2023 NY Slip Op 23085

MICHAEL MARVINNEY and JULIE MARVINNEY, Plaintiffs,
v.
AUSTRALIAN SPIRIT L.L.C., TEEKAY MARINE (SINGAPORE) PTE LTD. and BRADY MARINE REPAIR CO., Defendants.
BRADY MARINE REPAIR CO., Third-Party Plaintiff,
v.
REYNOLDS SHIPYARD CORP., Third-Party Defendant.

Index No. 151377/2019.

Supreme Court, Richmond County.

Decided March 30, 2023.

Plaintiff is represented by: Louis Grandelli Esq. of Louis Grandelli PC, 90 Broad Street, 15th Floor, New York, NY 10004.

Defendant/Third Party Plaintiff (Brady Marine) is represented by: Frank Jordan Esq. of Mendes & Mount, LLP., 750 Seventh Ave., New York, NY 10019.

Third Party Defendant Reynold's Shipyard is represented by: Gino A. Zonghetti Esq. of Kaufman, Dolowich & Voluck, LLP, 25 Main Street, Suite 500, Hackensack, NJ 07601.

CATHERINE M. DiDOMENICO, J.

Present Motion

By Notice of Motion dated March 2, 2022 (Seq. No. 004), Third Party Defendant Reynolds Shipyard Corp. ("Reynolds") moves to dismiss the Third-Party Complaint for common-law contribution/indemnity brought by Third Party Plaintiff Brady Marine Repair Co ("Brady Marine") pursuant to CPLR §3211(a)(1) and/or (a)(7). Reynolds argues that dismissal is appropriate because they have asserted a legal defense that precludes the causes of action asserted against them as a matter of law. *See* *Harounian v. Harounian,* 198 AD3d 734 (2d Dept. 2021). In the alternative, Reynolds requests that the Court convert the present motion to one for summary judgment pursuant to CPLR §3211(c) and dismiss the case on the ground that there are no issues of fact that would warrant a trial. In support of their motion, Reynolds argues that as Plaintiff's employer, it enjoys immunity from suit pursuant to the exclusivity provisions of the Longshore Harbor Worker's Compensation Act ("LHWCA"). *See* 33 U.S.C. §904 and §905(a) et seq. Reynolds claims that this immunity applies not only to direct suits commenced by Plaintiff,

but also precludes third party claims for indemnification or contribution such as the one brought by Brady Marine.

Earlier in this proceeding Brady Marine took a similar position to the one being asserted by Reynolds now. In its Verified Answer to Plaintiffs' Second Amended Summons and Complaint, Brady Marine asserted that Plaintiff's sole remedy is limited to the causes of action established by the LHWCA. Brady Marine *now* argues that factual questions exist as to whether LHWCA applies to Plaintiff in this case because he was allegedly "denied" LHWCA benefits when he attempted to apply for the same in May 2019. Brady Marine also objects to a conversion of this pre answer motion to one for summary judgment. Plaintiffs Michael and Julie Marvinney[1] take no position on the present motion.

Factual Background

At the time of his accident, on August 11, 2018, Plaintiff Michael Marvinney ("Plaintiff") was employed by Reynolds Shipyard, an entity engaged in maritime activities upon the navigable waters of the United States. Reynolds Shipyard operates a shipyard adjacent to the waters of New York Harbor. It performs construction, alterations, and repairs to ships, including the use of cranes, forklifts, and deck barges in furtherance of those repairs. These activities render Reynolds a "maritime employer" under the LHWCA. *See* 33 USCS §902(4). Plaintiff, on behalf of Reynolds Shipyard, was engaged in the performance of ship construction and repairs. He was employed by Reynolds in this capacity since 2014. Plaintiff was responsible for loading and unloading supplies onto vessels using forklifts and cranes and otherwise assisting in the replacement and repair of ships. Based on these responsibilities, Plaintiff is a "maritime employee" as defined in the LHWCA. *See* *Colamarino v. New York*, 166 AD2d 404 (2d Dept. 1990); *see also* *Triquero v. Conrail*, 932 F2d 95 (2d Cir. 1991).

The following facts are not disputed. At the time he was injured, Plaintiff was operating a crane to assist Brady Marine in repairing a vessel, "The Australian Spirit," owned by Australian Spirit, LLC and managed by Teekay Marine (Singapore) Pte Ltd. The repair being conducted required an old anchor chain on the vessel to be replaced with a new one that was being loaded by Plaintiff onto a barge owned by Reynolds. The barge was intended to transport the new anchor chain so it could be reattached to the Australian Spirit which was anchored some 500 feet from the dock. The crane operated by Plaintiff was being used in connection with the "construction, repair, modifications and/or alterations" of this vessel. Plaintiff's responsibility was to operate the crane to lower the heavy chain onto the barge as directed by Brady Marine. All the personnel operating the barge and directing Plaintiff were employed by Brady Marine. As Plaintiff began the process of lowering the chain as directed, the crane began to tip over. Plaintiff jumped out of the cab of the crane as it fell and sustained serious injuries to his foot and leg when his body hit the ground.

It is undisputed that at the time of this accident, Reynolds Shipyard had secured LHWCA coverage through a rider contained on its Worker's Compensation Policy with the New York State Insurance Fund. Following the accident, Reynolds voluntarily paid Plaintiff his full salary for at least eight months until Plaintiff attempted to file for benefits under the LHWCA. Plaintiff's application for benefits was filed on or around May 7, 2019, but never actually received such benefits. In addition to receiving his full salary from Reynolds Shipyard, Plaintiff's medical bills were also fully paid by Reynolds Shipyard's insurance coverage. While Brady

Marine asserts that these bills were paid for under the "Jones Act," Plaintiff does not allege that he ever filed for benefits under any statutory scheme other than under LHWCA.

Applicable Law

When considering a motion to dismiss pursuant to CPLR §3211, the complaint at issue is to be afforded a liberal construction. *See* *Belling v. City of Long Beach,* 168 AD3d 900 (2d Dept. 2019). The Court must generally accept the facts alleged in the pleading as true and accord the plaintiff every possible favorable inference. *See* *Rushaid v. Pictet & Cie,* 28 NY3d 316 (2016). To succeed on a motion to dismiss pursuant to CPLR §3211(a)(1), the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim. *See* *Dubon v. Drexel,* 2021 NY Slip Op 04119 (2d Dept. 2021); *see also* *Shah v. Exxis, Inc.*, 138 AD3d 970 (2d Dept. 2016). On a motion pursuant to CPLR §3211(a)(7) to dismiss for a failure to state a cause of action, the court must only determine whether the facts as alleged fit within a cognizable legal theory. *See* *Edelman v. Berman,* 2021 NY Slip Op 04120 (2d Dept. 2021). An affirmative defense claiming immunity from suit, or exclusivity of remedy, is suitable to be adjudicated by a motion to dismiss. *See e.g.* *Kramer v. NAB Constr. Corp.*, 282 AD2d 714 (2d Dept. 2001); see also *Schwartz v. Kurlander,* 279 AD2d 465 (2d Dept. 2001). Such motions are generally addressed under CPLR 3211(a)(7) to determine if the cause of action plead is a legally viable one. *See* *Rodriquez v. Dickard Widder Indus.*, 150 AD3d 1169 (2d Dept. 2017); see also *Walsh v. Knudsen,* 198 AD3d 843 (2d Dept. 2021). If necessary and appropriate, a motion to dismiss may be converted to one for summary judgment. *See* CPLR §3211(c). Here conversion is unwarranted, and insufficient notice was given in any event. *See* *Shabtai v. City of New York,* 308 AD2d 532 (2d Dept. 2003).

The Longshore Harbor Workers Compensation Act provides exclusive worker's compensation immunity for maritime employers from suit brought by injured maritime employees. 33 USC §905(a). This "no fault compensation structure" serves as the exclusive remedy for injured land based (non-seamen) maritime workers who are injured during the course of their employment. Analogous to New York State's worker's compensation statute, LHWCA bars all negligence claims by maritime workers against their employers. *See* *Olsen v. James Miller Marine Serv.*, 16 AD3d 169 (1st Dept. 2005); see also *Doty v. Tappan Zee Constructors, LLC,* 831 Fed. Appx. 10 (2d Cr. 2002). Notably, LHWCA does not bar suits by an injured worker against negligent third parties, or vessels. *See* 33 USC §905(b); 33 USC 933§.

The LHWCA statutory immunity precluding suits by an injured worker against their employer also addresses actions brought by third parties against that employer for indemnification or contribution. In this regard, the statute provides that "the liability of an employer shall be *exclusive* and in place of all other *liability of such employer to the employee* and *anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury*." 33 USC §905(a) (emphasis added). This statutory language has been interpreted to bar third party claims for contribution or indemnification against a covered employer. *See Ashjian v. Orin Power Holdings, Inc.* 70 AD2d 738 (2d Dept. 2010); *see also* *Colamarino v. New York,* 166 AD2d 404 (2d Dept. 1990); *Lee v. Astoria Generating Co., L.P.*, 13 NY3d 382 (2009).

Decision

Brady Marine argues that Reynolds Shipyard's motion to dismiss its claims for common-law contribution and indemnification must be denied because there is a question of fact as to whether Plaintiff is a covered employee under the LHWCA. Specifically, Brady Marine argues that there is evidence in the record suggesting that Plaintiff received medical benefits under the Jones Act (46 USC Appendix §688) and therefore, was necessarily characterized by Reynold's Shipyard's as a "seaman" under that statute. *See* *Songui v. City of New York*, 2 AD3d 706 (2d Dept. 2003). Brady argues that the Jones Act and the LHWCA are exclusive avenues of federal relief for injured workers. Accordingly, if Plaintiff is covered by the Jones Act, then he cannot be covered under the LHWCA. Accordingly, Brady Marine argues that the exclusive remedy immunity provided by the LHWCA is not available to protect Reynolds Shipyard from the third-party contribution and indemnity claims asserted here. In response, Reynolds argues that this Court has already decided the statutory standing of Plaintiff in relation to a prior motion for summary judgment (Seq. No. 002) filed by Defendant Australian Spirit. In addition, Reynolds argues that whether Plaintiff received Jones Act medical benefits is irrelevant as an injured worker can receive benefits under both statues on an interim basis until a final determination is made regarding which statute applies.

This Court agrees with Reynold's Shipyard. As to the question of whether the LHWCA applies, this Court has already determined Plaintiff's status. Specifically, this Court previously granted a motion for summary judgment brought by defendants Australian Spirit (the vessel being repaired), and Teekay Marine (the vessel's owner) which addressed the issue. Section 905(b) of the LHWCA specifically authorizes an injured worker to sue a potentially negligent vessel. *See* *Schnapp v. Miller's Launch, Inc.*, 150 AD3d 32 (1st Dept. 2017); *see also* *Sutherland v. City of New York*, 266 AD2d 373 (2d Dept. 1999). The duty of care owed to a worker under this section has been delineated by the United States Supreme Court. *See* *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S.156 (1981); *see also* *Howlett v. Birkdale Shipping Co.*, 512 U.S. 92 (1994). Applying these principles, this Court found that the limited duties of care under Section 905(b) were not breached by the vessel defendants in this case. This determination mooted Plaintiff's cross motion (Seq. No. 003) which sought (in part) to assert a §905(b) claim against the vessel defendants. As far as this Court is aware the Decision granting summary judgment has not been appealed and the time to do so has expired. Similarly, no motion to renew or reargue has been filed. Despite being given a full and fair opportunity to litigate the issue, Brady Marine did not oppose Australian Spirit's motion or take a position on Plaintiff's cross motion. Brady Marine's counsel was also present for oral argument but took no position as to whether the LHWCA applied to Plaintiff. Accordingly, as the determination that Plaintiff is a covered employee under the LHWCA has already been made by this Court, this determination has become the law of the case and cannot be challenged by Brady Marine now. *See* *Gliklad v. Cherney*, 113 AD3d 505 (1st Dept. 2014); *see also* *Quik Park W. 57 LLC v. Bridgewater Operating Corp.*, 189 AD3d 488 (1st Dept. 2020); *Brownrigg v. New York City Hous. Auth.*, 29 AD3d 721 (2d Dept. 2006); *Savet v. Schmidt*, 265 AD2d 474 (2d Dept. 1999). However, even if this Court had not already made this decision, it would reach the same conclusion again on this motion given the nature of Plaintiff's employment responsibilities. *See* *Daza v. Pile Found. Constr. Co.*, 983 F. Supp. 2d 399 (S.D.NY 2013).

In the alternative, Brady Marine argues that even if the LHWCA applies to Plaintiff,

Reynolds Shipyard is not a covered employer under the statute because Plaintiff never "actually received" LHWCA benefits. The exclusive remedy provision of §905 applies to all employers who "secure the payment to his employees of the compensation payable" under the LHWCA. *See* 33 USC 904(a); see also §905(a) [allowing suit against employer if this condition is *not* met.] There are two ways in which an employer may "secure" payment to its employees and thereby preserve its immunity: (1) by obtaining and maintaining insurance with an authorized insurance carrier, or (2) by obtaining authorization to act as a self-insurer. 33 USC §932(a). Here, it is undisputed that Reynolds Shipyard had insurance that satisfies this provision at the time of the subject accident.

Relying on the fact that Plaintiff never actually received LHWCA benefits, Brady Marine claims that the exclusive remedy immunity provided by the LHWCA never attached. *See e.g., Passman v. Rigging Int'l, Inc.,* 1999 U.S. Dist. LEXIS 9046 (E.D. Pa 1999). Reynolds Shipyard, on the other hand, relies on cases that interpret the Act as conferring immunity to an employer who *secures* a qualifying policy, without further condition. *See e.g., In re Natures Way Marine, LLC,* 984 F. Supp. 2d 1231 (S.D. Ala 2013).

After considering the arguments raised by both sides, this Court finds that the LHWCA simply requires an employer to secure coverage, rather than actually make payments to the covered employee, in order for statutory immunity to attach. In other words, "an employer which provides compensation coverage may not be sued, but one which does not provide coverage may be sued." *Reichert v. Chemical Carriers, Inc.*, 794 F.2d 1557 (11th Cir. 1986). This interpretation is supported by the plain language of the statute. *See* 33 USC §904(a) [an employer secures coverage under LMWCA "by obtaining and maintaining insurance with an authorized insurance carrier"]; *see also B.S. Costello, Inc. v. Meagher*, 867 F.2d 722 (1st. Cir. 1989). New York Courts have agreed with this analysis, albeit without much discussion. *See, e.g., Sumner v. FCE Indus.*, 308 AD2d 440 (2d Dept. 2003) [where employer provided insurance for benefits, claim by employee was barred]; *see also Morales v. Hapag-Lloyd A.G.(Am.)*, 134 AD3d 783 (2d Dept. 2015) [suit barred because insurance coverage provided]; *Durando v. City of New York*, 105 AD3d 692 (2d Dept. 2013) [dismissing action after finding that employer satisfied its obligation to obtain LHWCA coverage). Moreover, the interpretation argued by Reynolds is the only one that makes sense as a practical matter. Clearly, an employer's statutory immunity cannot depend on a condition over which it has no control, such as whether an injured worker elects to pursue the payment of benefits, including appealing any initial determination by an insurance company contesting the application. Indeed, this is precisely what happened in this case.

Plaintiff, through his legal counsel Marciano and Topazio, filed a claim seeking LMWCA benefits on or about May 7, 2019. On that application, Plaintiff described his position with Reynolds as "Manager." He admitted that his full salary had been paid by Reynolds since August 11, 2018 (the date of accident) and would stop on August 19, 2019. In response to that filing, Plaintiff's counsel received a Notice of Controversion indicating that Reynold Shipyard's carrier was contesting the claim for the following reasons "jurisdiction, no comp due, paid full salary in lieu of comp, all meds paid by Assured's Insurance under Jones Act." Plaintiff was advised of his right to challenge this controversion and to attend further proceedings (including an informal conference and ultimately a hearing) where he could have submitted evidence in support of his application. Despite his rights, Plaintiff took no further action to pursue his claim for benefits. The Notice of Controversion, relied upon by Brady Marine, does not support a conclusion that Plaintiff was "denied"

LHWCA benefits. To the contrary, the notice makes clear that no final decision regarding the merits of Plaintiff's claim had been made.

Applying these undisputed facts to the applicable law, it would be inequitable to find that a covered employer (i.e., Reynolds) lost the exclusive remedy immunity protections afforded by the LHWCA because a covered employee (i.e., Plaintiff) chose not to pursue the process relevant to secure benefits. *See e.g.,* *Raicevic v. Fieldwood Energy, LLC,* 979 F.3d 1027 (5th Cir. 2020) [holding that simply having LHWCA insurance at the time of injury is enough to invoke the exclusive recovery provision]. There is no requirement that immunity attaches only to an employer who "actually pays" benefits. *See* *Melancon v. Amoco Production Co.,* 834 F2d 1238 (5th Cir. 1988). Indeed, there may be many reasons why an injured employee may choose not to pursue LHWCA benefits. Here, Plaintiff was being paid his full salary by Reynolds and his medical expenses were being paid by Reynold's insurance carrier. To make an employer's LHWCA statutory immunity depend on the actions of each individual injured employee would defeat the objectives of the legislation and make it impossible for a covered employer to assess its liability exposure or determine its coverage needs. *See* *Kielich v. Nicholson & Hall Boiler & Welding Corp.,* 129 Misc 2d 556 (1985).

In addition, this Court agrees with Reynolds that the "Jones Act" reference set forth in the Notice of Contravention does not serve to block LHWCA statutory immunity. There is no evidence in the motion record that Plaintiff, or anyone else on his behalf, affirmatively filed for Jones Act benefits. However, even if he had filed for Jones benefits, an injured employee is permitted to pursue both LMCWA and Jones Act benefits, on an interim basis, until such time as a final determination can made as to that employee's statutory status. *See* *Southwest Marine v. Gizoni,* 502 U.S.81 (1991); see also *Mooney v. City of New York,* 219 F.3d 123 (2d Cir. 2000). Accordingly, this unexplained passing reference to the Jones Act in the Notice of Controversion cannot serve to preclude Reynolds Shipyard's statutory immunity as a matter of law. As indicated above, this Court has already determined that Plaintiff is an employee covered by the LHWCA.

Finally, it is important to note that Brady Marine does not assert any independent contractual basis for its contribution and indemnification claims against Reynolds Shipyard. Rather, its third-party claims sound in common law tort and are dependent on the success of Plaintiff's personal injury claims against Brady Marine. It is well settled that common law third-party claims for contribution or indemnification are prohibited by the exclusive remedy provisions of the LHWCA. *See* *Ashjian v. Orion Power Holdings, Inc.,* 70 AD3d 738 (2d Dept. 2010); *see also* *Colamarino v. New York,* 166 AD2d 404 (2d Dept. 1990); *Magno v. Waterman S.S. Lines,* 89 AD2d 958 (2d Dept. 1982); *Triguero v. Conrail,* 932 F.2d 95 (2d Cir. 1991).

Conclusion

In summary, this Court has previously found that Plaintiff is a covered employee under the LHWCA, and it now adheres to that finding. Reynolds Shipyard secured payment for Plaintiff's benefits by maintaining a qualifying policy which was in effect at the time of the accident. The securing of a LHWCA policy is all that was required for Reynolds to receive exclusive remedy statutory immunity. Any finding to the contrary would provide a sweeping disincentive for maritime employers who choose to voluntarily provide more generous benefits to their injured employees than what would be provided by their LHWCA policy. Accordingly, for the detailed

reasons set forth above, Third Party Defendant's motion is hereby granted in its entirety and the causes of action asserted by Third Party Plaintiff Brady Marine Repair Co. are hereby dismissed.

This constitutes the Decision and Order of this Court in relation to Motion Sequence Number 004. The matter is hereby adjourned for a telephone conference to discuss any outstanding discovery issues which shall be held on May 10, 2023, at 11:30 AM.

[1] Julie Marvinney has asserted a loss of consortium claim due to her Husband's injuries.