UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL NO. 02-12014-RGS

JOHN MULLETT

v.

SABINE TRANSPORTATION CO.,
Owner and/or Operator of SS SAG RIVER

MEMORANDUM AND ORDER ON
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

June 21, 2004

STEARNS, D.J.

John Mullett, a merchant seaman, brought this admiralty action against his employer Sabine Transportation Co. (Sabine), the operator of the oceangoing cargo vessel SAG RIVER. Sabine now moves for summary judgment asserting that Mullett is unable to prove that a defect or condition of the ship played a part in his accident, that his claim for maintenance and cure has been satisfied, and that the foundation of Mullett's Jones Act claim rests solely on conjecture.

BACKGROUND

The facts in the light most favorable to Mullett as the nonmoving party are as follows. Mullett was employed as a seaman on the SAG RIVER from October 2 to December 12, 2001, as it made passage from Texas to North Korea with a load of grain. Mullet claims that he injured his arm on November 16, 2001, during the off-loading of the cargo onto a daughter ship for transshipment to the port of Chong Jin. The SAG RIVER is approximately 800 or 900 feet long, while the Russian freighter involved in the accident

was some 560 feet in length. Mullett injured a tendon in his right shoulder while attempting to fasten a mooring line securing the two vessels in tandem. Mullett was stationed with other crewmen on the port side fantail behind the "house." The work crew consisted of Mullen, third mate Patrick Jacobs, chief pumpman Paul Gattinella, and six to eight Bulgarian laborers who had boarded the SAG RIVER at Pusan, South Korea, to assemble the unloading machinery. Third mate Jacobs was in charge of the crew.

Just prior to the accident, the Russian freighter attempted to maneuver herself alongside the SAG RIVER's port. On the third or fourth attempt, the freighter succeeded in passing a line to the SAG RIVER. Mullett described the ensuing accident as follows:

> [t]he Russian vessel sent a line over to our vessel so that we could hook that line on to a stationary point on our vessel and then they would use their winches to pull in all the slack, which would bring their vessel at a more controlled rate alongside our vessel. The mooring lines used were ten to twelve inches in diameter, big, heavy manila lines with an eye on the end of it that you would slip over a bollard, and I would say the eye was approximately eight inch - I mean, eight foot diameter.
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> To send this line over to our vessel while this Russian vessel was approximately 150 feet off our port quarter, they tie a smaller line or weighted line to the big line and it has what they call a monkey's fist on the end of it. So a seaman will throw that line over to our vessel, we'll catch it, and then start pulling in the small line attached to the big line and pull that line from that vessel over to our vessel.
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> . . . Paul Gattinelli [sic], the pump of man [sic], caught the monkey fist [sic], because it went in his direction. As he caught the monkey's fist, he started pulling in all the slack line. And out of the corner of [my] eye, I observed this and I knew what he was doing was wrong, because the line couldn't come over that part of the vessel. It had to come 30 feet forward from where he was to be fairleaded through an opening in the railing called a chock. He was bringing it over the third bar of the railing which was the highest part of the railing.
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> So I yelled to stop and ran in the direction of Paul Gattinelli [sic], the pump

> man, at which time he had the eye up on the railing. I grabbed the eye from Paul and Paul and I went forward 30 feet to the opening in the railing. We slid the line on the railing, let the railing hold the weight of the line, because there was a hundred and something feet of slack in between the two vessels. When we got to the chock, me and Paul conversed what we were going to do. I got down on my knees to receive the eye of the line as he and a couple of Bulgarians were going to feed it through the chock from the outboard side of the vessel to me on the inboard side.
>
> When I received the eye, Paul, myself and the Bulgarians all stood up and I had to go -- I was the first person, I was holding the eye. I had to go approximately 25 feet inboard to slip the eye over a bollard to secure the line to a stationary point on our vessel. As everybody was pulling the line, I ran with it towards the bollard to slip the eye over the bollard. Just as I was about to slip the eye over the bollard, everybody let go of the line. When that happened, from all the slack that was going between the two vessels, the line suddenly jerked my arm and my hand was in through the loop of the eye so as I could pull it and hold it in a more secure fashion. Before I realized what was happening, my arm, like, jerked all the way forward and then I went all the way forward, almost like a cartoon, still holding onto the eye because my arm was through the eye, being quickly led back towards the outboard side of the vessel to where the railing was and the chock.

Mullett Dep. at 41-44. According to Mullett, the Bulgarian crew could not understand English and therefore did not heed his entreaties to keep a grip on the line; nor did they have the seamen's experience that would have intuited an appropriate response to the sudden surge of the freighter. Id. at 37-38, 46.

The Complaint asserts three theories of recovery: Count I - Jones Act negligence; Count II - unseaworthiness; and Count III - maintenance and cure.[1]

DISCUSSION

Summary judgment is appropriate when "the pleadings, depositions, answers to

[1]Mullett acknowledges that Sabine has been paying his entitled maintenance of $15 per day since the accident, as well as all of his medical bills. Consequently, he agrees to the voluntary dismissal of the claim for maintenance and cure.

interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Barbour v. Dynamics Research Corp., 63 F.3d 32, 36-37 (1st Cir. 1995). Fed. R. Civ. P. 56(c) "mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Although in a Jones Act case a "jury is entitled to make permissible inferences from unexplained events," summary judgment is nevertheless warranted when there is a complete absence of proof as to an essential element of a seaman's case. Martin v. John W. Stone Oil Distributor, Inc., 819 F.2d 547, 549 (5th Cir.1987).

Count I - Jones Act

Under the Jones Act[2], a seaman may

> "maintain an action where an employer's failure to exercise reasonable care causes a subsequent injury even where the employer's negligence did not

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[2]The Jones Act provides a cause of action in negligence for "any seaman" injured "in the course of his employment." 46 U.S.C. § 688(a).

> Under maritime law prior to the statute's enactment, seamen were entitled to "maintenance and cure" from their employer for injuries incurred "in the service of the ship" and to recover damages from the vessel's owner for "injuries received . . . in consequence of the unseaworthiness of the ship," but they were "not allowed to recover an indemnity for the negligence of the master, or any member of the crew." The Osceola, 189 U.S. 158, 175 (1903). Congress enacted the Jones Act in 1920 to remove the bar to suits for negligence articulated in The Osceola.

Chandris, Inc. v. Latsis, 515 U.S. 347, 354 (1995)

> render the ship unseaworthy." Jones Act negligence differs, however, from that of ordinary common law negligence. . . . Liability, . . . "exists if the employer's negligence contributed even in the slightest to the plaintiff's injury."

Ferrara v. A. & V. Fishing, Inc., 99 F.3d 449, 453 (1st Cir. 1996), quoting Toucet v. Maritime Overseas Corp., 991 F.2d 5, 10 (1st Cir. 1993). "A plaintiff's burden of proving causation under the Jones Act is [thus] featherweight." Ferrara, 99 F.3d at 453.

Sabine argues that Mullett's testimony that the Bulgarian laborers mistakenly thought that he had successfully secured the eye to the bollard and thus prematurely let go of the line is simply speculation. While Mullett testified that his eyes were not on the Bulgarians when the accident occurred (he was running forward towards the chock at the time), his account, which begins with the line held fast by the Bulgarians, and ends with the line suddenly in free play, is sufficient to warrant a jury, if it credits Mullett's testimony, in finding negligence on the part of the Bulgarian crew members. See Conde v. Starlight I, Inc., 103 F.3d 210, 214 (1st Cir. 1997). If the jury were also to conclude that the action of the Bulgarians in letting go the line was in any degree responsible for Mullett's injury, Sabine as their employer, is liable. See McAleer v. Smith, 57 F.3d 109, 116 (1st Cir. 1995); California Home Brands, Inc. v. Ferreira, 871 F.2d 830, 833 (9th Cir. 1989).

Count II - Unseaworthiness

The Court of Appeals for the First Circuit has summarized the maritime doctrine of unseaworthiness as follows.

> A claim based on unseaworthiness enforces the shipowner's "absolute duty to provide to every member of his crew 'a vessel and appurtenances reasonably fit for their intended use.'" The duty includes maintaining the ship and her equipment in a proper operating condition, and can be

> breached either by transitory or by permanent defects in the equipment. A "temporary and unforeseeable malfunction or failure of a piece of equipment under proper and expected use is sufficient to establish a claim of damages for unseaworthiness." Finally, the injured seaman must prove that the unseaworthy condition was the sole or proximate cause of the injury sustained. Although the duty is absolute, "[t]he standard is not perfection, but reasonable fitness; not a ship that will weather every imaginable peril of the sea, but a vessel reasonably suitable for her intended service."

Ferrara, 99 F.3d at 453 (citations omitted).

Sabine argues that Mullett, by claiming that his accident was caused by human error, effectively admits that no physical condition of the ship played a part in causing his injury. Sabine asserts that as a consequence, no claim for unseaworthiness can lie. At first blush, there is a compelling logic to Sabine's argument. "Operational negligence . . . such as a single isolated act by a crew member, is not unseaworthiness because it is distinct from an unseaworthy condition." 1 T. Schoenbaum, Admiralty and Maritime Law, 335 (2d ed. 1994). "[T]o hold that [an] individual act of negligence rendered the ship unseaworthy would be to subvert the fundamental distinction between seaworthiness and negligence that we have so painstakingly and repeatedly emphasized in our decisions." Usner v. Luckenbach Overseas Corp., 400 U.S. 494, 500 (1971).

There is, however, an equally compelling distinction between the inadvertent negligence of an otherwise able-bodied seaman, and a crewman manifestly unfit for service. "Just as a dangerous mast, a defective line, or a damaged hull may render a vessel unseaworthy, so may a seaman who is not reasonably fit. To establish such unseaworthiness, a plaintiff must prove that the crewmember was not 'equal in disposition and seamanship to the ordinary men in the calling." Sementilli v. Trinidad Corp., 155 F.3d

1130, 1138 (9th Cir. 1998). The test of seaworthiness is to be applied “when and where the work is to be done.“ Mahnich v. Southern S.S. Co., 321 U.S. 96, 104 (1944). As the Supreme Court has explained, “the shipowner has a duty to provide a crew ‘competent to meet the contingencies of the voyage.’” Boudoin v. Lykes Bros. S.S. Co., 348 U.S. 336, 339-340. “Even though the equipment furnished for the particular task is itself safe and sufficient, its misuse by the crew renders the vessel unseaworthy.” Waldron v. Moore-McCormack Lines, Inc., 386 U.S. 724, 727 (1967).

> If petitioner had been ordered to use a defective pulley in lifting the rope, he would clearly be protected by the doctrine of unseaworthiness. If the pulley itself were sound but petitioner had been ordered to load too much rope on it, he would likewise be protected. If four men had been assigned to uncoil the rope but two of the men lacked the strength of ordinary efficient seamen, petitioner would again be protected. Should this protection be denied merely because the shipowner, instead of supplying petitioner with unsafe gear, insufficient gear, or incompetent manual assistance, assigned him insufficient manual assistance? We think not. When this Court extended the shipowner's liability for unseaworthiness to longshoremen performing seamen's work, either on board or on the pier, either with the ship's gear or the stevedore's gear, either as employees of an independent stevedore or as employees of a ship-owner pro hac vice, – we noted that ‘the hazards of marine service, the helplessness of the men to ward off the perils of unseaworthiness, the harshness of forcing them to shoulder their losses alone, and the broad range of the ‘humanitarian policy’ of the doctrine of seaworthiness,’ should prevent the shipowner from delegating, shifting, or escaping his duty by using the men or gear of others to perform the ship's work. By the same token, the shipowner should not be able to escape liability merely because he has used men rather than machines or physical equipment to perform that work.

Id. at 728 (1967)

Thus, there is no owner liability if an “individual act of negligence rendered the ship unseaworthy.” Usner, 400 U.S. at 500. See also Freimanis v. Sea-Land Service, Inc., 654 F.2d 1155, 1163 n.7 (5th Cir. 1981). A crew member’s “momentary inattention to duty . .

. [is] not enough to make out a claim for unseaworthiness, for 'liability based upon unseaworthiness is wholly distinct from liability based upon negligence.'" Clauson v. Smith, 823 F.2d 660, 665 (1st Cir. 1987), quoting Usner, 400 U.S. at 498. If, however, the owner has engaged seamen who lack the skill and experience of sailors fit for ordinary duty, the ship is unseaworthy and the owner will be liable for any negligent act that causes injury to another crew member. Here, while the evidence depends largely on Mullett's opinion of the seamanship of the Bulgarians, if Mullett is able to persuade a jury that Sabine had employed an inexperienced crew who were unable to understand the operating language of the ship, it could also find that Sabine is responsible for a defect in the ship wholly apart from the momentary negligence that resulted in his injury.

ORDER

For the foregoing reasons, the motion for summary judgment is DENIED as to Counts I and II of the Complaint. Count III, as noted, is deemed waived, and will therefore be DISMISSED. The Clerk will set the case for trial.

SO ORDERED.

/s/ Richard G. Stearns

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UNITED STATES DISTRICT JUDGE