

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EUGENE FLOYD : CIVIL ACTION
: :
: :
v. : :
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: :
BLACK SWAN SHIPPING CO., LTD. :
and NOBIS SHIPPING GMBH : No. 98-4207

MEMORANDUM ORDER

Plaintiff brought this action to recover for injuries he sustained while working as a longshoreman when he lifted a heavy cable at defendants' behest. In its answer defendant Nobis Shipping asserts several affirmative defenses. Presently before the court is plaintiff's motion to strike this defendant's ninth, thirteenth, sixteenth, seventeenth, eighteenth and nineteenth affirmative defenses.

Pursuant to Fed. R. Civ. P. 12(f), the court may strike "from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter." A motion to strike is a proper means for attacking an insufficient affirmative defense. See Environ Products, Inc. v. Total Containment, Inc., 951 F. Supp. 57, 60 (E.D. Pa. 1996); Resolution Trust Corp. v. Farmer, 823 F. Supp. 302, 305 (E.D. Pa. 1993). Motions to strike pleadings, however, are generally disfavored. See Larsen v. Senate of the Commw. of Pa., 955 F. Supp. 1549, 1582 (M.D. Pa. 1997); Environ Products, 951 F. Supp. at 60. Such a motion should be denied if disputed issues of fact

or law are implicated or if the alleged insufficiency is not "clearly apparent" from the pleadings. Id. (quoting Cipollone v. Liggett Group, Inc., 789 F.2d 181, 188 (3d Cir. 1986)).

Defendant's ninth affirmative defense alleges assumption of risk by plaintiff. Plaintiff notes that assumption of risk is not a recognized defense under the Jones Act or admiralty law. Defendant correctly notes, however, that Pennsylvania recognizes assumption of risk as a defense in certain circumstances. The only claim in the amended complaint as pled is one for common law negligence and plaintiff expressly predicates federal jurisdiction only upon diversity of citizenship. As Pennsylvania recognizes assumption of risk as a defense to negligence in some circumstances, defendant's ninth affirmative defense will not be stricken. See Howell v. Clyde, 620 A.2d 1107, 1112 (Pa. 1993); Bullman v. Giuntoli, 761 A.2d 566, 569, 569 n.3 (Pa. Super. 2000).

Although plaintiff lists defendant's thirteenth affirmative defense among those he seeks to strike, he offers no argument in support of striking this defense and ignores this defense entirely after listing it in the opening paragraph of his motion. Defendant's thirteenth affirmative defense will not be stricken.

Defendant's sixteenth affirmative defense asserts that any injury to plaintiff was caused by an "Act of God" or "peril

of the sea" rather than defendant's alleged negligence. Defendant cites to several admiralty cases recognizing "Acts of God" and "perils of the sea" as valid defenses to claims of negligent acts or omissions. These cases, however, involved either damages to vessels or to cargo. Defendant has offered no precedent to indicate that these are recognized defenses to an admiralty claim for personal injury. It appears nevertheless that Pennsylvania law recognizes an act of God defense generally and extends it to personal injury actions. See Goldberg v. R. Grier Miller & Sons, Inc., 182 A.2d 759, 763 (Pa. 1962) ("act of God" defense "has always been and legitimately remains a legitimate defense in Pennsylvania"); Kimble v. Mackintosh Hemphill Co., 59 A.2d 68, 71 (Pa. 1948) (considering act of God defense in wrongful death action). Plaintiff challenges this defense on the sole basis that "[a]cts of God and perils of the sea have nothing to do with a length of cable too heavy for plaintiff to lift unassisted without injuring himself." Defendant avers that prevailing weather conditions at the time may have caused plaintiff's accident. This implicates a disputed issue of fact as to causation. Defendant's sixteenth affirmative defense will not be stricken.

Plaintiff challenges defendant's seventeenth affirmative defense as repetitive of its second affirmative defense as they both plead lack of personal jurisdiction over the

defendant. Rule 12(f) expressly contemplates elimination of redundant defenses. Defendant's seventeenth affirmative defense will be stricken.

Plaintiff similarly challenges defendant's eighteenth affirmative defense on the basis that it is repetitive of defendant's third affirmative defense. Defendant's third affirmative defense alleges insufficient service of process while its eighteenth affirmative defense pleads insufficient process. These are two distinct defenses. See Fed. R. Civ. P. 12(b)(4) & 12(b)(5). Plaintiff does not challenge defendant's eighteenth affirmative defense on any other ground. It will not be stricken.

Defendant's nineteenth affirmative defense is for improper venue. It will not be stricken.

ACCORDINGLY, this day of July, 2001, upon consideration of plaintiff's Motion to Strike Defendant Nobis Shipping GmbH's Affirmative Defenses (Doc. #19) and defendant's response thereto, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** as to defendant's seventeenth affirmative defense and is otherwise **DENIED**.

BY THE COURT:

JAY C. WALDMAN, J.