IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

MELVIN OLIVER,

Plaintiff,

vs.

CIVIL ACTION NO. 12-C-125H

AMERICAN COMMERCIAL LINES, INC., et al.,

Defendants.

ORDER

Plaintiff brings this action for negligence pursuant to the Jones Act, 46 U.S.C. § 30104, and for unseaworthiness, and general maritime negligence. As such, plaintiff asserts that he was a seaman as that term is defined by the United States Supreme Court, and that he contracted cancer as a result of his work aboard defendants' vessels due to defendants' negligence. He asserts that he can recover damages from the defendants for his disease under the Jones Act, *i.a.*

Defendants, American Commercial Lines, LLC and Commercial Barge Line Company, have filed a Motion for Summary Judgment. Defendants assert, as a matter of law, that plaintiff was not a seaman under the Jones Act, and specifically contend that Mr. Oliver was a land-based harbor worker. Plaintiff counters that his extensive work on vessels traveling on navigable inland waterways, at a minimum, makes his status as a seaman a disputed question of fact, insusceptible to resolution by summary judgment.

The parties have briefed the issues, and presented oral argument on April 18, 2014. The Court is of the opinion that defendants' motion should be **DENIED**, and finds as follows.

1. **Summary Judgment Standard.**

Defendants assert that "the question of Jones Act seaman status may be decided on

summary judgment where the evidence does not support a finding, as a matter of law, that the plaintiff is permanently assigned to a Jones Act vessel or did not have a substantial connection to a vessel or fleet of vessels in both duration and nature." Defendants' Motion for Summary Judgment, p. 7 *citing Chandris, Inc. v. Latsis*, 515 U.S. 347, 371 (1995).

"Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syl. Pt. 2, *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995).

In passing on a motion for summary judgment, a trial court "must draw any permissible inference from the underlying facts in the most favorable light to the party opposing the motion." *Id.*, 194 W. Va. at 59, 459 S.E.2d at 336 (citations omitted). Additionally, the trial court "must grant the nonmoving party the benefit of inferences, as 'credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.'" *Id.*, *citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986).

As the United States Supreme Court has stated in a Jones Act case:

> The seaman inquiry is a mixed question of law and fact, and it will often be inappropriate to take the question from the jury. Nevertheless, summary judgment or [judgment as a matter of law] is mandated where the facts and law will reasonably support only one conclusion.

Harbor Tug and Barge Co. v. Papai, 520 U.S. 548, 554 (1997). See also, Defendants' Motion for Summary Judgment, p. 11.

2. **Jones Act "Seaman" Status.**

The Jones Act provides that "[a] seaman injured in the course of employment . . . may elect to bring a civil action at law, with the right of trial by jury, against the employer." 46 U.S.C. § 30104.

46 U.S.C. § 10101 defines "seaman" as "an individual (except scientific personnel, a sailing school instructor, or a sailing school student) engaged or employed in any capacity on board a vessel." The United States Supreme Court has found that "[t]he key to seaman status is employment-related connection to a vessel in navigation." *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 355 (1991) (citations omitted). The *Wilander* Court went on to note that "[i]t is not necessary that a seaman aid in navigation or contribute to the transportation of the vessel, but a seaman must be doing the ship's work." *Id.*

In essence, "an employee's duties must 'contribute to the function of the vessel or the accomplishment of its mission.'" *Chandris, Inc. v. Latsis*, 515 U.S. at 368, *quoting Wilander*, 498 U.S. at 355. Moreover, "a seaman must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature." *Chandris*, 515 U.S. at 368. The *Chandris* Court observed that this latter requirement serves to distinguish seamen "from those land-based workers who have only a transitory or sporadic connection to a vessel in navigation, and therefore whose employment does not regularly expose them to the perils of the sea." *Id.* at 368-69, *citing* 1B A. Jenner, BENEDICT ON ADMIRALTY § 11a, 2-10.1 to 2-11 (7th ed. 1994) ("If it can be shown that the employee performed a significant amount of his work on board the vessel on which he was injured, with at least some degree of regularity and continuity, the test for seaman status will be satisfied").

Defendants frame the question thus: To prove seaman status under the Jones Act, plaintiff has the burden of proving: (1) he contributed to the function of a vessel or to the accomplishment of its mission; and (2) he had a connection to a vessel in navigation (or to an identifiable group of such vessels) that was substantial in terms of both its duration and its nature. Defendants' Motion for Summary Judgment, p. 8 *citing Chandris*, 515 U.S. at 368.[1]

In summary, "the [Court's] inquiry into [Mr. Oliver's] seaman status is of necessity fact specific; it will depend on the nature of the [fleet] and [his] precise relation to it." *Chandris*, 515 U.S. at 371 *quoting Wilander*, 498 U.S. at 356.

3. Plaintiff's Duties on Defendants' Vessels were Substantial in Nature.

At the outset, the Court cannot find as a matter of law that Mr. Oliver's job duties were of a transitory or sporadic connection with the defendant's fleet in navigation . . . nor can it find that his employment did not regularly expose him to the perils of the sea so as to prevent the application of the Jones Act to his allegations. *See Chandris,* 515 U.S. at 368. As the defendants point out, "the inquiry into the nature of the employee's connection to the [fleet] is whether the employee's duties take him to sea." Defendants' Motion for Summary Judgment, p. 8 *citing Harbor Tug,* 520 U.S. at 554-555 (citations omitted).

[1]At oral argument, defendants' counsel advised the Court that (1) defendants were not arguing that Mr. Oliver's duties did not contribute to the function of the vessel; April 18, 2014 transcript p. 9 (2) defendants were not arguing a "temporal" element, conceding for this motion that Mr. Oliver was on vessels a significant amount of his time; April 18, 2014 transcript p. 10 and (3) the vessels on which Mr. Oliver worked were for purposes of this motion to be considered a "fleet". April 18, 2014 transcript p. 13. Generally, defendants maintain that "land-based workers who have only a transitory or sporadic connection with the vessel and navigation, and . . whose employment has not regularly exposed them to the perils of the sea" are not entitled to Jones Act protection. April 28, 2014 transcript p. 28 *citing Chandris* at page 554.

The Court finds that plaintiff's testimony by deposition and affidavit reasonably supports more than one conclusion as to plaintiff's seaman status preventing summary judgment. Specifically, Mr. Oliver's job classification with the defendants was a salaried position after 1976 which did not provide for overtime wages . Oliver Deposition (Nov. 8, 2012), p. 62, ln. 16-22. Mr. Oliver worked on moving barges "before they got to the dock," and rode tows between onshore facilities. *Id.* p. 35, ln. 14-p. 37, ln. 3. Mr. Oliver testified that he regularly boarded barges hauling benzene to specific facilities (PPG and Mobay). *Id.*, p. 97, ln. 15-p. 98, ln. 21. Mr. Oliver testified that he was exposed to various chemicals (including benzene) on barges, when the barges vented and when he worked on mechanical equipment such as pumps. *Id.*, p. 69, ln. 4-p. 70, ln. 21. Mr. Oliver was also exposed to chemical products while performing inspections and cargo discharge operations. *Id.*, p. 88, ln. 22-p. 90, ln. 19; Affidavit of Melvin D. Oliver, ¶ 4. Mr. Oliver testified that between 1976 and 1999, when he worked as a tankerman for ACL, it was "[v]ery seldom" for him to go through a day without boarding a barge or a tow boat. *Id.*, p. 60, ln. 8-22.

It is evident to the Court that plaintiff has demonstrated that facts are in dispute so as to overcome defendants' assertion that no genuine issue of material fact exists. The Court finds that plaintiff's duties as a salaried employee were performed on the navigable waters of the Ohio, Monongahela, and Allegheny Rivers such that a jury could conclude that Mr. Oliver has satisfied the test for seaman status in that he performed a significant amount of his work on board a fleet of vessels on which he was injured, with at least some degree of regularity and continuity. *Chandris*, 515 U.S. at 368-69, *citing* 1B A. Jenner, BENEDICT ON ADMIRALTY § 11a, 2-10.1 to 2-11 (7th ed. 1994).

Defendants cite various cases for the proposition that the preceding facts are not sufficient

to overcome their motion for summary judgment. However, each of the cases cited by the defendants is factually distinguishable since none of the plaintiffs were exposed to the perils of the sea in that they were never more than a gangplank from the shore or only on the water maneuvering vessels. Indeed, the Court finds the reasoning of *Bridges, et al. v. Standard Concrete Products, et al.*, 2008 U.S. Dist. LEXIS 90310, 2008 A.M.C. 2910, 2911, 2916-17 (E.D. La. 2008) as to the nature of Mr. Bridges' duties supportive of plaintiff Oliver's seaman status.

In *Bridges*, plaintiff asserted a Jones Act claim as a result of an acute injury. However, the district court found that Mr. Bridges was not employed by the owners of the fleet of barges with which he asserted a substantial relationship, but rather was an employee of a land-based entity. His only connection with the fleet was his loading of materials onto the vessels. He never performed maintenance on the vessel, never sailed more than a few feet from shore, never assisted with unloading the vessel's cargo, and he did not experience the perils of sea. *Bridges*, 2008 U.S. Dist. LEXIS 90310 *13. As such, Mr. Bridges was found not to be a seaman for Jones Act purposes by the district court.

Unlike plaintiff Bridges, Mr. Oliver was employed by the owners of the fleet of barges to which he suggests a substantial relationship. Unlike plaintiff Bridges, Mr. Oliver performed maintenance on the vessels while sailing in navigable waters. Unlike plaintiff Bridges, Mr. Oliver assisted in the unloading of the vessel's cargo. Unlike plaintiff Bridges, Mr. Oliver experienced the perils of sea. All of these distinctions could support the conclusion by the trier of fact that he was a seaman for Jones Act purposes, and certainly reasonably supports more than one factual conclusion as to that seaman status. *See Harbor Tug*, 520 U.S. at 554. *See also, Ates v. Mallard Bay Drilling, Inc.*, 801 So.2d 653 (La. Ct. App. 2001) (trial court's conclusion that plaintiff was a Jones Act seaman because he was assigned as a mechanic for the entire fleet, he

performed maintenance and repair jobs on those vessels, which work was essential to the drilling function of the vessels, and he spent approximately half his time either on the vessels or traveling thereto was upheld by appellate court as correct).

4. Defendants' motion for summary judgment.

The Court finds that genuine issues of fact exist as to the plaintiff's seaman status, making summary judgment inappropriate.

The Court therefore **DENIES** defendants' motion for summary judgment.

The objections and exceptions of the defendants are noted.

It is so **ORDERED**.

The Clerk shall transmit a copy of this Order to all counsel of record.

Entered this 3rd day of June 2014.

DAVID W. HUMMEL, JR., CIRCUIT JUDGE

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