

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

BENJAMIN YATES : CIVIL ACTION
 :
 v. :
 :
 NAVIGATION MARITIME BULGARE LIMITED : NO. 99-CV-118

MEMORANDUM

O'NEILL, J.

August , 2000

Defendant Navigation Maritime Bulgare Limited (“Navibulgar”) moves for summary judgment on the claims asserted against it by plaintiff Benjamin Yates. Yates, a longshoreman, alleges that Navibulgar is liable for injuries he suffered on August 31, 1998, aboard the M/V Liliana Dimitrova, a vessel owned by Navibulgar. Navibulgar contends that it is entitled to summary judgment because Yates has failed to put forth evidence sufficient to establish the existence of the elements essential to his case.

I have jurisdiction over this matter pursuant to 28 U.S.C. § 1332, due to the diversity of citizenship between Yates, a resident of Delaware, and Navibulgar, a corporation with its principal place of business located in Varna, Bulgaria.

Summary judgment is appropriate “if the pleadings, depositions, answers to 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 a judgment as a matter of law.” Fed. R. Civ. P. 56(c). After the moving party has demonstrated the “absence of a genuine issue of material fact,” Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986), the burden falls upon the nonmoving party to “make a showing sufficient to establish the existence of [every] element essential to that party’s case, and on which that party will bear the burden of proof at trial.” Id. at 322. “In evaluating whether the non-moving party

established each element of its case, we must resolve all reasonable inferences in favor of the non-moving party.” Davis v. Portline Transportes Maritimo Internacional, 16 F.3d 532, 536 (3d Cir. 1994), citing Matushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. at 587-88 (1986).

I. FACTS

The following facts are not in dispute. According to Yates, the M/V Liliana Dimitrova which is owned, operated, and managed by Navibulgar arrived in the Port of Wilmington, Delaware on August 30, 1998. Christina Service Company, a stevedoring enterprise, employed Yates and other longshoremen to discharge the cargo from this ship. On this particular assignment, Yates was to discharge steel coils from various hatches of the M/V Liliana Dimitrova in his capacity as a crane operator. On August 30, Yates worked on the number 5 hatch. On the same day, John Disby, Jr., a crane operator in Yates’ work gang, noticed hydraulic fluid on the steps of the interior ladder that he was obliged to ascend in order to enter the crane operator’s cab and operate the crane servicing the number 7 hatch. Digsby speculated that the fluid must have originated from the hoses directly behind the ladder, which not only carried such fluid but were wrapped with black tape. Digsby alerted a vessel officer to the fluid on the ladder’s rungs, and the officer attempted to clean up the mess. At this time Digsby also pointed out to the officer the poor lighting in the area of the ladder but no additional lighting was subsequently provided. On August 31, 1998, the work gang that included both Yates and Digsby was initially assigned to work on the number 5 hatch but at approximately 11:15 a.m. went to work on the number 7 hatch instead. Yates subsequently climbed the interior ladder leading to the crane operator’s cab, from which he would operate the crane discharging the number 7 hatch. At this time, Yates noticed no fluid on the rungs of

the ladder and ascended it without incident. At approximately noon, the longshoremen commenced their lunch break, which required Yates to leave the crane operator's cab and descend the interior ladder to the deck below. Before descending Yates observed the poor lighting and attributed it to oil on the light bulb casings. Yates also observed that the rungs of the ladder were covered with oil or hydraulic fluid. See Plaintiff's Deposition ("Pl. Dep.") at 26, Exhibit C to Defendant's Motion for Summary Judgment ("Def. Motion"). Nonetheless, Yates continued to descend the ladder. While doing so, he slipped and fell over thirty feet to the deck below. Digsby noticed the fluid on the ladder's rungs when he later replaced Yates on August 31.

II. DISCUSSION

A. TIMELINESS OF MOTION FOR SUMMARY JUDGMENT

Yates' first objection to Navibulgar's motion for summary judgment is a procedural one and involves the timeliness of the motion. Prior to February 11, 2000, the date scheduled for arbitration of this case, Navibulgar asked for and was granted a continuance of the arbitration until March 16, 2000 so that it could obtain three depositions. On February 10, 2000, without having taken the three depositions, Navibulgar filed this motion for summary judgment. Yates contends that this motion would have been untimely had February 10 remained the arbitration date, but he offers no legal support for this contention. In addition, Yates argues that Navibulgar's request for a continuance of the arbitration was based on false grounds and that "[he] would not have consented to a continuance of the arbitration scheduled for February 11, 2000 if defendant had indicated the reason for the continuance was for the purpose of preparing a Motion for Summary Judgment." Pl. Memo. at 2.

However, as the January 26, 2000 letter of Navibulgar’s counsel to me clearly shows, the request for a continuance was not based on false grounds; due to a snowstorm, Navibulgar needed the extra time to reschedule a medical examination of Yates. Also, Navibulgar needed more time to arrange for its three depositions. More important, the Federal Rules of Civil Procedure do not place any restrictions on when a motion for summary judgment can be filed. Therefore, Yates’ contention that this motion is untimely is meritless.

B. DUTIES IMPOSED UPON NAVIBULGAR UNDER LHWCA

Yates alleges that Navibulgar has breached two of its three major duties under § 5(b) of the 1972 Amendments to the Longshore and Harbor Workers’ Compensation Act (“LHWCA”), 33 U.S.C. § 905(b) – specifically, Navibulgar’s turnover duty/duty to warn and Navibulgar’s active operations duty. The Supreme Court in Scindia Steam Navigation Co. v. de los Santos, 451 U.S. 156 (1981), and Howlett v. Birkdale Shipping Co., 512 U.S. 92 (1994), explained the standard of care that a vessel owes to longshoremen under the LHWCA. The Court derived three primary duties from these two cases: the turnover duty with its corollary duty to warn; the active operations duty; and the duty to intervene. The three duties may be summarized as follows:

The first, which courts have come to call the “turnover duty,” relates to the condition of the ship upon the commencement of stevedoring operations. ... The second duty, applicable once stevedoring operations have begun, provides that a shipowner must exercise reasonable care to prevent injuries to longshoremen in areas that remain under the “active control of the vessel.” ... The third duty, called the “duty to intervene,” concerns the vessel’s obligations with regard to cargo operations in areas under the principal control of the independent stevedore.

Howlett, 512 U.S. at 98, citing Scindia, 451 U.S. at 167-78. I now examine both the turnover duty/duty to warn and the active operations duty in light of the facts before the Court.

1. TURNOVER DUTY/DUTY TO WARN

As precedent from the Supreme Court instructs:

[a] vessel must ‘exercise ordinary care under the circumstances’ to turn over the ship and its equipment and appliances ‘in such condition that an expert and experienced stevedoring contractor, mindful of the dangers he should reasonably expect to encounter, arising from the hazards of the ship’s service or otherwise, will be able by the exercise of ordinary care’ to carry on cargo operations ‘with reasonable safety to persons and property.

Howlett, 512 U.S. at 98, quoting Federal Marine Terminals, Inc. v. Burnside Shipping Co., 394 U.S. 404, 416-17, n.18 (1969). As a corollary to this turnover duty, the vessel is required to

warn the stevedore “of any hazards on the ship or with respect to its equipment,” so long as the hazards “are known to the vessel or should be known to it in the exercise of reasonable care,” and “would likely be encountered by the stevedore in the course of his cargo operations[,] are not known by the stevedore[,] and would not be obvious to or anticipated by him if reasonably competent in the performance of his work.”

Id. at 98-99. In interpreting the turnover duty with its complimentary duty to warn, the Court of Appeals has noted that normally a vessel can “reasonably rely on the stevedore (and its longshore employees) to notice obvious hazards and to take steps consistent with its expertise to avoid those hazards where practical to do so. Thus, where a danger is obvious but easily avoidable, the shipowner will not be liable for negligence.” Kirsch v. Plovidba, 971 F.2d 1026, 1030 (3d Cir. 1992).

Yates argues that Navibulgar breached its turnover duty by not fixing an hypothesized leak in the hydraulic system, which rendered the longshoremen incapable of performing their

tasks with reasonable safety because it gave rise to the fluid on the ladder. According to Yates, the oil on the ladder in combination with the dim lighting (due to oil on the light bulb casings) led to a dangerous situation which caused him to fall 30 feet to the deck below. Yates insists that Navibulgar's crew is required to inspect and maintain the hydraulic system and that an experienced longshoreman could not be expected to perform this task. In addition, Yates emphasizes that only one ladder leads to the crane man's cab and that he had no choice but to descend from the cab in this manner.

Yates's, however, fails to put forth sufficient evidence in support of these contentions. As this Court has stated previously, "[w]hile liability may be established by circumstantial evidence and inferences reasonably deductible therefrom, there must be sufficient facts in evidence from which the jury could reasonably and logically reach the conclusion sought by the plaintiff." Smith v. B.P. Tanker Co., 395 F. Supp. 582, 587 (E.D. Pa. 1975), rev'd on other grounds, 541 F.2d 275 (3d Cir. 1976). See also Higgins v. Teamsters, 585 F. Supp. 148, 150-57 (E.D. Pa. 1984) ("The Third Circuit has held that mere inferences, conjecture, speculation, or suspicion are insufficient to establish a material fact upon which to base a denial of summary judgment.").

Even regarding the facts in this case in the light most favorable to Yates, a jury could not reasonably find based on the evidence before me that the vessel's hydraulic system suffered from a leak or defect. The presence of black tape on a hose behind the ladder from which Yates fell is not sufficient evidence to establish that there was a leak in the hydraulic system, and Yates offers no testimony, expert or lay, in support of that conclusion. Nor is the presence of oil or some other fluid on the ladder when Yates descended sufficient to establish that there was a leak. Both Yates and Digsby testified that this occurrence was to be expected

on vessels. See Pl. Dep. at 30-31, Exhibit C to Def. Motion; Digsby's Deposition ("Dig. Dep.") at 13-14, Exhibit 2 to Plaintiff's Answer to Defendant's Motion for Summary Judgment ("Pl. Answer"). During his testimony, Yates made clear that he did not know how the oil or fluid came to be on the ladder. He and Navibulgar's counsel engaged in the following dialogue:

- Q. Do you know where the hydraulic fluid or oil came from?
- A. No. Machinery.
- Q. Do you know what machinery?
- A. The cranes. What particular place, no, I don't know.
- Q. Do you know for sure it came from the cranes or are you guessing it came from the cranes?
- A. I am pretty much guessing because I didn't see a leak unless somebody just spilled it in there. It had to come from the crane.
- ...
- Q. Had anybody been working on that crane prior to 11:00 to 11:15 that day?
- A. Yes.

Pl. Dep. at 27-29, Exhibit C to Def. Motion. Yates simply made a guess that the oil on the ladder came from an imagined "leak" in the hydraulic system. Significantly, Yates' admission that other longshoremen had used the crane earlier in the day undercuts his leak theory because if a leak did exist, one would think that the ladder would have been covered with oil when Yates ascended it at 11:15 a.m. the day of the accident.

With respect to the actual hydraulic fluid on the ladder, Navibulgar did not breach its turnover duty/duty to warn because, as Yates admits, the fluid was not present on the rungs of the ladder at 11:15 a.m. on August 31, 1998, when Yates ascended into the craneman's cab to discharge the number 7 hatch. Thus, at the time of turnover earlier that morning to Christina Service Company the spill of hydraulic fluid that caused the accident had not yet occurred. Accordingly, Navibulgar could not have breached any duties associated with turning over the vessel in a reasonably safe condition to an expert and experienced stevedore.

Even assuming arguendo that Yates could prove that the vessel's hydraulic system suffered from a defect which leaked hydraulic fluid onto the ladder on which Yates slipped, Navibulgar still could not be found to have breached its turnover duty/duty to warn because the spilled hydraulic fluid was obvious to him. As the Court of Appeals stated in Kirsch, "where a danger is obvious but easily avoidable, the shipowner will not be liable for negligence." 971 F.2d at 1026. Here, the danger was easily avoidable for at least two reasons. First, as was the case with the injured longshoreman in Kirsch, Yates could have contacted the stevedoring company or the vessel's crew to clean up the oil instead of choosing to tread through it. See Id. at 1033 ("[The longshoremen] had another option – to eliminate the obvious hazard by treating or cleaning up the oil slick themselves or by telling the ship's crew to do so.") The Safety & Health Regulations for Longshoring published by the Occupational Safety and Hazard Administration ("OSHA") make clear that stevedores shall clean up spills as they occur. See 29 C.F.R. § 1918.91 (c) (1991). Indeed, rags and cleaning solvents for this exact purpose were located at the bottom of the ladder from which Yates fell. In addition, Yates does not point to any time limitations that would suggest any impracticality in waiting for Christina Service Company or the vessel's crew to eliminate the hydraulic fluid. Secondly, although Yates alleges that only one ladder existed from which to exit the crane's cab, he supplies a drawing of the crane which shows the presence of a second ladder as a means of egress. See Exhibit 6 to Pl. Answer.

Based on the record before me, I find that Yates has not put forth sufficient evidence to enable a jury to concede that Navibulgar breached its turnover duty/duty to warn.

2. ACTIVE OPERATIONS DUTY

The Court of Appeals has dealt in depth with the active operations duty and the events that trigger it. In order for the active operations duty to apply, “the vessel must have substantially controlled or been in charge of (i) the area in which the hazard existed, (ii) the instrumentality which caused the injury or (iii) the specific activities the stevedore undertook” Davis v. Portline Transportes Maritimo Internacional, 16 F.3d 523, 540-41 (3d Cir. 1994). Once the plaintiff longshoreman demonstrates that the vessel, either acting individually or jointly with the stevedore, conducted itself so as to trigger the active operations duty, the plaintiff must satisfy each element of a four-prong test to prove that the vessel breached this duty. The plaintiff longshoreman must show:

- (1) that the vessel appreciated, should have appreciated, or with the exercise of reasonable care would have appreciated, the condition;
- (2) that the vessel knew, or should have known, that the condition posed an unreasonable risk of harm to a longshore worker;
- (3) that a longshore worker foreseeably might fail to (i) either discover the condition or apprehend the gravity and probability of harm, or (ii) protect himself or herself against the danger; and
- (4) that the vessel failed to take reasonable precautionary or remedial steps to prevent or eliminate the dangerous condition

Id. at 541. The Davis Court also noted that once the active operations duty is triggered, the obviousness of the danger and the plaintiff longshoreman’s knowledge of the condition do not automatically entail summary judgment in favor of the defendant vessel; rather, these factors would serve only to reduce the plaintiff longshoreman’s recovery by the proportion of his comparative fault. *Id.* at 544.

Yates contends that the facts of this case trigger the active operations duty and that Navibulgar breached that duty. First, Yates submits that the active operations duty applies because Navibulgar retained exclusive control over the hydraulic system and maintained joint control with Christina Service Company over the ladder on which Yates slipped. As Yates

states, “maintenance and inspection of the hydraulic system is exclusively a function of the vessel’s crew which has the means and skill to maintain that system.” Pl. Memo. at 19. Also, since Navibulgar’s crew would have to utilize the ladder on which Yates slipped to service the hydraulic system, Yates claims that Navibulgar shared control of this instrumentality with Christina Service Company. Thus, Yates alleges that the active control duty is triggered both because Navibulgar was substantially in charge of the area in which the hazard existed and because it had substantial control of the instrumentality that caused the injury.

I cannot agree with either contention. Yates offers no evidence that the vessel’s hydraulic system suffered from a defect. He cannot simply allege that such a defect existed and then rely upon this unsupported allegation to defeat Navibulgar’s motion. Nor can Yates claim that Navibulgar shared control with Christina Service Company of the ladder from which he fell simply because in the event of an emergency the vessel’s crew would have to utilize the ladder to make a repair to the hydraulic system. The Davis Court noted that “the vessel’s mere reservation of the right to intervene to protect the ship’s and its crew’s interests, or to eject the stevedore at any time, does not amount to the substantial control necessary to trigger the vessel’s active operations duty as long as the vessel does not exercise those reserved rights.” 16 F.3d at 541. There is no evidence that Navibulgar exercised this latent right.

Even if Yates could successfully argue that the facts of this case trigger the active operations duty, he fails to offer sufficient evidence of a breach of that duty by Navibulgar. As already noted, the condition that Yates alleges, a defective hydraulic system which caused a leak on an interior ladder, is mere speculation. In addition, Yates offers no evidence to refute the regularity of Navibulgar’s practice of crane inspection every morning at 8:00 a.m.

and again at the conclusion of the workday or to show in some other way that the vessel could have appreciated the condition with the exercise of reasonable care. See Defendant's Answer to Interrogatory No. 35, Exhibit 4 to Pl. Answer. Moreover, there is no evidence to suggest that Navibulgar knew or should have known the alleged condition posed an unreasonable risk of harm to a longshoreman or that a longshoreman foreseeably might fail to discover or appreciate this danger, or to protect himself from it. As both Yates and Digsby testified, oil spills occur with frequency on vessels, so much so that OSHA regulations require stevedores to clean them up as they occur. See 29 C.F.R. §1918.911(c) (1991). Materials placed at the base of the ladder existed for this purpose, and on the day prior to the accident, the vessel's crew had used these cleaning agents to eliminate a similar spill on the same ladder shortly after a longshoreman drew their attention to it. Indeed, Yates testified that he noticed oil on the ladder before but neglected to notify the vessel's crew. Nor is there any evidence to show that Navibulgar failed to take precautions or exercise remedial steps in dealing with the dangerous condition of the oily ladder, once notified of the problem. The record only shows that Navibulgar inspected its cranes twice daily and that it had cleaned up a similar spill in a timely fashion the day prior to the accident at issue here. See Defendant's Answer to Interrogatory No. 35, Exhibit 4 to Pl. Answer. See also Dig. Dep. at 14-18, Exhibit 2 to Pl. Answer.

An appropriate Order follows.

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BENJAMIN YATES	:	CIVIL ACTION
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v.	:	
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NAVIGATION MARITIME BULGARE LIMITED	:	NO. 99-CV-118

ORDER

AND NOW on this day of August, 2000, upon consideration of defendant's Motion for Summary Judgment, and plaintiff's response thereto, IT IS HEREBY ORDERED that the Motion is GRANTED. Judgment is entered in favor of defendant Navigation Maritime Bulgare Limited and against plaintiff Benjamin Yates.

Thomas N. O'Neill, Jr., J.