Lee v Astoria Generating Company, L.P.

2007 NY Slip Op 34371(U)

January 12, 2007

Supreme Court, New York County

Docket Number: 0400173/2004

Judge: Carol R. Edmead

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SCANNED ON 1/24/2007

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. CAROL EDMEAD

PART 35

Index Number : 400173/2004

LEE, JAMES D.

vs

ASTORIA GENERATING

Sequence Number : 003

SUMMARY JUDGMENT

INDEX NO. 400173/04

MOTION DATE 1·18·07

MOTION SEQ. NO. 003

MOTION CAL. NO. ______

The following papers, numbered 1 to ______ were read on this motion to/for ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: X Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
JAN 23 2007
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by Third-Party Defendants Elliott Turbomachinery Co., Inc. and Elliott Company for summary judgment dismissing the third-party complaint and dismissing Plaintiff's complaint is granted. And it is further

ORDERED that the branch of the cross-motion by Third-Party Plaintiffs Astoria Generating Company, L.P., Orion Power New York GP, Inc., Orion Power New York, L.P., Orion Power New York LP, LLC for summary judgment dismissing the Plaintiff's complaint, is granted, and the branch of Third-Party Plaintiffs cross-motion to for summary judgment granting conditional defense and indemnification is denied. And it is further

ORDERED that the Clerk is directed to enter judgment accordingly. And it is further

ORDERED that Third-Party Defendants serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 1·12·07

HON. CAROL EDMEAD J.S.C.

Check one: X FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

JAMES D. LEE,

Plaintiff,

-against-

ASTORIA GENERATING COMPANY, L.P., ORION POWER NEW YORK GP, INC., ORION POWER NEW YORK, L.P., ORION POWER NEW YORK LP, LLC,

Defendants.

Index No. 400173/2004

DECISION/ORDER

ASTORIA GENERATING COMPANY, L.P., ORION POWER NEW YORK GP, INC., ORION POWER NEW YORK, L.P., ORION POWER NEW YORK LP, LLC,

Third-Party Plaintiffs,

-against-

ELLIOTT TURBOMACHINERY CO., INC. and ELLIOTT COMPANY,

Third-Party Defendants.

Third-Party
Index No. 590721/2004

FILED
JAN 23 2007
NEW YORK
COUNTY CLERK'S OFFICE

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

Before this Court is the motion of Third-Party Defendants Elliott Turbomachinery Co., Inc. and Elliott Company, former employer of Plaintiff James D. Lee, for an order pursuant to CPLR 3212 granting summary judgment dismissing the third-party complaint and the underlying complaint in its entirety. Also before this Court is a cross-motion by Third-Party Plaintiffs Astoria Generating Company, L.P., Orion Power New York GP, Inc., Orion Power New York,

L.P., Orion Power New York LP, LLC for summary judgment dismissing the underlying complaint, and granting summary judgment for common law and contractual defense and indemnification against third-party defendants. For the reasons that follow, the underlying complaint and third-party complaint are dismissed.

FACTUAL BACKGROUND

On April 16, 2001, James D. Lee ("Plaintiff") was injured while performing work as a millwright for Elliott Turbomachinery Co., Inc. (hereinafter "Elliott") at the Gowanus Gas Turbines (hereinafter the "Facility") located in Upper New York Bay adjacent to the intersection of 29th Street and 2nd Avenue in Brooklyn, New York. The Facility is owned and operated by Astoria Generating Company, L.P., Orion Power New York GP, Inc., Orion Power New York, L.P., and Orion Power New York LP, LLC (hereinafter "Astoria/Orion"). The Facility is a peak load electrical power generating station used during high-demand periods.

The site is comprised, in part, of four barges that are each 80 feet wide by 200 feet long that collectively house eight individual gas turbine generating units. The units are approximately 10 feet wide by 50 feet long. The barges, which were originally purchased by Consolidated Edison and arrived at the site in 1969, float in the navigable waters of the Gowanus Canal and are attached to a pier by way of a spud beam clamping system, which allows the barges to rise and fall with the tide. Additionally, electrical lines run from the adjacent land to the barges and transmit the electricity generated by the barge-mounted turbines to an adjacent substation that is owned by Consolidated Edison. Communication, remote start, and fire protection lines, as well as water supplied via the New York City water system, also run between the land and the barges. The barges can be disengaged from the pier and transported by tugboat to dry dock for

maintenance and repair, or to other locations to supply electricity where needed.[1] The barge contains life rings and is only accessible by walking on a gang plank (Mtn. at ¶ 27).

Astoria/Orion hired Elliott to conduct a major overhaul of the turbines (Mtn. at ¶ 29). This involved disassembling each turbine, shipping parts to Elliott's facility in Pennsylvania to either be restored or replaced, and then returning the parts to the Gowanus site for reassembly by Elliott's millwrights.

On the date of the accident, Plaintiff and his work partner, Steve Perry ("Perry"), were performing work on Turbine 2, located on Barge 1. According to Plaintiff, he was ordered to enter the turbine's exhaust well through the stack hatch in order to perform welding duties at the base of the well (Opp. at pg. 5-6; Lee Aff. ¶ 4), even though such entry is typically made by cutting an access hole in the side of the well (Opp. at pg. 5; Lee Aff. ¶ 4). Such an opening existed until the day before the accident (Opp. at pg. 6; Lee Aff. ¶ 4). The hatch is located approximately 15 feet above the base of the well, which sits on the deck of the barge. The distance from the hatch opening to the top of the turbine shell is approximately six to eight feet (Opp. at pg. 6; Lee Aff. ¶ 4).

According to Plaintiff, he entered the well through the hatch without a ladder, any fall protection, or any safety devices, despite expressing concern about the method as being unsafe, because he was told to or to "get [his] stuff and leave" (Opp. at pg. 7; Lee Tr. 39; Lee Aff. ¶ 5). After Plaintiff had lowered himself through the top of the hatch to the top of the turbine he slipped and fell eight feet to the base of the well, injuring his back (Opp. at pg. 8; Lee Aff. ¶ 4).

---

[1] In 1996, two of the barges were transported by water to Astoria, Queens to supply emergency power following an accident at the Astoria, Queens power generating station.

Upon completing the welding duties Plaintiff climbed out of the exhaust well with the assistance of Perry. Thereafter, Plaintiff aggravated his back injury as he and Perry were closing the hatch (Mtn. ¶ 41). Upon closing the hatch and climbing down the outside of the exhaust well Plaintiff left the jobsite and sought medical attention (Opp. at pg. 8; Lee Aff. ¶ 4).

Plaintiff filed a workers compensation claim with the United States Department of Labor against Elliott pursuant to the Longshore and Harbor Workers Compensation Act ("LHWCA") (33 U.S.C. § 901 et seq.), and has been receiving benefits under the LHWCA since 2002. An administrative law judge found that Plaintiff was injured during the course of his employment while on a navigable waterway and awarded him benefits under the LHWCA. This decision was affirmed by the Benefits Review Board ("BRB").

Plaintiff commenced the within action in June 2003 against Astoria/Orion alleging that his injuries were caused by violations of Labor Law §§ 200, 240(1), and 241(6).[2] Thereafter, Astoria/Orion impleaded Elliott, claiming it was entitled to common law and contractual indemnification. The instant motions ensued.

MOTIONS FOR SUMMARY RELIEF

Elliott seeks dismissal of the third-party complaint, arguing that as Plaintiff's employer, it is immune from suit under the LHWCA (33 U.S.C. § 905[a]), which is the exclusive remedy for maritime employees covered under the LHWCA. It is further argued that the LHWCA renders Elliott immune from claims for indemnity (33 U.S.C. § 905[b]) (Mtn. ¶ 5).[3] Thus, Elliott argues,

---

[2] Plaintiff alleges that the injuries he sustained on the day of the accident aggravated conditions relating to pre-existing back injuries (Mtn. ¶ 42).

[3] Elliott also argues that as Plaintiff's employer, it is immune from suit under New York Workers' Compensation Law § 11 because Plaintiff did not suffer a "grave injury." Astoria/Orion contends that since there

the third-party complaint should be dismissed.

Elliott further argues that Plaintiff's action against Astoria/Orion should be dismissed because Plaintiff's (1) Labor Law § 240(1) claim is preempted by the LHWCA, 33 U.S.C. § 905[b];[4] (2) claims for both Labor Law §§ 240(1) and 241(6) are preempted by federal Maritime Law; and (3) Labor Law §§ 200, 240(1), and 241(6) claims are not viable because Astoria/Orion did not exercise any supervision or control over the methods and materials of his work, his own negligence was the sole proximate cause of his injury, and he was not engaged in any protected activity such as construction, excavation, or demolition work, respectively (Mtn. ¶¶ 6-7). Elliott also adds that Plaintiff is estopped from taking the position against Elliott that he was engaged in a "local, land-based repair," which is contrary to his argument before the Department of Labor against Orion/Astoria that he was injured while working aboard a vessel.[5]

Astoria/Orion filed a cross-motion joining in Elliott's motion for summary judgment to dismiss the underlying complaint, adding that Plaintiff was not engaged in activity protected under Labor Law § 240(1) and that Plaintiff was not engaged in gravity-related work when he fell. Also, Astoria/Orion seeks summary judgment on its claims for defense and conditional indemnification against Elliott pursuant to its "Master Agreement" with Astoria. In opposition to dismissal of the indemnification claims, Astoria/Orion argues that in so much as this matter is

---

footnote 3 cont'd.

has been no factual determination that Plaintiff has not suffered a grave injury, it would be premature to release Elliott from it common-law obligations.

[4] Elliott's LHWCA preemption argument is limited to Plaintiff's 240(1) claim, and is not addressed toward Plaintiff's 200 and 241(6) claims (Mtn. at pg. 7).

[5] Elliott also points out that Plaintiff's claim under LHWCA 905[b] fails because it is time-barred and Plaintiff cannot show that Orion was negligent.

currently in State Court and there is no pending Federal claim/suit, Elliott's application to dismiss is unwarranted, and Elliott's request that this Court impose Federal Law in a State Action is unwarranted.

Plaintiff opposes both Elliott's motion and Astoria/Orion's cross-motion, arguing that his Labor Law claims are not preempted by Federal law because the "floating electric generating station structure" is not a "vessel in navigation." According to Plaintiff, caselaw provides that the structure here is not a vessel in navigation because it has permanent anchorage, connection to city utilities, lack of propulsion equipment, no transportation function, and was built and put to a special use, not for transportation, but as an extension of land or a land-based activity. Thus, substantive maritime law does not apply, and Plaintiff's claim, which is pursuant to LHWCA § 933's preservation of third-party claims under state law, is to be analyzed under New York State substantive law. Plaintiff further contends that neither his receipt of LHWCA benefits nor construction work done near navigable waters, creates maritime jurisdiction. And, even if the Court finds maritime jurisdiction over Elliott because of its payment of LHWCA benefits, maritime jurisdiction does not necessarily apply to Plaintiff's claim against Orion.

In the event the Court finds that the floating electric generating station structure at issue is a vessel in navigation, Plaintiff claims that New York's Labor Law still applies under the "maritime but local" doctrine, which allows federal admiralty law to import state substantive law. Such a finding would be one of several factors in determining whether substantive general maritime law principals would apply to preempt plaintiff's Labor Law claims. And, here, the issues predominately are local in concern, fall within the traditional applicable police powers of the State, and there are no countervailing federal concerns affected.

Plaintiff further contends that 33 USC § 905 [b] provides that claims are assertable against the vessel for negligence as otherwise permitted under § 933, and under § 933, the duties imposed by Labor Law §§ 240 (1) and 241(6) are actionable. And, though Plaintiff filed a workers compensation claim under the LHWCA, he never alleged that the barge was a vessel in navigation, but that the structure was on navigable waters, a major distinction, which entitled him to LHWCA benefits. Finally, Plaintiff maintains that Labor Law §§ 240(1) and 241(6) apply to the accident herein, and Plaintiff was not the sole proximate cause of his injury.

Elliott also opposes Astoria/Orion's cross-motion, arguing that the indemnification is moot since Plaintiff's claims are governed by Federal law, which immunizes Elliott from further liability. In addition, Astoria/Orion would not be entitled to indemnification even if state law applied due to the absence of a "grave injury" and issues of fact as to the scope of the indemnification agreement and whether Elliott was negligent.

As to Plaintiff's dispute that the barge was not a vessel, Elliott points out that the barge at issue floats and can be used as a means of transportation, was specially designed for transporting its own generators, two of the power barges were moved by waterway to Astoria in 1996 to supply energy. And, contrary to Plaintiff's argument, Elliott maintains that Federal courts have admiralty jurisdiction over Plaintiff's claim since the alleged tort occurred on navigable water and Plaintiff's injury has a significant relationship to traditional maritime activity.

DISCUSSION

To obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor (CPLR 3212 [b]). This standard requires that the proponent of a motion for summary judgment make a *prima*

facie showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11 [1st Dept 2002]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR 3212 [b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman, supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546 [1st Dept 2003]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co*, 46 NY2d 276, 281-82, [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767 [1978]; *Mallad Const. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290, [1973]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347 [1st Dept 1998]).

I. DISMISSAL OF THE COMPLAINT

A. LABOR LAW §§ 240(1) AND 241(6) CLAIMS

The primary issue is whether the LHWCA preempts Plaintiff's Labor Law and negligence claims. In determining the answer to this question, the Court must first address whether the barge in question is a vessel under the LHWCA in order to determine whether the LHWCA is

applicable. Upon a finding that the barge is a vessel, and consequently, that the LHWCA applies, the question becomes whether the LHWCA's precludes Plaintiff's claims asserted herein.

1. LHWCA

The LHWCA, which became law in 1927, regulates the relationship between (1) longshoremen/harbor workers, (2) their employers, and (3) vessel owners (*Gravatt v. City of New York*, 1998 WL 171491 at 13 [S.D.N.Y. 1998]). The LHWCA "establishes a comprehensive federal workers' compensation program that provides longshoremen [and harbor workers[6]] and their families with medical, disability, and survivor benefits for work-related injuries and death on navigable waters"[7] (*Emanuel v. Sheridan Transp. Corp.*, 10 A.D.3d 46, 779 N.Y.S.2d 168 [1st Dept 2004] *citing Howlett v. Birkdale Shipping Co.*, 512 U.S. 92, 96 [1994]; *Guilles v. Sea-Land Service, Inc.*, 820 F.Supp. 744 [SDNY 1993]; 33 U.S.C. §§ 902[2], 902[3], and 903).[8] A two-prong inquiry of status and situs summarize the test for determining LHWCA coverage (Danielle E. Hunter, *The Elusive Vessel of Maritime Jurisprudence and Navigation Through the Jones Act and Longshore and Harbor Workers' Compensation Act in Light of Stewart v. Dutra Construction*, 30 Tul. Mar. L.J. 381, 395 [2006], *citing* Robert Force, Admiralty and Maritime Law 102 [2004]). Notably, if the injured employee is physically on navigable

---

[6] Section 902(3) provides in relevant part: "The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include ... a master or member of a crew of any vessel" (33 U.S.C § 902[3]).

[7] Section 902(2) states in relevant part that: "The term 'injury' means accidental injury or death arising out of and in the course of employment . . . ." (33 U.S.C § 902[2]).

[8] Courts have also referred to these workers as "land-based" or "nonseaman" maritime workers (*see Uzdavines v. Weeks Marine, Inc.*, 418 F.3d 138, 141 [2d Cir. 2005]; *Norfolk Shipbuilding & Drydock Corporation v. Garris*, 532 U.S. 811, 818 [2001]).

waters when the injury occurs, LHWCA coverage is presumed (*see Office of Workers' Comp. Programs v. Perini N. River Assocs.*, 459 U.S. 297, 324 [1983]).

Under this workers' compensation system, employers are required to compensate covered employees injured in the course of their employment, regardless of fault (*see Emanuel v. Sheridan Transp. Corp.*, 10 AD3d 46, 51 *supra*; *Howlett v. Birkdale Shipping Co*, 512 U.S. 92, 96 *supra*; *Sweeney v. City of New York*, 4 Misc3d 834, 835-36 [Supreme Ct. Kings County, 2004]; *Sutherland v. City of New York,* 266 AD2d 373, 377 [2d Dept. 1999]; 33 U.S.C. § 904).[9] However, under § 905(b),[10] an injured worker may also bring an action against a vessel owner for its own negligence without losing his or her worker-compensation rights (*see Emanuel v. Sheridan Transp. Corp.*, 10 AD3d 46, 51 [1st Dept. 2004]; *Howlett v. Birkdale Shipping Co*, 512 U.S. 92, 96 [1994]; *Sweeney v. City of New York*, 4 Misc3d 834, 836 [Supreme Ct. Kings

[9] Section 905(a) states in relevant part: "The liability of an employer prescribed in section 904 of this title 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 or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee . . . may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee. For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title.

[10] Section 905(b) states in relevant part: "In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provision of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

County, 2004]; *Sutherland v. City of New York*, 266 AD2d 373, 377 [2nd Dept. 1999]; Danielle E. Hunter, *The Elusive Vessel of Maritime Jurisprudence and Navigation Through the Jones Act and Longshore and Harbor Workers' Compensation Act in Light of Stewart v. Dutra Construction*, 30 Tul. Mar. L.J. 381, 39 [2006]; 33 U.S.C. § 905[b]).

Thus, in the situation where the employer and the vessel owner are independent entities, the worker may obtain workers' compensation from his or her employer and damages resulting from the vessel owner's negligence (*see Howlett v. Birkdale Shipping Co*, 512 U.S. 92, 96 [1994]; *Sweeney v. City of New York*, 4 Misc3d 834, 836 [Supreme Ct. Kings County, 2004]; *Sutherland v. City of New York*, 266 AD2d 373, 377 [2nd Dept. 1999]; 33 U.S.C. § 905[b]).[11] Although the "LHWCA does not define negligence for the purpose of actions against third-party vessel owners under § 905(b)" . . . "the Supreme Court articulated federal common-law standards to guide judicial determinations of liability under this subsection, articulating three duties of care owed by vessel owners to the longshoremen, *to wit*, the 'turnover duty,' the 'active control duty' and the 'duty to intervene' (*see Emanuel v. Sheridan Transp. Corp.*, 10 AD3d 46, 52 [1st Dept. 2004]). Integral to maintaining a suit for negligence against the vessel owner under § 905(b) is a finding that the person injured is a covered worker within the meaning of § 902(3) (*see Sweeney v. City of New York*, 4 Misc3d 834, 836 [Supreme Ct. Kings County, 2004]) as well as a finding that the watercraft in question is a vessel (*see Emanuel v. Sheridan Transp. Corp.*, 10 AD3d 46 [1st Dept. 2004]; 11 N.Y. Jur.2d Boats, Ships, and Shipping § 212; 33 U.S.C. § 905(b); *see also*

[11] The employer's immunity from tort liability is not absolute. In *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 [1983], the United State Supreme Court held that 33 U.S.C. § 905(b) authorizes a negligence action against a vessel even if the owner is also the worker's employer, but only to the extent that the vessel owner is negligent in its capacity as a vessel owner and not in its capacity as employer (*see Jones & Laughlin Steel Corp.*, 462 U.S. at 531, n.6).

Eric V. Hull, *Through the Looking Glass: Judicial Interpretation of Vessel Status Leaves Injured Workers Adrift in Uncharted Territory*, 16 U.S.F. Mar. L.J. 321, 324 [2003-2004]).

The Court adopts the determination by the Department of Labor in Plaintiff's workers' compensation proceeding that Plaintiff is a covered employee within the meaning of § 902(3), and proceeds to determine the barge on which Plaintiff was injured qualifies as a vessel.

2. VESSEL STATUS[12]

> "When I use a word," Humpty Dumpty said, in a rather scornful tone, "it means what I choose it to mean--neither more nor less."
> "The question is," said Alice, "whether you can make words mean so many different things" (Lewis Carroll, Through the Looking-Glass, and What Alice Found There 106 [Charles Lutwidge Dodgson ed., Peter Pauper Press 1953] [1872]).

The undertaking of defining a "vessel," though not novel, is not simple. In fact, one author has stated that "[i]f the term vessel had a simple, universally-accepted definition," his law journal article would have no purpose (Eric V. Hull, *Through the Looking Glass: Judicial Interpretation of Vessel Status Leaves Injured Workers Adrift in Uncharted Territory*, 16 U.S.F. Mar. L.J. 321, n1 [2003-2004]). The common sense notion of the term as a structure built to transport goods and passengers over water has proved to be somewhat elusive in the legal setting. The "vessel" issue typically arises with regard to a floating structure that has a specialized purpose and the transportation function of such a structure is merely just incidental.

Elliott and Astoria/Orion contend that the LHWCA is Plaintiff's exclusive remedy. In its

[12] "[I]t seems a stretch of the imagination to class the deck hands of a mud dredge in the quiet waters of a Potomac creek with the bold and skillful mariners who breast the angry waves of the Atlantic; but such and so far-reaching are the principles which underlie the jurisdiction of the courts of admiralty that they adapt themselves to all the new kinds of property and new sets of operatives and new conditions which are brought into existence in the progress of the world" (*Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 497 [2005], quoting *Saylor v. Taylor*, 77 F.476, 479 [4th Cir. 1896]).

reply papers, Elliott highlights that the barge should be considered a vessel under the LHWCA because (1) it floats and can be used as a means of transportation on water; (2) it can be transported over water; (3) it has been transported over water to other parts of the city to provide electricity; (4) it is not permanently moored to its berth, sunk in place, or withdrawn from the water; and (5) it is subject to regulation by the U.S. Coast Guard.

On the other hand, Plaintiff contends that (1) it was designed and built for the exclusive purpose of being a power plant and not as a means of transportation on water; (2) it is secured to the land; (3) the craft is permanently moored; (4) it does not serve any maritime purpose; (5) it receives utilities from shore; and (6) it is not self-propelled and does not carry any running lights In summary, the "power plant does not meet any of the *tests* for being a vessel" (emphasis added).

Courts and agencies have reached different conclusions concerning the status of the barge in question. However, as will be explained in greater detail below, no court has expressly determined whether the specific barge at issue is a "vessel" under the LHWCA.

In *Matter of Consolidated Edison Company of New York, Inc., et al., v. City of New York, et al.* (44 NY2d 536 [1978]), the New York State Court of Appeals addressed whether the barges in question could be taxed as real property (*Id.* at 541). The court held that they could be, but confined its finding to "real estate tax purposes" (*Id.* at 543). The court's decision is only relevant to the instant case to the extent that its analysis included a similar description, location, and connection of the barges to the land as this court has noted (*Id.* at 538-39). The court concluded that the barges fit within the definition of real property under section 102 (subd 12, par [b]) of the Real Property Tax Law, which described improvements constituting real property as,

inter alia, " . . .substructures and superstructures erected upon, under or above the land, or affixed thereto, including bridges and wharfs and piers" (*Id.* at 541). Since power plants fall within the "familiar connotation of structures" (*Id.* at 541), the court saw no reason to differentiate between improvements to the land by horizontal annexation rather than the more traditional vertical annexation (*Id.* at 543). However, as the court noted, its holding was limited (*Id.* at 543). As such, the Court of Appeals' determination has no bearing on the instant case.

In *Caserma v. Consolidated Edison Co.* (BRB No. 97-0770 [March 6, 1998]), the Benefits Review Board, a division of the United States Department of Labor, stated that it was undisputed that the barges in question could be transported over water for maintenance or to other locations to generate electricity as needed. The Board found that a determination could be made that the barges in question were vessels (*Id.* at fn 5).

The United States Supreme Court has recently elucidated a single test for determining the meaning of the term "vessel" for the purpose of LHWCA. In *Stewart v. Dutra Construction Co.*, (543 U.S. 481 [2005]), the Court considered the issue of whether a dredge, a floating platform with a bucket that removes silt from the ocean floor, is a "vessel" under the [LHWCA]," and concluded that it is (*Stewart*, 543 U.S. at 484; *see also Uzdavines v. Weeks Marine, Inc.*, 418 F.3d 138, 144 [2nd Cir. 2005]). The Court held that a vessel is every description of watercraft or other artificial contrivance "'used, or capable of being used, as a means of transportation on water'" (*Stewart*, 543 U.S. at 489, quoting Rev. Stat. § 3, codified at 1 U.S.C. § 3*; see Uzdavines v. Weeks Marine, Inc.*, 418 F.3d 138, 144 [2nd Cir. 2005])[13], but "it does not require that a

[13] Some courts have expressed discomfort with the breadth of 1 U.S.C. § 3 stating that, "[n]o doubt the three men in a tub would also fit within our definition [of a vessel under 1 U.S.C. § 3] and one probably could make a convincing case for Johah inside the whale" (*see* Eric V. Hull, *Through the Looking Glass: Judicial Interpretation*

watercraft be used *primarily* for that purpose" (*Stewart*, 543 U.S. at 495). The Court further stated that "structures may lose their character as vessels if they have been withdrawn from the water for extended periods of time" (*Stewart*, 543 U.S. at 496), "permanently moored, or otherwise rendered practically incapable of transportation or movement" (*Stewart*, 543 U.S. at 494; *see Uzdavines v. Weeks Marine, Inc.*, 418 F.3d 138, 144 [2nd Cir. 2005]). However, "a [watercraft] does not move in and out of 'vessel' status because it is temporarily 'at anchor, docked ... or berthed for minor repairs'" (*Stewart*, 543 U.S. at 494; *see Uzdavines v. Weeks Marine, Inc.*, 418 F.3d 138, 144 [2nd Cir. 2005]). Provided a watercraft's use as a means of transportation remains a "practical possibility," rather than "merely a theoretical one," it qualifies as a "vessel in navigation" for the purposes of the LHWCA (*Stewart*, 543 U.S. at 496; *see Uzdavines v. Weeks Marine, Inc.*, 418 F.3d 138, 144 [2nd Cir. 2005]). In applying this analysis to the dredge in *Stewart*, the Supreme Court emphasized that the dredge "was not only 'capable of being used' to transport equipment and workers over water--it *was* used to transport those things" (*see Uzdavines v. Weeks Marine, Inc.*, 418 F.3d 138, 144 [2nd Cir. 2005]).

The Court's sweeping definition of a vessel under the LHWCA has not prevented the instant litigation from coming forth. However, in applying the *Stewart* analysis to the instant case, the Court concludes that the barge in question qualifies as a vessel under the LHWCA and that Plaintiff's assertions to the contrary are unpersuasive.

It is undisputed that the barge in question is a watercraft floating on water. Despite Plaintiff's contentions, it is not permanently moored. Rather, as noted above, it is attached to the

---

of Vessel Status Leaves Injured Workers Adrift in Uncharted Territory, 16 U.S.F. Mar. L.J. 321, 324 [2003-2004], citing *Burks v. Am. River Transp. Co.*, 679 F.2d 69, 75, 1983 AC 2208 [5th Cir. 1982]).

adjacent land *via* a spud beam clamping system, as well as a series of utility connections, which can be, and has been, disengaged to allow the barge to be transported across water either for repairs or to provide electricity to other locations. It is undisputed that this has occurred in the past, thus suggesting that the barge's use as a means of transportation remains a "practical possibility," rather than "merely a theoretical one" (*see Uzdavines v. Weeks Marine, Inc.*, 418 F.3d 138, 144 [2nd Cir. 2005], quoting *Stewart*, 543 U.S. at 496). Thus, Plaintiff's contentions that the barge is not a vessel because it does not serve a maritime purpose and that it was designed and built for the purpose of being a power plant and not as a means of transportation on water are irrelevant in light of *Stewart*.

Furthermore, Plaintiff's contention that the barge is not a vessel because it lacks a propulsion system is itself lacking. The vessel in *Stewart* was also found to be without certain traditional characteristics common to watercraft such as propulsion system, but the Court did not find this fact dispositive to its determination. Instead, it noted that the vessel had previously been moved long distances by tugboat.

Plaintiff also cites an array of cases dealing with everything from floating casinos, fish processing plants, wharfboats, floating dormitories, submersible barge fabrication structures, dry docks, and floating oil and grain storage facilities, which were all held *not* to be vessels, in a vain attempt to persuade the Court that the barge in question is not a vessel (Opp. pg. 11-18). However, all of the cases cited by Plaintiff *predate Stewart*, and are factually distinguishable in that the barge in question has been, and is practicably capable of being, used as a means of transportation. Nor can it be said that the barge at issue is permanently moored or moored in an indefinite manner.

The record demonstrates that the barge in question is a vessel within the definition articulated in *Stewart*. As this Court finds that the barge at issue is a "vessel, the remaining issue is whether LHWCA § 905(b) preempts the Labor Law and indemnification claims herein. In this regard, Federal law preempts state law in three instances: (1) "by express provision in the Federal statute"; (2) "by inference, where the Federal legislative scheme is so pervasive and the character of the obligations imposed leaves no room for the State or local government to legislate"; and (3) "to the extent that the State or local law actually conflicts with the Federal law, for example where compliance with both is impossible or adherence to the State or local law would thwart the objectives of its Federal counterpart" (*City of New York v. Job-Lot Pushcart*, 88 N.Y.2d 163 [1996]).

3. LABOR LAW §§ 240(1) AND 241(6) CLAIMS PREEMPTED

Contrary to Plaintiff's contentions, his Labor Law §§ 240(1) and 241(6) claims against the vessel owner, Astoria/Orion, are preempted by the LHWCA.

Section 905(b) provides, in pertinent part, that in "the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person . . . may bring an action against such vessel as a third party[14] in accordance with the provisions of section 933 of this title" . . . and "[t]he remedy provided in this subsection shall be *exclusive* of all other remedies against the vessel except remedies available under this Act" (33 U.S.C. 905 [b]). Thus, although the employee is barred from suing his employer in tort, the employee may sue negligent third parties

---

[14] Congress used the term "third party" to describe suit against a "vessel" (*see Guilles v. Sea-Land Service, Inc.*, 820 F.Supp 744, 751, fn 5 [S.D.N.Y. 1993]). In this statutory context, the phrase "third party" merely means that the vessel itself can be sued as if it were a third party (*see Guilles v. Sea-Land Service, Inc.*, 12 F.3d 381, 385 [2d Cir. 1993] *affd.*, *Guilles v. Sea-Land Service, Inc.*, 12 F.3d 381 *supra*).

in tort, notwithstanding his entitlement to no-fault compensation provided by the employer (*see* 33 U.S.C. § 933(a) ["If . . . the person entitled to . . . compensation determines that some person other than the employer . . . is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person"]).

The Court notes that in 1972, Congress amended the LHWCA to, among other things, eliminate the injured worker's strict liability remedy against the vessel owner (*see Guilles v. Sea-Land Service, Inc.*, 12 F.3d 381, 384 [2d Cir. 1993]; *Guilles v. Sea-Land Service, Inc.*, 820 F.Supp 744, 749 [S.D.N.Y. 1993]; *Director, OWCP v. Perini North River Asso.*, 459 U.S. 297 [1983]) and limit an injured worker's right to recover from a vessel owner solely to a negligence action (*see* 11 N.Y. Jur. 2d Boats, Ships, and Shipping § 212]; *see also Gravatt v. City of New York*, 226 F.2d 108, 117 [2nd Cir. 2000], *citing* H.R. Rep. No. 92-1441, 1972 U.S.C.C.A.N. at 4704). The United State Supreme Court has noted that under § 905(b), a vessel owner may only be held liable for its own negligence and that the section expressly preempts all other claims against a vessel owner (*see Norfolk Shipbuilding & Drydock Corporation v. Garris*, 532 U.S. 811, 818 [2001]; *see also* 11 N.Y. Jur. 2d Boats, Ships, and Shipping § 212 [an injured worker's right to recover from a vessel owner is limited solely to a negligence action]).

Thus, upon a plain reading of the statute and caselaw, it is apparent to the Court that § 905(b) expressly preempts all causes of action against a vessel owner except those brought pursuant to § 905(b) in negligence (*see Guilles v. Sea-Land Service, Inc.*, 12 F.3d 381, 386 [2d Cir. 1993]; *Sweeney v. City of New York*, 4 Misc.3d 834, 782 N.Y.S.2d 537 [NY 2004] ["under section 905 (b) of the LHWCA, an injured maritime worker may maintain an action against a vessel owner for its negligence"]; *see also* H.R. Rep. No 98-570(I), *reprinted in* 1984

U.S.C.C.A.N. 2734, 2741 ["The Committee intends that this language [in section 905(b)] not be construed to limit an employee's right to bring a cause of action, except in the circumstances indicated with the language"]). Contrary to the moving defendants' contentions, the LHWCA is the exclusive remedy for Plaintiff as against Plaintiff's employer, Elliot, but not as against a third party, *to wit*: Astoria/Orion, the vessel owner. Indeed, Plaintiff may seek redress against the vessel owner for negligence, in accordance with section 933 of the LHWCA.

Section 240(1) is a strict liability statute in which the owner and the general contractor are made liable if the worker is accidentally hurt in a fall where a proper safety device would have prevented the injury, to which contributory negligence is no defense (*Norfolk Shipbuilding & Drydock Corporation v. Garris*, 532 U.S. 811, 818 [2001]). Thus, section 240(1) conflicts with § 905(b), given that 905(b) creates a cause of action for negligence, solely. Also, Congress specifically amended the LHWCA to eliminate the injured worker's strict liability remedy against the vessel owner (*see Guilles v. Sea-Land Service, Inc.*, 12 F.3d 381, 384 [2nd Cir. 1993]; *Guilles v. Sea-Land Service, Inc.*, 820 F.Supp 744, 749 [S.D.N.Y. 1993]; *Director, OWCP v. Perini North River Associates*, 459 U.S. 297 [1983]); *c.f. Rigopoulos v. State of New York*, 236 AD2d 459, 460 [1997] and *Eriksen v. Long Island Lighting Co.*, 236 AD2d 439, 440 [2nd Dept. 1997]). And, Congress intended that comparative negligence should apply in cases where the injured employee's own negligence may have contributed to causing the injury (*see also Gravatt v. City of New York*, 226 F.2d 108, 118 [2nd Cir. 2000], citing H.R.Rep. No. 92-1441, 1972 U.S.C.C.A.N. at 4705).

Section 241(6) is a fault provision that deals with construction, excavation, and demolition work and requires conformity to safety regulations in which a property owner may be

held vicariously liable for the negligence of a third party (*see* Paul S. Edelman, State Labor Law May be Applied in Maritime Cases, 1/29/2001 NYLJ 3, [col. 1]). However, § 905(b) only provides for liability based on actual negligence and does not provide for vicarious liability (*see Norfolk Shipbuilding & Drydock Corporation*, 532 U.S. at 818; *see also Gravatt v. City of New York*, 226 F.2d 108, 117 [2nd Cir. 2000], citing H.R.Rep. No. 92-1441, 1972 U.S.C.C.A.N. at 4704 ["The vessel will not be chargeable with the negligence of the stevedore or employees of the stevedore"]).

In further evidence of a conflict, "[i]t is axiomatic that the statutory duties imposed (by Labor Law §§ 240[1] and 241[6]) place strict liability for safety practices upon owners of the worksite and general contractors" (*see Sweeney*, 4 Misc3d at 849, quoting *Sabato v. New York Life Ins. Co.*, 259 AD2d 535), whereas § 905(b) places strict liability upon the *employer* of the injured worker (*see Howlett v. Birkdale Shipping Co.*, 512 U.S. 92, 97 [1994]; *see also see also Gravatt v. City of New York*, 226 F.2d 108, 118 [2nd Cir. 2000], citing *Canizzo v. Farrell Lines, Inc.*, 579 F.2d 682, 687-88 [2nd Cir. 1978] [Friendly, J., dissenting] ["Recognizing that Congress conceived statutory compensation payments 'as the usual source of making the [covered employee] whole,' we have cautioned that '[c]ourts must be exceedingly careful in defining the contours of the [covered employee's] action for negligence against the ship ... lest too expansive notions of the ship's duty vitiate Congress' intent to do away with absolute liability for vessels...'"]). Applying the Labor Law to the instant case would place strict liability for the safety on the vessel owner, Astoria/Orion, rather than on the employer, Elliott, in direct contradiction to the intent of Congress.

Thus, regardless of whether express intent to preempt state law may be gleaned from

§ 905(b), it is apparent from the pervasiveness of the LHWCA and the conflict between federal and state law that federal law, in this instance, preempts Plaintiff's Labor Law §§ 240(1) and 241(6) claims. And, Plaintiff's "maritime but local" argument is insufficient. As such, plaintiffs' New York State Labor Law §§ 240(1) and 241(6) causes of action against the vessel owner, Astoria/Orion, are preempted, and therefore, dismissed.

B. LABOR LAW § 200 CLAIM

Labor Law § 200 codifies the common-law duty imposed on an owner or general contractor to provide construction site workers with a safe work site *(Nevins v. Essex Owners Corp.*, 276 A.D.2d 315, 714 N.Y.S.2d 38 [1st Dept 2000]; citing *Blessinger v. The Estee Lauder Co.,* 271 A.D.2d 343, 707 N.Y.S.2d 78), but "[a]n implicit precondition to this duty 'is that the party charged with that responsibility have the authority to control the activity bringing about the injury'" (*Blessinger, supra,* quoting *Russin v. Picciano & Son,* 54 N.Y.2d 311, 317, 445 N.Y.S.2d 127, 429 N.E.2d 805). In addition to showing that the defendant exercised supervisory direction or control over the operation, plaintiff also must show that the defendant had actual or constructive notice of the alleged unsafe condition that caused the accident (*Dilena v. The Irving Reisman Irrevocable Trust,* 263 A.D.2d 375, 692 N.Y.S.2d 371); *Lombardi v. Stout,* 80 N.Y.2d 290, 294, 590 N.Y.S.2d 55). Further, liability does not attach under section 200 absent actual or constructive notice of the condition complained of (*see Miller v Perillo*, 71 AD2d 389, 391, *app dsmd* 49 NY2d 1044, *mot for lv to app dsmd* 51 NY2d 767; *Zaulich v Thompkins Sq. Holding Co.*, 10 AD2d 492, 496).

The record clearly demonstrates that Astoria/Orion did not exercise any supervision or control of the methods or materials of Plaintiff's work. The record indicates that Plaintiff only

received instruction from Elliott's personnel.

The Court also notes that the Complaint also fails to assert a cause of action for negligence against Astoria/Orion *pursuant to section 905(b)*, or that said defendant violated any of the duties imposed upon vessel owners, such as the turnover duty, the active control duty, or the duty to warn. Finally, Plaintiff's "maritime but local" argument is insufficient. Having failed to allege a claim of negligence in accordance with the LHWCA, and upon dismissal of Plaintiff's Labor Law claims, the Plaintiff's complaint is dismissed in its entirety.

II. DISMISSAL OF THE THIRD-PARTY COMPLAINT

Notwithstanding the above dismissal of the complaint, the Court finds that the LHWCA also preempts the third-party action herein. The LHWCA provides, in pertinent part,

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person . . . may bring an action against such vessel . . . *and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void . . . .*
> (emphasis added).

23 U.S.C. § 905(b).

The language of section 905(b) is not ambiguous and the above-cited clause clearly bars liability of the employer (Elliott) to the barge/vessel owner (Astoria/Orion) (*see Kramer v. Bouchard Transp. Co. Inc.*, 741 F.Supp. 1023 [E.D.N.Y. 1990]). In the face of this irreconcilable conflict, the LHWCA must control, and the third-party complaint against Elliott must therefore be dismissed (*Kramer v. Bouchard Transp. Co. Inc.*, 741 F.Supp. 1023, *supra Lipsky v. Commonwealth United Corp.*, 551 F.2d 887, 894 [2d Cir. 1976; *Lou v. Belzberg*, 728 F.Supp. 1010, 1016 [S.D.N.Y. 1990]). The instant matter is an action directly against the barge owner, Astoria/Orion; and the third-party complaint by the vessel herein seeks to impose barge-

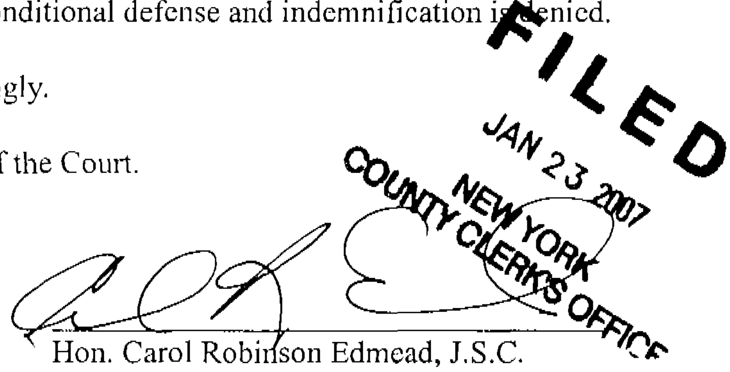
related liability on the employer, Elliott, which is expressly forbidden by section 905(b) (*see Kramer supra*). Therefore, "at least to this limited extent, the federal remedy (or, more precisely, non-remedy) preempts the state remedy" (*see Kramer v. Bouchard Transp. Co. Inc.*, 741 F.Supp. at 1026; *cf. Hartley v. City of New York*, 163 Misc. 2d 540, 621 N.Y.S.2d 789 [Sup. Ct. Kings County 1994] [stating that construction company's "status as a vessel or non-vessel is significant, because if [company] is considered a vessel, then a contribution or an indemnification claim by [said company against plaintiff's employer is barred. A non-vessel, on the other hand, may bring an action for indemnity based on an express agreement "since the employer's liability 'springs from an independent contractual right'"], *affd.* 228 A.D.2d 646, 646 N.Y.S.2d 351 [2d Dept 1996] [a nonvessel may pursue, *inter alia,* its contractual remedies against an "employer"]).

For the foregoing reasons, the Court holds that § 905(b) of the LHWCA preempts Astoria/Orion's third-party claims for common law and contractual defense and indemnification against Elliott.

CONCLUSION

Elliott's motion for summary judgment dismissing the third-party complaint and Plaintiff's complaint is granted. The branch of Astoria/Orion's cross-motion for summary judgment dismissing the Plaintiff's complaint, is also granted. The branch of Astoria/Orion's cross-motion for summary judgment granting conditional defense and indemnification is denied. The Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.



Dated: January 12, 2007

Hon. Carol Robinson Edmead, J.S.C.