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

IN RE: COMPLAINT OF ARTHUR H. SULZER ASSOCIATES, INC., AS OWNER OF THE SPUD BARGE TOR FOR EXONERATION FROM OR LIMITATION OF LIABILITY	:	**CIVIL ACTION NO. 04-1533**

MEMORANDUM AND ORDER

Tucker, J. **March 31, 2006**

Presently before this Court are Claimant, Weeks Marine, Inc.'s Motions for Summary Judgment (Docs. 37 & 42), Claimants, Holly Shaw and the Estate of Scott Shaw's Response in Opposition (Doc. 39), Plaintiff, Arthur H. Sulzer Associates, Inc.'s Motion for Summary Judgment (Doc. 52) and Weeks Marine's Response in Opposition (Doc. 59). For the reasons set forth below, the Court will grant in part and deny in part Weeks's Motions and deny Sulzer's Motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff, Arthur H. Sulzer Associates, Inc. ("Sulzer"), seeks an exoneration or limitation of liability pursuant to 46 U.S.C. § 183, for events that led to the death of Scott Shaw. Sulzer, a Pennsylvania corporation, was the owner of the SPUD BARGE TOR (the "TOR"), one of the vessels at the center of this case. Claimant, Armco Construction, Inc. ("Armco"), another Pennsylvania corporation, oversaw and performed dredging operations in the Delaware and Schuylkill Rivers in Philadelphia, Pennsylvania. Claimant, Weeks Marine, Inc. ("Weeks"), a New Jersey corporation, owned the other barge involved in this case, the Weeks 114. Claimant, Holly Shaw, is the surviving spouse of decedent, Scott Shaw, and is the Administratrix of the Estate of Scott Shaw (collectively,

the "Shaw Claimants").

The United States Coast Guard awarded Armco a contract to remove forty-three thousand yards of silt from the Coast Guard basin in the Delaware River. After removal, Armco was to transport and dump the silt from the Coast Guard basin to the Core of Army Engineers Spoil Facility located in the Schuylkill River. In June 2002, Armco chartered two barges for use in a dredging project in the Delaware River. Armco chartered the Weeks 114 from Claimant Weeks and the TOR from Claimant Sulzer. During the project, Scott Shaw worked with three other Armco employees on the TOR to unload dredge spoils from the Weeks scows. The Armco employees placed the dredge material into the Weeks scows, and then towed the barges to the TOR to be emptied. The Armco employees completed the dredging phase of the project on September 7, 2002, and began the next phase of the project – cleaning out the Weeks scows before returning them to Weeks.

As part of the cleaning process, the Armco employees placed a small bulldozer, a water cannon, a jet pump and a submersible pump on the Weeks 114. Scott Shaw and two other employees then boarded the Weeks 114 to complete the cleaning. Scott Shaw and another employee set up the water cannon on the stern of the Weeks 114. After helping to secure the water cannon, Scott Shaw walked forward along the starboard side of the Weeks 114 towards the jet pump, which provided water to the cannon. Moments later, the Armco employees found Scott Shaw's body in the Delaware River.

On January 27, 2004, Holly Shaw filed a complaint in the Court of Common Pleas for Philadelphia County (the "First Common Pleas Action") alleging that Sulzer was responsible for the death of her husband Scott Shaw. The First Common Pleas Action also named Weeks and Armco as Defendants. Sulzer denied liability in the First Common Pleas Action and filed the present action

for limitation of liability. Subsequently, the parties filed a number of counterclaims and cross claims. The Shaw Claimants filed survival actions in this Court against Sulzer, Weeks and Armco for the death of her husband. Weeks filed claims against Sulzer and Armco for indemnity; Armco filed a claim against Sulzer for indemnity. Sulzer filed counterclaims against Weeks and Armco as well as a Third Party Complaint

The parties attended a Rule 16 Conference on December 3, 2004. At that conference, the Court ordered the parties to conduct bifurcated discovery. The parties were to conduct liability discovery for six (6) months, then file dispositive motions on the issues of liability. On August 30, 2005, Shaw filed another action in the Court of Common Pleas for Philadelphia County (the "Second Common Pleas Action") against Armco and Weeks. Weeks removed the Second Common Pleas Action to this Court on September 21, 2005. The Court later consolidated the Second Common Pleas Action, with the present case. Subsequently, the parties filed the Summary Judgment Motions discussed below.

II. LEGAL STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with 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." FED. R. CIV. P. 56(c). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual dispute is "material" if it might affect the outcome of the case under the governing law. *Id.*

A party seeking summary judgment always bears the initial responsibility for informing the district court of the basis for its motion and identifying those portions of the record that it believes

demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the movant's initial *Celotex* burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." *Id.* at 325. After the moving party has met its initial burden, "the adverse party's response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). That is, summary judgment is appropriate if the non-moving party fails to rebut by making a factual 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*, 477 U.S. at 322. "[I]f the opponent [of summary judgment] has exceeded the 'mere scintilla' [of evidence] threshold and has offered a genuine issue of material fact, then the court cannot credit the movant's version of events against the opponent, even if the quantity of the movant's evidence far outweighs that of its opponent. *Big Apple BMW, Inc. v. BMW of North America, Inc.*, 974 F.2d 1358, 1363 (3d Cir. 1992). Under Rule 56, the Court must view the evidence presented on the motion in the light most favorable to the opposing party. *Anderson*, 477 U.S. at 255. Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from facts must await trial. *Id.*

III. DISCUSSION

A. Liability for Unseaworthiness

Weeks and Sulzer's first argument concerns liability for the unseaworthiness of their vessels, the Weeks 114 and the TOR. Weeks and Sulzer argue that they cannot be found liable for the unseaworthiness of their vessels because they transferred full control and authority over to Armco as the charterer. (Weeks's Sum. Jud. Mem. at 2-3; Sulzer's Sum. Jud. Mem. at 5.) Under settled

principles of admiralty law, liability for unseaworthiness turns upon control of the ship at the time of the accident. *Myers v. Bank of New York*, No. 94-4950, 1995 U.S. Dist. LEXIS 3789, *6-8 (E.D. Pa. Mar. 23, 1995). A bareboat charter gives the charterer full possession and control of the vessel for the period of the charter, making the charterer liable for personal injuries sustained on the vessel. *Reed v. The Yaka*, 373 U.S. 410, 412-13 (1963). However, the charterer's liability does not fully absolve the owner of a vessel from liability. *See Haskins v. Point Towing Co.*, 421 F.2d 532, 536 (3d Cir. 1970) (affirming the denial of a vessel owner's liability because the record contained no evidence of unseaworthiness of the vessel at the time of the bareboat charter). The owner of a vessel may still be held liable for injuries caused by defects in the vessel that existed prior to commencement of the charter. *Haskins*, 421 F.2d at 536. Stated another way, shipowners have an obligation of seaworthiness that cannot be avoided by contract. *Reed*, 373 U.S. at 414-15. Because the bareboat charter would insulate Weeks and Sulzer from liability for equipment defects that surfaced *after* the charter's execution, the Court must determine whether a material issue of fact exists as to the seaworthiness of Weeks 114 at the time of the bareboat charter.

Given the submissions of the parties, the Court concludes that there is a material issue of fact regarding the pre-charter seaworthiness of Weeks 114 and the TOR. For a ship to be considered seaworthy, its equipment must be reasonably fit for the purpose for which it is to be used. *Edynak v. Atlantic Shipping, Inc.*, 562 F.2d 215, 222 (3d Cir. 1977). This equipment includes the vessel's means of ingress and egress. *See Sarauw v. Oceanic Navigation Corp.*, 622 F.2d 1168, 1172 n. 4 (3d Cir. 1980). The record reflects that neither the Weeks 114 nor the TOR had a gangway ladder for purposes of ingress or egress. In his report, the Shaw Claimants' maritime expert, Captain Mitchell Stoller indicated that the Weeks 114 was not equipped with a gangway or ladder, and that

its disembarkation area was cluttered with tripping hazards. (Shaw's Mem. at Ex. F.) In Captain Stoller's opinion, the condition of the Weeks 114 violated both federal regulations and accepted practices of the maritime industry. *Id.* The record further contains evidence that both vessels were not equipped with other safety equipment such as life jackets and flotation devices. There is sufficient evidence in the record to support a finding of unseaworthiness before the charter. Therefore, Weeks and Sulzer's Motions are denied.

B. Evidence as to the Cause of the Accident

Next, both Weeks and Sulzer argue that the lack of evidence as to how the accident occurred mandates summary judgment because there is insufficient evidence to establish that the alleged unseaworthiness of the Weeks 114 and the TOR was a substantial cause of the accident. (Weeks's Sum. Jud. Mem. at 5-7; Sulzer's Sum. Jud. Mem. at 5-6.) In support of its position, Weeks highlights the fact that neither Scott Shaw's co-workers nor the OSHA investigators were able to discover the cause of the accident. (Weeks's Sum. Jud. Mem. at 6.) Similarly, Sulzer indicates that there is no evidence that the accident occurred on the TOR. (Sulzer's Sum. Jud. Mem. at 6.) Therefore, the Court must consider whether the absence of direct evidence regarding the death of Scott Shaw entitles Weeks and Sulzer to summary judgment. The Court finds that it does not.

While the absence of a direct cause may be a negative fact for the Shaw Claimants, it does not entitle Weeks or Sulzer to summary judgment on the issue of causation. In a negligence action, a claimant is not required to provide direct evidence of how that accident occurred. *See Schulz v. Pennsylvania R. Co.*, 350 U.S. 523, 525 (U.S. 1956) (holding that the issue of negligence should not be taken from the jury merely because there was no direct evidence of how the death occurred); *see also Thomas v. Conemaugh & B. L. R. Co.*, 234 F.2d 429, 433 (3d Cir. 1956) (same). Fact finding

does not require mathematical certainty. *Schulz*, 350 U.S. at 525. When viewing the facts in the light most favorable to the Shaw Claimants, the Court finds that a reasonable fact finder could determine that the condition of the Weeks 114 and the TOR caused Scott Shaw's accident. Scott Shaw was last seen on the deck of the Weeks 114 checking the oil level in the water pump. (Shaw's Mem. at Ex. D, M & P.) The oil level on the pump was low and the oil was located on the TOR. *Id.* Those facts, combined with the evidence of ingress and egress discussed above, could be sufficient to find liability. Consequently, the Court will deny Weeks's and Sulzer's Motion as to liability.

C. Cause of Action Under the Jones Act

Weeks argues thatit is entitled to summary judgment on the Shaw Claimants' Jones Act claim. The Jones Act, 46 U.S.C. § 688, provides a seaman, injured in the course of his employment, a cause of action in negligence against his employer. *Reeves v. Mobile Dredging & Pumping Co.*, 26 F.3d 1247, 1250 (3d Cir. 1994). Weeks contends that the Shaw Claimants cannot meet the elements for a Jones Act claim for two reasons. First, Weeks asserts that Scott Shaw cannot qualify for Jones Act seaman status with respect to the Weeks 114 because he was a member of the TOR's crew. (Weeks's Sum. Jud. Mem. at 7-10.) Secondly, Weeks reasons the Shaw Claimants cannot state a claim for negligence because Scott Shaw was an Armco employee and not a Weeks employee. *Id.* at 10.

1. Scott Shaw's Seaman Status

The Jones Act itself does not define the term "seaman" and therefore leaves to the courts the determination of exactly which maritime workers are entitled to its protection. *Chandris, Inc. v. Latsis*, 515 U.S. 347, 355 (U.S. 1995). The test for seaman status recognizes the "fundamental

distinction between land-based and sea-based maritime employees." *Chandris*, 515 U.S. at 359. The inquiry into seaman status is fact specific and depends on "the nature of the vessel and the employee's precise relation to it." *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 356 (U.S. 1991). The inquiry does not focus on the site of the injury. *Shade v. Great Lakes Dredge & Dock Co.*, 154 F.3d 143, 147 (3d Cir. 1998). To assist courts in making this distinction, the Supreme Court outlined a two part test for seaman status. First, an employee's duties must contribute to the function of the vessel or to the accomplishment of its mission. *Chandris*, 515 U.S. at 368. Secondly, a seaman must have a connection to a vessel in navigation that is substantial in terms of both its duration and its nature. *Chandris*, 515 U.S. at 368.

After applying the *Chandris* factors, the Court finds that there is sufficient evidence to deny Weeks's Motion on the issue of Scott Shaw's seaman status. According to the record, the Weeks 114 was part of Armco's dredging operation; its function was to transport the soil from the Coast Guard basin to be deposited at the Army Corps of Engineer's Soil Depository. The record can support a finding that Scott Shaw's duties contributed to function of the Weeks 114. On the day of the accident, Scott Shaw assisted the Weeks 114 crew in removing sediment and transporting the barge. There is also evidence that Scott Shaw performed deck hand duties on the Weeks 114. Furthermore, Weeks failed to establish that Scott Shaw did not have substantial connection to the Weeks 114. Scott Shaw's duties involved pumping out the sediment that was in the Weeks 114. Given that the mission of the Weeks 114 was as part of a dredging operation, it would be reasonable if a fact finder were to determine that Scott Shaw's duties were substantially connected to the Weeks 114, making Scott Shaw a seaman. Weeks's Motion here is denied.

2. Scott Shaw's Employment Status

Weeks also argues that the Shaw Claimants' Jones Act claim must fail because Scott Shaw was an employee of Armco and not of Weeks. (Weeks's Sum. Jud. Mem. at 10.) The Third Circuit has directly addressed the issue of employment relationships in Jones Act cases, specifically the issue of actions against non-employers. Usually, the shipowner is also the employer of the seamen, however, the employer "need not be the owner of the vessel." *Matute v. Lloyd Bermuda Lines, Ltd.*, 931 F.2d 231, 235-36 (3d Cir. 1991), *overruled on other grounds Neely v. Club Med Mgmt. Servs.*, 63 F.3d 166, 177-78 (3d Cir. 1995). While a Jones Act claimant must establish an employment relationship, that relationship can be with either the owner of the vessel or with some other employer who assigns the employee to a task creating the proper connection with a vessel. *Reeves*, 26 F.3d at 1252-53. The existence of an employment relationship is a question of fact that turns on the degree of control the employer exerts over the employee. *Id.* at 1253. In the present case, the mere fact that Scott Shaw was an Armco employee does not entitle Weeks to summary judgment. Consequently, Weeks's Motion is denied.

D. Weeks's Breach of Contract Claim Against Armco

Weeks also moved for summary judgment on Count II of its Cross-Claim against Armco, for breach of contract. In Pennsylvania, three elements are necessary to plead a cause of action for breach of contract: (1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract and (3) resultant damages. *J. F. Walker Co. Inc. v. Excalibur Oil Group, Inc.*, 792 A.2d 1269, 1272 (Pa. Super. Ct. 2002).

The Court finds that Weeks is entitled to summary judgment on its breach of contact claim. As part of the bareboat charter agreement, Armco agreed to maintain protection and indemnity

insurance in the amount of $5,000,000 during the term of the charter. (Weeks's Armco Sum. Jud. Mem. at Ex. 1, ¶¶19-20.) In its Amended Complaint, Weeks alleged that Armco did not have the insurance policy in place on the date of the accident. (Weeks's Am. Compl. ¶¶ 13-16.) Armco, in its response, admitted that the policy was not in place on the day of the accident. (Armco's Ans. to Weeks's Am. Compl. ¶ 13.) Furthermore, Thomas Clauss, testified in his deposition that, he signed the charter on behalf of Armco, that he understood the charter to require insurance coverage, and that the policy had been permitted to lapse. (Weeks's Armco Sum. Jud. Mem. at Ex. 5.) Based on the evidence submitted by Weeks in support of its Motion, this Court holds that Weeks's Motion for summary judgment is granted with respect to the breach of contract claim against Armco.

E. Effect of Dismissal of Shaw's Claims

On March 15, 2006, this Court granted the Shaw Claimants' Motion to Voluntarily Dismiss Its Claims against Sulzer, pursuant to FED. R. CIV. P. 41(a)(2). (*See* Doc. 62.) Sulzer argues that the dismissal has the same effect as a joint tortfeasor settlement, and therefore Weeks and Armco cannot be held liable for any liability the Court would attribute to Sulzer. (Sulzer's Sum. Jud. Mem. at 7.) Sulzer relies on *McDermott v. Anclyde and River Don Castings, Ltd.*, 511 U.S. 202 (1994), in which the Supreme Court, applying the proportional share rule, ruled that a pre-trial settlement between the plaintiff and a defendant limited the liability of the remaining defendants to their proportionate share of the damage. However, Sulzer's reliance on *McDermott* is misplaced because the Shaw Claimants' dismissal was not the result of a settlement. Moreover, a dismissal of one defendant does not operate as a dismissal of a cross-claim filed against such defendant by a co-defendant. *Aetna Ins. Co. v. Newton*, 398 F.2d 729, 734 (3d Cir. 1968). Sulzer's Motion is denied.

IV. CONCLUSION

For the reasons stated above, this Court will deny Weeks's Motion for summary judgment as to all claims, except Count II of its Cross-Claim against Armco; the Court grants summary judgment on Weeks's breach of contract claim against Armco. The Court will also deny Sulzer's Motion for Summary Judgment in its entirety. An appropriate order follows.

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

IN RE: COMPLAINT OF ARTHUR H. SULZER ASSOCIATES, INC., AS OWNER OF THE SPUD BARGE TOR FOR EXONERATION FROM OR LIMITATION OF LIABILITY	:	**CIVIL ACTION NO. 04-1533**

ORDER

AND NOW, on this 31st day of March, 2006, upon consideration of Weeks's Motions for Summary Judgment (Doc. 37 & 42), the Shaw Claimants' Response in Opposition (Doc. 39), Sulzer's Motion for Summary Judgment (Doc. 52) and Weeks's Response in Opposition (Doc. 59), **IT IS HEREBY ORDERED** that:

1. Weeks's Motion for Summary Judgment on it breach of contract claim against Armco (Count II) is **GRANTED**;

2. Weeks's Motion for Summary Judgment as to all other claims is **DENIED**;

3. Sulzer's Motion for Summary Judgment is **DENIED** in its entirety.

BY THE COURT:

/S/ Petrese B. Tucker

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Hon. Petrese B. Tucker, U.S.D.J.