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Mack v City of New York
2023 NY Slip Op 50073(U)
Decided on February 2, 2023
Supreme Court, New York County
Moyne, J.
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Decided on February 2, 2023

Supreme Court, New York County

Ernest Mack, Plaintiff,

against

The City of New York, New York City Sanitation Department, New York City Department of Transportation, Defendant.

Index No. 156903/2018

Plaintiff's counsel: Andrew Levinson, Esq., Elefterakis, Elefterakis, & Panek, 80 Pine Street, 38th Floor, New York, New York 10005

Defendants' counsel: Aneta Sudol, Esq., Assistant Corporation Counsel, Hon. Sylvia O. Hinds-Radix Corporation Counsel of the City of New York, 100 Church Street, New York, New York 10007, 212-356-2771

Nicholas W. Moyne, J.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 35, 36,

37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48 were read on this motion to/for AMEND CAPTION/PLEADINGS.

Upon the foregoing documents, it is

This is an action to recover monetary damages for personal injuries allegedly sustained by the plaintiff while he was working as a supervisor for the New York City Department of Sanitation. On July 25, 2017, the date of the subject accident, the plaintiff was assigned to supervise the marine transfer station located at Pier 99. At his deposition, the plaintiff testified that his duties as supervisor included facility check, roll call, payroll, monitoring the sanitation workers and overseeing the entire building located at the transfer station (*see* Exhibit A, page 13, lines 14-21). The marine transfer station served as a paper recycling center for Manhattan and was used to transport paper waste from around the city to the transfer station/recycling plant (*see* Exhibit A, page 23, lines 12-23). Plaintiff, in his role as supervisor, would remain at Pier 99 for the duration of his shift (*see* Exhibit A, page 24, lines 1-21). The plaintiff primally worked inside the recycling plant building, which he described as a plant located on the water with an opening for the barges to fit under the building itself.

The plaintiff's duties included preparing barges for the receipt of recyclables from the plant. On the date of the accident, the plaintiff was assisting one of his employees, who was attempting to place a net over the barge. He testified that the accident occurred when he stepped off the barge, back onto the dock, and got his foot caught on a metal wire on the dock, causing him to trip and fall.

The plaintiff commenced this action on July 24, 2018, alleging claims for common law negligence against the defendants City of New York, New York City Department of Sanitation and New York City Department of Transportation. The plaintiff now moves, pursuant to CPLR §3025(b), for an order permitting him to amend his complaint to assert a cause of action under 46 USC §30104, (hereinafter the "Jones Act"). The Jones Act states:

> A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer. Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section. *Id.*

The issue on this motion is whether the plaintiff qualifies as a seaman under the Jones Act. The Jones Act does not provide a definition of what constitutes a seaman. The plaintiff argues that he qualifies as a seaman because as part of his duties as a supervisor, he was tasked in assisting workers

in the process of loading barges with paper recyclable goods and preparing the barges for transport by tugboat across the waters. He asserts that the duties he performed on the barge (including sounding the barge and assisting in covering the barge with a net in order to [*2]facilitate the transport of recyclable paper) contributed to the function of the vessel and the accomplishment of its mission. The defendants disagree that the plaintiff qualifies as a seaman and, on that basis, oppose the motion to amend.

The United States Supreme Court has created a test for determining whether an injured plaintiff falls within the definition of "seaman" in the Jones Act, a test known as the *Chandris* test (*Chandris, Inc. v Latsis*, 515 US 347 [1995]). In *Chandris*, the Court held that qualifying as an injured seaman under the Jones Act requires proof of two elements: 1) the injured worker's duties must have contributed to the function of the vessel or the accomplishment of its mission, and 2) the worker must have a connection to a vessel in navigation that is substantial in terms of both its duration and its nature (*Id.*). The defendants argue that, pursuant to the *Chandris* test, the plaintiff, a Department of Sanitation supervisor, who primarily worked in an office located inside the transfer station, and only intermittently on a barge, does not qualify as a "seaman" under the Jones act because he was primarily a land-based worker who only had transitory connections to a vessel in navigation. The defendants also maintain that the record, including the plaintiff's own deposition testimony, demonstrates that the vast majority of the plaintiff's worktime was spent performing administrative or supervisory tasks and that any work the plaintiff performed on the barge was insubstantial and/or transitory.

Plaintiff cites to *Calcaterra v City of New York*, 45 AD3d 270 [1st Dept 2007] as support for his claim that he is an injured seaman under the Jones act. In *Calcaterra*, the First Department found that an employee who regularly worked on a barge in the middle of a bay could be considered a seaman under the Jones Act. At the time of his injury, the plaintiff in *Calcaterra* was retrieving a scow filled with material from the mooring, to which he had been towed by tugboat (*Calcaterra*, 45 AD3d at 271). The First Department found that the evidence conclusively established that the barge was a vessel in navigation and that the injured employee's duties contributed to the accomplishment of its mission by preparing an area for the dredging of a trench (*Id.*at 72). The Court also found that the employee's connection to the barge was substantial in terms of both its duration and its nature, i.e., at the time of the accident, he had been out on the barge every day for about four months. (*Id.)* Consequently, the employee qualified as a seaman under the Jones Act.

Defendants argue that *Calcaterra* is distinguishable from the instant matter. As outlined above,

they assert that the record demonstrates that the plaintiff was a supervisor of the transfer station, not a crewmember of the barge or tugboat, and that the majority of the plaintiff's time spent at work was on land and involved paperwork, job assignments, and other administrative tasks.

This motion is not a motion to dismiss the complaint or motion for summary judgment and the standard applicable to evaluating the plaintiff's proof on this motion is not the same. This is plaintiff's motion to amend the complaint. On a motion for leave to amend the complaint, the plaintiff does not need to establish the merits of his proposed new allegations, but rather he need only demonstrate that the proffered amendment is not "palpably insufficient or clearly devoid of merit" (*see Sorge v Gona Realty, LLC*, 188 AD3d 474, 475 [1st Dept 2020]; *MBIA Ins. Corp v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]). This interpretation of the applicable standard in evaluating the merits of a motion to amend comports [*3]with the standard set forth in CPLR §3025, which directs that motions for leave to amend shall be "freely granted." That would seem to imply, as many decisions have recently held, that motions for leave to amend should not be subject to the same scrutiny that would be applied in the context of a motion to dismiss (*see Sorge*, 188 AD3d at 475; *WDF, Inc. v Trustees of Columbia Univ.*, 170 AD3d 518 [1st Dept 2019]; *Koch v Sheresky, Aranson & Mayefsky LLP*, 161 AD3d 647 [1st Dept 2018], *lv dismissed* 32 NY3d 928 [2018]). Notably, however other cases have held that "palpable" insufficiency is equivalent to insufficiency as a matter of law and/or would not survive a motion to dismiss (*see Mashinsky v Drescher*, 188 AD3d 465 [1st Dept 2020]; *LDIR, LLC v DB Structured Products, Inc*, 172 AD3d 1, 4 [1st Dept 2019]; *Gonik v Israel Discount Bank of New York*, 80 AD3d 437, 438-39 [1st Dept 2011]); *see also Olam Corp. v Thayer*, 2021 NY Slip Op 30345[U], *3-4 [Sup Ct, NY County 2021]).

In the opinion of this Court, when considering whether to grant a motion to amend under CPLR § 3025(b), judicial resources need not be expended in considering, in detail, the merits of the proposed amendment. That would often lead to motions to amend being subject to higher standard of proof without the benefit of further discovery and/or a motion for summary judgment where all legal issues must be fleshed out and determined.

In this case, the claims asserted in the proposed amendment, coupled with the evidence that is in the record thus far, is sufficient to demonstrate that the plaintiff's proposed amendment is not palpably insufficient or clearly devoid of merit. At this stage, the Court is bound to accept the facts alleged in the amended pleading as true and draw all reasonable inferences in favor of the plaintiff. The arguments put forth by the defendants in opposition to the motion highlight factual disputes concerning the nature of the plaintiff's work at the marine transfer station and, specifically, the

duration and frequency of the plaintiff's work in preparing the barge for transport of paper recyclable goods. Even when the facts are undisputed, the issue of whether an employee qualifies as a seaman under the Jones Act must be left to the trier of fact unless the application of the proper legal standards to the facts presented will reasonably support only one conclusion (*see Smith v Lone Star Industries*, 1 AD3d 860, 862-863 [1st Dept 2003]). At this stage of the litigation, the Court cannot, and should not, opine as to whether the plaintiff's work on a barge was sufficient to qualify him as a seaman. Accordingly, the motion to amend the complaint should be grated.

For the reasons set forth hereinabove, it is hereby

ORDERED that the plaintiff's motion for leave to amend the complaint is granted; and it is further

ORDERED that the amended complaint, in the form annexed to the motion papers, shall be deemed served upon service of a copy of this order with notice of entry upon all parties who have appeared in the action.

This constitutes the decision and order of the court.

2/2/2023
NICHOLAS W. MOYNE, J.S.C.

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