UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GREGORY MULHOLLAND,

Plaintiff,

-against-

THE CITY OF NEW YORK,

Defendant.

ORDER DENYING DEFENDANT'S MOTIONS AFTER TRIAL

09 Civ. 6329 (AKH)

ALVIN K. HELLERSTEIN, U.S.D.J.:

After seven days of trial, a jury of eight persons delivered a verdict in favor of Plaintiff, Gregory Mulholland, and against Defendant, the City of New York (the "City"), in the amount of $3,200,000. Defendant moves to set aside the verdict, and to obtain judgment as a matter of law or, alternatively, a new trial. Fed. R. Civ. P. 50(a)-(b), 59(a). Defendant argues that the charge to the jury was improper, that the evidence did not support the verdict, and that various preclusions and evidentiary rulings deprived it of a fair trial. Defendant's arguments are without merit, as discussed below, and its motion is denied.

The Facts Proved at Trial

Plaintiff worked for the City of New York for fourteen years as a deckhand aboard ferry boats transporting passengers and vehicles. In May 2009, he began working aboard the ferry shuttling between City Island in the Bronx and Hart Island in the East River. Plaintiff's job consisted mainly of leveling the bridge of the pier to the deck of the vessel to permit passengers and vehicles to board and disembark from the ferry.

On July 2, 2009, the "Rosemary Miller," a ferry chartered by the City while the City's own ferry was out of service, brought a work crew and vehicles to Hart Island. The "Rosemary Miller" tied-up to the Hart Island ferry landing, and Plaintiff jumped onshore to operate one of the two chain-pulls that leveled the bridge of the pier to the deck of the ferry. The chain jammed, and Mulholland severely hurt his back. The jury heard evidence that the chain had not been maintained properly, and had not regularly been lubricated or cleaned of rust.

In the wake of his injury, Mulholland underwent physical therapy, epidural injections to his spine, and two spinal surgeries in July 2010 and May 2011. He wears a back brace and continues to receive medical treatment. Testimony was offered that given his physical limitations, Mulholland is no longer employable as a seaman or in other occupations given his condition, age, and experience.

The Pre-Trial Proceedings

Plaintiff filed his Complaint on August 15, 2009, and the City filed its Answer on September 22, 2009. The parties proposed and, on December 8, 2009, I ordered, a Case Management Plan by which the parties agreed to complete fact discovery by April 9, 2010. The parties requested, and I granted, four extensions to that completion date, ultimately extending the discovery deadline to January 27, 2012. I made it clear that I would not agree to any further extensions.

At the status conference of January 27, 2012, the parties stated that they were close to settlement, but that did not happen. At the conference of June 15, 2012, the parties asked for the assistance of a Magistrate Judge, and I referred the case to Magistrate Judge Henry B.

Pitman. The parties met with him twice, but they were unable to agree to a settlement, and they reported that inability to me at a status conference on December 14, 2012.

At that conference, I inquired as to experts. The parties stated that they would exchange Rule 26(a)(2) reports by January 13, 2013, and soon complete expert depositions. I approved, and set dates for a final pre-trial conference to rule on motions *in limine* and approve a pre-trial order (March 20, 2013) and to begin trial (April 8, 2013).

Proceedings at the Final Pre-Trial Conference

At the final pre-trial conference, I granted Plaintiff's motions *in limine* to limit the testimony of Ali M. Sadegh and preclude the testimony of Richard Dien. The report of Dr. Sadegh, Defendant's biomechanical expert, calculated the force necessary to pull the chainfall at Hart Island, and concluded that the force required could have strained Mulholland's shoulder and elbow, but not his back. Dr. Sadegh is not a medical doctor, and he did not examine Mulholland or his medical records, and so I found that he was not qualified to offer testimony on the cause, extent, or character of Mulholland's injury. See Morgan v. Girgis, 2008 WL 2115250 (S.D.N.Y. May 16, 2008). I limited Dr. Sadegh's testimony to a general discussion of the forces required to pull the Hart's Island chainfall. I also precluded Dr. Sadegh from testifying to opinions not disclosed in a timely manner as required by Rule 26(a)(2)(D).

Defendant's expert, Richard Dien, sought to testify as to his legal opinion that Plaintiff did not qualify as a "seaman" under the Jones Act. Such a determination is left to the jury, guided by the Court's instructions. Hygh v. Jacobs, 961 F.2d 359, 363 (2d Cir. 1992) ("This circuit is in accord with other circuits in requiring exclusion of expert testimony that expresses a legal conclusion"). I therefore precluded Mr. Dien's testimony.

Lastly, I granted Plaintiff's motions to preclude the testimony of eleven Defense witnesses who, as to fact witnesses, were not disclosed by the City as required by Rule 26(a)(1), and as to experts, did not submit timely reports as required by Rule 26(a)(2)(D).

Standards for Determining Motions After Trial

A court may grant judgment as a matter of law against a party if it finds "that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." Fed. R. Civ. P. 50(a). The motion should only be granted if "viewed in the light most favorable to the nonmoving party, 'the evidence is such that, without weighing the credibility of the witnesses or otherwise considering the weight of evidence, there can be but one conclusion as to the verdict that reasonable men could have reached.'" Samuels v. Air Transport Local 504, 992 F.2d 12, 14 (2d Cir.1993) (citation omitted). In making its determination, the "district court[] appl[ies] the same standard used in assessing whether factual issues exist as used in reviewing summary judgment motions under Fed.R.Civ.P. 56." United States v. Real Prop. Known as 77 E. 3rd St., New York, N.Y., 869 F. Supp. 1042, 1056 (S.D.N.Y. 1994).

A new trial after a jury verdict may be granted "for any reason for which a new trial has heretofore been granted in an action at law in federal court." Fed. R. Civ. P. 59(a)(1). "A motion for a new trial should be granted when . . . the jury has reached a seriously erroneous result or . . . the verdict is a miscarriage of justice." Song v. Ives Laboratories, Inc., 957 F.2d 1041, 1047 (2d Cir.1992) (internal quotations omitted). The motion may "be predicated on a court's error in giving, or refusing to give, instructions to the jury" Morse/Diesel, Inc. v. Trinity Indus., Inc., 875 F. Supp. 165, 169 (S.D.N.Y. 1994). "A district court has substantial discretion to grant a motion for a new trial, and unlike the posture required in considering motions for

judgment as a matter of law, the trial judge may weigh conflicting evidence without viewing it in the light most favorable to the verdict winner." Real Prop. Known as 77 E. 3rd St., 869 F. Supp. at 1064 (citing Song, 957 F.2d at 1047).

The Instructions Defining a "Seaman" Under the Jones Act

Plaintiff sued for recovery under the Jones Act, which entitles "[a] seaman injured in the course of employment...to bring a civil action at law...against the employer." 46 U.S.C. § 30104. Defendant contends that my instructions to the jury defining a Jones Act "seaman" were in error. "A jury instruction is erroneous if it misleads the jury as to the correct legal standard or does not adequately inform the jury on the law." LNC Invest., Inc. v. First Fidelity Bank, N.A., 173 F.3d 454, 460 (2d Cir. 1999). However, "a trial court has considerable discretion in the formulation and style of jury instructions." Albert v. New York City Sch. Const. Auth., 99 F. App'x 306, 310 (2d Cir. 2004) (citing Parker v. Sony Pictures Entm't, Inc., 260 F.3d 100, 106 (2d Cir.2001).

I instructed the jury that Plaintiff had to prove, by a preponderance of the evidence, four elements to establish his Jones Act claim:

> First, the plaintiff was a seaman. I will define that term;
> Second, that the Defendant was Plaintiff's employer, that the City was the employer of Mulholland and that Plaintiff was acting in the course of his employment when he was injured;
> Third, that the Defendant or one of its officers, employees, or agents, was negligent; and
> Fourth, that such is negligence played a part—no matter how slight—in bringing about an injury to the Plaintiff.

Tr. 959. Defendant does not object to these instructions. I then defined what constitutes a Jones Act "seaman":

> So the first element, remember, was Plaintiff a seaman, and Plaintiff has to prove that by a preponderance of the evidence.
>
> There are two tests.
>
> First, that the Plaintiff's duties contributed to the functions of the vessel or to the accomplishment of its mission...Plaintiff's duties have to contribute to either or both of those—the functions of the vessel or the accomplishment of the vessel's mission;
>
> Second, that the Plaintiff had a connection to a vessel in navigation or to an identifiable group of such vessels under common ownership or control, and that this connection was substantial in terms of duration and nature...
>
> The status of a seaman does not depend on the place where the injury was suffered, but on the nature of the services of the seaman and the nature of the relationship of the seaman to the vessel and to its operations. Seamen do not lose their coverage when their service to the vessel takes them ashore or if they are doing something other than aiding in the vessel's navigation.
>
> Vessels can have various functions and the job of a seaman is to contribute to the functions of the vessel or to accomplish its mission. So that is the question: Was Mulholland doing that?
>
> As long as the seaman performs some material function of the vessel's mission or purpose, that person can be a seaman, and also that the seaman had a connection to a vessel in navigation.

Tr. 960-61. Defendant objects only to this final sentence, contending that it was vague and confusing, and that it erroneously expanded the category of people who might qualify as "seamen." Defendant's objection is without merit. My instructions tracked the Supreme Court's definition of a Jones Act "seaman," see Chandris, Inc. v. Latsis, 515 U.S. 347 (1995), and McDermott Int'l, Inc. v. Wilander, 498 U.S. 337, 355 (1991), and the model jury instructions, see L. Sand, et al., Modern Federal Jury Instructions (2012). The jury understood that to prove his status as a "seaman," Plaintiff had to show that his duties contributed to the mission of the vessel and that he had a connection to a vessel in navigation that was substantial.

I then instructed the jury as to a seaman's necessary connection to a "vessel in navigation" or an "identifiable group of vessels under common ownership or control":

> A seaman must establish an attachment to a vessel or to an identifiable fleet of vessels under common ownership or control. "Control" of the vessel does not necessarily require that the person or party in control supervise all the practical operations aboard. You can decide if an identifiable group of vessels is under "common ownership or control" based on the totality of evidence presented to you.

Tr. 962. Defendant objects that I did not adequately define "control." But courts evaluating the "common ownership or control" requirement have not established a rigid test. Common ownership or control does not require that a single entity supervise the practical operations aboard the group of vessels. Romain v. Indus. Fabrication & Repair Serv., Inc., 203 F.3d 376, 380 (5th Cir. 2000). Courts allow plaintiffs to raise the existence of common control as an issue of fact when various factors indicate that such control exists. See, e.g., Harbor Tug & Barge Co. v. Papai, 520 U.S. 548, 558 (1997) (common ownership or control is "not established by the mere use of the same hiring hall which draws from the same pool of employees"); St. Romain, 203 F.3d at 379 (plaintiff who worked on eleven liftboats owned by nine different companies did not raise genuine issue as to whether the liftboats were under common control).

After explaining the first two elements, I went on to explain that Plaintiff must show that the Defendant, or one of its officers, employees, or agents, was negligent. I defined negligence as "the failure to use the same degree of care which a person of ordinary prudence would use in the circumstances of a given situation." Tr. 963. I noted that "[t]he reasonably prudent person standard of negligence requires the Defendant to guard against those risks or dangers of which it knew or by the exercise of due care should have known." Id. Therefore, "[t]he Jones Act imposes on the defendant, on the City, a duty to exercise reasonable care to provide the plaintiff with a reasonably safe place in which to work, reasonably safe conditions in

which to work, and reasonably safe tools and equipment to operate at work." Id. I went on to describe how the jury might judge whether Defendant had exercised reasonable care:

> Now, you consider whether a defendant exercised reasonable care with regard to a particular risk or danger by asking yourself three criteria—you may think of others.
>
> First, you may consider any evidence presented concerning the defendant's actual knowledge or the actual knowledge had by one of the employees or agents of the defendant.
>
> Second, you may consider any evidence concerning if the risk was brought to the attention of the employer or to the attention of the employer or to the attention of one of the employer's employees or agents, for example, through the employee's statements, complaints, or protests that a particular condition or assignment was dangerous or that equipment was dangerous or malfunctioned.
>
> Third, you may consider if a reasonably prudent person would have performed inspections which would have brought the risk to the defendant's attention.

Tr. 964-65.

Defendant does not object to the three factors I laid out, but objects that in introducing the three factors, I should not have said, "you may think of others." However, the instruction did not, as Defendant argues, suggest to the jury that it may "substitute anything it wanted to those [instructions] given by the Court." Def. brief 28. The instruction explains the criteria the jury may consider, while leaving it to the jury, as the fact-finder, to determine if the Defendant acted reasonably under the circumstances. The negligence instructions neither misled nor misinformed the jury as to the correct legal standard. LNC Invest., 173 F.3d at 460.

In sum, the instructions to the jury were not in error and do not entitle the Defendant to a new trial.

The Verdict was Substantially Supported by the Evidence

Defendant argues that I should have granted the City judgment as a matter of law because the evidence did not support a finding that Plaintiff was a Jones Act "seaman." First, Defendant claims that Mulholland did not perform the work required of a seaman. Plaintiff, however, testified as to his duties on board the "Rosemary Miller" and on shore. Tr. 57-75. A seaman does not lose Jones Act coverage when he is doing something other than aiding in the vessel's navigation or when his service to the vessel takes him ashore. Latsis, 515 U.S. 347. A seaman must only be "doing the ship's work," Wilander, 498 U.S. at 355, and a reasonable jury could have concluded that Mulholland, in raising the bridge fo the pier to allow vehicles and passengers to board and disembark from the ferry, was a "seaman" under those terms.

Defendant raises other objections. Defendant argues that Mulholland did not serve aboard the "Rosemary Miller" for long enough to be a seaman. But "[t]he duration of time aboard a vessel is not enough, standing alone, to determine status as a seaman under the Jones Act." Boy Scouts of Am. v. Graham, 86 F.3d 861, 866 (9th Cir. 1996). Though Plaintiff only began working on the ferry two months prior to his injury, that does not disqualify him from coverage under the Jones Act. See Grothe v. Central Boat Rentals, Inc., 2008 WL 2783457 (S.D. Tex. July 15, 2008) (worker injured first day on the job may be a Jones Act seaman).

The City claims it could not be liable for Plaintiff's injury because, although it employed Mulholland, the City did not own the "Rosemary Miller." But the Jones Act entitles a plaintiff injured in the course of his employment to sue his employer even if his employer does not own the vessel on which he was injured. Reeves v. Mobile Dredging & Pumping Co., 26 F.3d 1247, 1252-53 (3d Cir. 1994); Wallace v. Oceaneering Int'l, 727 F.2d, 433 (5th Cir. 1984).

Lastly, Defendant contends that the Court erred in not including a special interrogatory as to Plaintiff's seaman status on the verdict sheet submitted to the jury. The verdict sheet asked, "Did the Plaintiff, Gregory Mulholland, prove his claim of negligence under the Jones Act?" Having instructed the jury as to the Plaintiff's burden of proving that he was a "seaman," I decided that a special interrogatory was unnecessary and might complicate the ultimate question. Such a decision is well within the Court's discretion. United States v. Applins, 637 F.3d 59, 82-3 (2d Cir. 2011).

Defendant is therefore not entitled to judgment as a matter of law because a reasonable jury could have found that Plaintiff was a Jones Act "seaman." Fed. R. Civ. P. 50(a).

The Rulings Precluding Witnesses and Limiting Testimony

Defendant argues that I erred in precluding and limiting certain testimony during trial. A trial court has discretion in ruling on the admissibility of evidence, Barrett v. Orange County Human Rights Comm'n, 194 F.3d 341, 346 (2d Cir. 1999), and that discretion is not considered abused unless an error affects a substantial right, considering the trial as a whole. See, e.g., Malek v. Fed. Ins. Co., 994 F.2d 49, 55 (2d Cir. 1993); Fed. R. Evid. 103(a). For the reasons noted above, I limited or precluded the testimony of two of Defendant's witnesses at the final pre-trial conference. The City's unfortunate inattention to the discovery obligations of Rule 26, and in particular the obligation to disclose witnesses and reports in a timely manner, led me to limit or preclude numerous exhibits and witnesses, both during the final pre-trial conference and during trial. The reassignment of the City's attorney during pre-trial, settlement talks, after nearly three years of proceedings, cannot excuse a failure to abide by the discovery rules.

Defendant argues that during trial I wrongly prevented Dr. Herbert Sherry, an orthopedic expert, from testifying about his first examination of Mulholland and from offering an opinion of Plaintiff's MRIs. I limited Dr. Sherry to offering relevant evidence that was properly disclosed ahead of trial. Dr. Sherry's first report, a letter of April 11, 2011, was in fact read to the jury and admitted into evidence. Tr. 774-81; Defendant Exh. W. I precluded testimony as to Mulholland's MRIs because such opinions were not contained in Dr. Sherry's expert reports or otherwise disclosed to Plaintiff. See Fed. R. Civ. P. 26(a); 37.

The Amount of the Verdict

Finally, Defendant seeks a remittitur of the jury's $3.2 million award in damages. A court may reduce an award if the amount "is grossly excessive," Akermanis v. Sea-Land Serv., Inc., 688 F.2d 898, 902 (2d Cir. 1982), or "shocks the conscience," Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 416 (1996).

I instructed the jury that if Plaintiff made his case under the Jones Act he could recover for lost earnings and for pain and suffering. Tr. 969. Plaintiff's expert estimated Mulholland's lost earnings at $691,882. Plaintiff's Ex. 39. The jury heard evidence that Plaintiff underwent physical therapy and two spinal surgeries, and Mulholland testified that he endured considerable pain as a result of those surgeries and continued to feel pain and discomfort to the present day. Tr. 125-26. Plaintiff testified that the pain in his neck and back "is sharp" and that, as a result, he wears a back brace and walks with a limp. Tr. 140-42. As a result of his pain, Plaintiff said, "I never get a straight sleep anymore." Tr. 142. Mulholland testified that he did not seek employment after his accident because of "the injuries, the pain, and the medication." Tr. 141-42.

In support of its argument, Defendant cites only one case, Delano v. United States, 859 F.Supp.2d 487 (W.D.N.Y. 2012), in which the plaintiff returned to his job within seven months of his injury. In addition, the Delano plaintiff's award was limited by 28 U.S.C. § 2675(b) to the amount in his administrative claim, $750,000. Defendant does not offer a single instance in which a court granted a remittitur in a case like to the present one. In contrast, Plaintiff cites numerous cases in which juries awarded damages close to, or above, $3.2 million for similar injuries. See, e.g., Stewart v. New York City Transit Auth'y, 82 A.D.3d 438 (1st Dep't 2011); Barrowman v. Niagara Mohawk Power Corp., 252 A.D.2d 946 (4th Dep't 1998); Williams v. City of New York, 105 A.D.3d 667 (1st Dep't April 30, 2013). In light of these precedents and the evidence presented to the jury, the award is not "grossly excessive," and it does not "shock the conscience."

Defendant's motion is denied. The Clerk shall mark the motion (Doc. No. 50) terminated.

SO ORDERED.

Dated: August 26, 2013
New York, New York

ALVIN K. HELLERSTEIN
United States District Judge