fault for seamen's injuries when one other than the shipowner is more at fault." *Id. citing Flunker v. United States, 1978 AMC 2378, 2381, 528 F.2d 239, 242 (5 Cir. 1975).* Since the warranty of workmanlike performance developed as tool of indemnification, the duty owed under this warranty only extends to the shipowner, not the injured seaman.

Defendant Hickman did not owe Plaintiff a duty under this theory, and amendment of the complaint to include this cause of action would be futile. Therefore, Plaintiff's motion to amend the complaint should be denied to the extent that it states this cause of action.

Therefore, it is ordered:

1. Plaintiff's motion for leave to file a supplemental brief in opposition to Defendant ACBL's motion for summary judgment is granted, and the court took the brief into consideration in developing the accompanying opinion.

2. Plaintiff's motion to file a second amended complaint is granted to the extent that it clarifies his cause of action against Defendant Hickman for negligence under general maritime law; and denied to the

extent that it states a new claim against Defendant Hickman for breach of warranty of workmanlike performance.

3. Defendant ACBL's motion for summary judgment is granted in regards to claims asserted under the general maritime doctrine of unseaworthiness; and denied as to claims asserted under the Jones Act.

4. Defendant Hickman Harbor and Marine's motion for summary judgment is denied.