

McCright v Maersk Line, Ltd.

2013 NY Slip Op 30186(U)

January 29, 2013

Sup Ct, New York County

Docket Number: 102991/11

Judge: Joan M. Kenney

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: JOAN M. KENNEY
J.S.C. _____
Justice _____

PART 8

Index Number : 102991/2011
MCCRIGHT, MICHAEL
vs.
MAERSK LINE LIMITED
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. 102991/11
MOTION DATE _____
MOTION SEQ. NO. 001

The following papers, numbered 1 to 32, were read on this motion to/for Summary Judgment
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s) 1-17
Answering Affidavits — Exhibits _____ No(s) 18-30
Replying Affidavits _____ No(s) 31-32

Upon the foregoing papers, it is ordered that this motion is

FILED

JAN 31 2013

NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE
WITH THE ATTACHED MEMORANDUM DECISION**

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

Dated: 1/29/13

Joan M. Kenney J.S.C.
JOAN M. KENNEY

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS Part 8

-----X

Michael McCright,
Plaintiffs,

-against-

Maersk Line, Ltd.,
Defendants,

-----X

DECISION AND ORDER
Index Number: 102991/11
Motion Seq. No.: 001

KENNEY, JOAN M., J.

FILED

JAN 31 2013

Recitation, as required by CPLR 2219(a), of the papers considered in review of these pre-answer motions to dismiss.

Papers	Numbered
Notice of Motion, Affirmation, Exhibits, and Memo of Law	1-17
Notice of Cross Motion, Affirmation/Opposition, Exhibits, and Memo of Law	18-30
Opposition Affirmation/Reply, Exhibits	31-32

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In this maritime personal injury action, defendant, Maersk Line, Ltd., moves for an Order, pursuant to CPLR 3212, dismissing the second cause of action in the complaint. Plaintiff, Michael McCright (McCright), cross-moves for an Order reinstating maintenance and cure for plaintiff.

Factual Background

On August 11, 2009, plaintiff, Michael McCright, was injured while working aboard defendant's ship, the Sealand Champion. Plaintiff sustained a fracture of the right femur which required surgery and the insertion of a rod to stabilize the fracture. After the surgery, plaintiff began a program of physical therapy (PT) to rehabilitate his right hip.

Plaintiff's PT lasted for approximately three years. During PT, plaintiff's orthopedist, Dr. Dickson, referred him a pain management specialist. Toward the end of the second year of PT plaintiff began to attend PT sessions less frequently, and began cancelling more often. Defendant alleges that the reports on plaintiff's therapy showed that his condition "had reached a plateau where he would permanently be unable to crouch, squat, kneel, bend, stoop, push, pull or twist—all of which

were activities required of all merchant mariners aboard a ship including licensed officers like” plaintiff.

Dr. Dickson limited plaintiff’s physical activity to two hours per day, e.g. walking, climbing stairs, standing, and sitting. As such, this makes it impossible for plaintiff (as a watchman) to stand watch for eight hours per day in four hour increments. Since Dr. Dickson did not put any time limit on plaintiff’s restricted activity, defendant alleges that plaintiff is permanently unfit for duty.

Plaintiff also underwent an independent medical examination by a physician selected by defendant, Dr. Kaldis, who concluded that plaintiff had achieved the maximum therapeutic benefit from the PT.

Conversely, plaintiff provides an affidavit from a Dr. Melton which states that plaintiff has not yet achieved his maximum medical improvement, and that additional treatment will likely result in objective benefits, not simply palliative pain relief.

Arguments

Defendant contends that plaintiff’s second cause of action, for punitive and consequential damages for failure to pay maintenance and cure, should be dismissed because plaintiff has reached both maximum medical cure and is permanently not fit for duty. Defendant also maintains that punitive damages are not recoverable in this instance.

Plaintiff asserts that maximum medical cure has not been reached, and that further medical treatment would be beneficial.

Discussion

Pursuant to CPLR 3212(b), “a motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts;

and it shall show that there is no defense to the cause of action or that the cause of action of defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision 'c' of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion."

The rule governing summary judgment is well established: "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." (*Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]; *Tortorello v Carlin*, 260 Ad2d 201 [1st Dept 1999]).

"Maintenance and cure is to the seaman as what workmen's compensation is to the landworker. Unless his illness or injury has been brought about by his act of willful misconduct, he is certain of receiving compensation intended to be sufficient to pay for his care with his employer assuming the responsibility of his medical expenses." (*See, Force and Norris, The Law of Seamen* § 26:1). It is a "contractual form of compensation given by general maritime law to a seaman who falls ill while in the service of his vessel. The shipowner's obligation is deep-rooted in maritime law and is an incident or implied term of a contract for maritime employment." (*The Law of Seamen* § 26:1, citing, *Evans v Blidberg Rothchild Co.*, 382 F2d 637 [US Ct. of Appeals, 4th Cir. 1967]).

"A ship's owner or master is obligated, under general maritime law, to provide a crew member who becomes sick or injured while employed in the ship's service with maintenance and cure. (*Holley v Transoceanic Cable Co.*, 301 AD2d 417 [1st Dept. 2003]). Maintenance is the right of

a seaman to payment for food and lodging, and “cure” is the right to necessary medical care for the treatment of the illness or injury. (*Id.*). The obligation to provide maintenance and cure continues until the seaman recovers or until his condition is diagnosed as permanent and incurable, the point known as “maximum cure.” (*Id.*).

“The breach of the duty to provide maintenance and cure to the injured or ill crew member is tortious and will render the ship's owner or master liable for all consequential damages suffered by the seafarer as a result of the dereliction.” (*Holley v Transoceanic Cable Co.*, 301 AD2d 417 [1st Dept. 2003]). Punitive damages, however, are not available in a cause of action for maintenance and cure. (*Holley v Transoceanic Cable Co.*, 301 AD2d 417 [1st Dept. 2003]; citing, *Kraljic v Berman Enterprises, Inc.*; see also *Guevara v Maritime Overseas Corp.*, 59 F3d 1496 [5th Cir.1995]; see also, *Pires v Frota Oceanica Brasileria, S.A.*, 240 AD2d 323 [1st Dept. 1997], stating “Plaintiff in a maintenance and cure case cannot obtain punitive damages.”).

Here, the case law is clear that a plaintiff may not seek punitive damages in a maintenance and cure case. As such, defendant’s motion, seeking to dismiss plaintiff’s second cause of action, is granted.

The second branch of defendant’s motion, seeking summary judgment on any claim for maintenance and cure, and conversely, plaintiff’s cross-motion, requesting an Order reinstating the maintenance and cure obligation, there are too many factual disputes to grant either motion.

Defendant bases its argument on statements and reports from doctors who claim that plaintiff has reached the maximum level of medical improvement from his injury, and that plaintiff will not be able to return to work for defendant in his previous capacity. If this were the case, plaintiff would not longer be owed any maintenance and cure payments.

Plaintiff avers, as per his own statements and reports from a doctor, that further PT will

improve his condition, and that there is a chance he could return to work for defendant. Because of this, plaintiff claims that he has not reached his maximum level of medical improvement.

Based upon these contested issues of material fact, both requests are denied. Accordingly, it is hereby

ORDERED, that defendant's motion, seeking dismissal of plaintiff's second cause of action for punitive damages, is granted; and it is further

ORDERED, that defendant's motion, seeking summary judgment on any claim for maintenance and cure, is denied; and it is further

ORDERED, that plaintiff's cross-motion, seeking an Order, reinstating the maintenance and cure obligation, is denied.

ORDERED, that the parties appear for a preliminary conference on February 21, 2013 at 9:30 am in Room 304 located at 71 Thomas St., NYC 10013.

Dated: 1/29/13

ENTER:



Joan M. Kenney, J.S.C.

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JAN 31 2013
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