United States District Court, S.D. New York.
Robert J. DURFOR, Plaintiff,
v.
K-SEA TRANSPORTATION CORP., E.W. Holding Corp., Wallin Marine Corp ., and Eklof Marine Corp., Defendants.

No. 00 Civ. 6782(AGS).
July 30, 2001.

*MEMORANDUM ORDER*

SCHWARTZ, J.

***1** In this action, plaintiff Robert J. Durfor ("Durfor") seeks damages under the Jones Act, 46 U.S.C. § 688 *et seq.,* and general maritime law for injuries allegedly sustained while working on the M/V Great Gull, while he was an employee of defendant K-Sea Transportation Corp. ("K-Sea"). Currently before the Court is plaintiff's motion, pursuant to Fed.R.Civ.P. 56, for an increase in the amount of maintenance payable to him by K-Sea. For the reasons set forth below, the motion is granted.

I. Factual Background

On June 22, 1999, plaintiff was employed by K-Sea as a deck hand and a member of the crew of the M/V Great Gull. (Plaintiff's Local Civil Rule 56.1 Statement of Material Facts ("Pl.56.1") ¶¶ 1, 2; Defendants' Response to Plaintiff's Rule 56.1 Statement ("Def. 56.1 Resp.") ¶¶ 1, 2.) Plaintiff alleges that he injured his back in the course of performing his duties, which caused him to be incapacitated. (Pl. 56.1 ¶ 1.) At the time of the incident, plaintiff was also a member of a union, Local 333, United Marine Division, ILA, AFL-CIO. (Defendants' Local Civil Rule 56.1(b) Statement of Material Facts ("Def.56.1") ¶ 1; Plaintiff's Response to Defendants' Local Civil Rule 56.1(b) Statement of Material Facts ("Pl. 56.1 Resp.") ¶ 1.) Pursuant to a collective bargaining agreement negotiated between plaintiff's union and K-Sea, maintenance was to be paid at a minimum of $15 per day. (Def. 56.1 ¶ 2; Pl. 56.1 Resp. ¶ 2; Affidavit of Richard P. Falcinelli dated Feb. 5, 2001 ("Falcinelli Aff."), Ex. A.) From June 22, 1999 to the present, K-Sea has sent plaintiff biweekly checks in the amount of $210.00 as maintenance payments, which equates to compensation of $15 per day.[FN1] (Pl. 56.1 ¶ 3; Def. 56.1 Resp. ¶ 3; Def. 56.1 ¶ 3.)

FN1. Plaintiff did not receive maintenance while he was hospitalized for back surgery between August 21 to 25, 2000. (Plaintiff's Memorandum of Law In Support of Motion for an Order Increasing the Rate of Maintenance at 2.) However, K-Sea assumed financial responsibility for the surgery, hospitalization and related costs. (Ex. C to Falcinelli Aff.)

From June 22, 1999 to mid-August 2000, plaintiff also received biweekly checks which alternated in amount between $784.59 and $187.84. (Ex. B to Falcinelli Aff.) Plaintiff claims that he was never informed of the purpose of the supplemental payments, but believed then, and still contends, that they were maintenance payments. (Affidavit of Robert J. Durfor in Support of Motion for Payment of Increased Rate of Maintenance dated Jan. 9, 2001 ("Pl.Aff.") ¶¶ 4-5; Reply Affidavit of Robert J. Durfor in Support of Motion for Payment of Increased Rate of Maintenance dated Feb. 13, 2001 ("Pl.Rep.Aff.) ¶¶ 2-3.) Defendants state that such payments were settlement advances of which plaintiff was explicitly informed and agreed to, and which were terminated when plaintiff indicated he would not arbitrate his claims. (Falcinelli Aff. ¶¶ 9-16.) Defendants have explained how the amounts for the supplemental payments were determined, and have submitted evidence that such payments were intended for settlement purposes, including an itemized invoice of all payments to plaintiff and a letter to plaintiff from K-Sea-which plaintiff acknowledges he received-discussing the settlement advances in the context of

potential arbitration. (*Id.* ¶¶ 10-12, Exs. A-C; Pl. Rep. Aff. ¶ 2.) Such evidence, in the Court's view, overwhelmingly demonstrates that the supplemental payments were settlement payments rather than maintenance payments.[FN2]

FN2. Plaintiff also contends that a document entitled "Incident Expense Report---Robert Durfor---1999", produced by K-Sea in discovery, indicates that he received maintenance in the amount of $35.31 from June 23, 1999 to December 31, 1999. (Affidavit of John P. James dated Jan. 12, 2001 ¶ 1, Ex. 1.) However, as defendants point out, this contention is unavailing, because such document was produced on November 20, 2000 and gives no indication of the time period for which maintenance was calculated. (Falcinelli Aff. ¶¶ 18-19, Ex. D.) Defendants assert in this regard that "1999" in the document's title refers to the year of the accident, rather than to the year of the calculation, and that the payment, for $6780, represents the contractual rate of maintenance over 458 days following plaintiff's accident. (*Id.* ¶¶ 18, 20.) The Court accepts such explanation as reasonable, although the correct product (458 x $15.00) should be $6870, rather than $6780.

***2** Plaintiff filed the instant action on September 8, 2000, alleging causes of action for negligence, and for maintenance, cure, and medical expenses. (Complaint ¶¶ 1-8.) During discovery, and after defendants declined to increase his rate of maintenance, plaintiff filed the instant motion for partial summary judgment. In his submissions, plaintiff introduces evidence of his cost-of-living expenses since he has been incapacitated. On the basis of such evidence, plaintiff contends that he is entitled to a rate of maintenance higher than $15.00, notwithstanding that such amount is fixed by his collective bargaining agreement. Specifically, plaintiff claims that he is entitled to either (i) $35.31 per day, based on an amount allegedly paid to him during 1999, or (ii)(a) $33.12 per day for the period between July 22, 1999 and January 14, 2000, and (b) $28.96 per day for the period between January 15, 2000 and the present. Plaintiff asserts that he is not bound by the rate specified in the collective bargaining agreement because it unlawfully abrogates his common law right to maintenance. Because the Court has already rejected the rationale underpinning plaintiff's request for a rate of $35.31, *see* note 2 *supra*, it will consider his second request in light of (i) the relationship between the common law maintenance right and the collective bargaining agreement, and (ii) the costs plaintiff actually has incurred while he has been convalescent which are germane to maintenance.

II. Discussion

A. Summary Judgment Standard

A district court may grant summary judgment only if it is satisfied that "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). All inferences and ambiguities are resolved in the non-movant's favor. *See Gallo v. Prudential Residential Servs., Ltd. Partnership*, 22 F.3d 1219, 1223 (2d Cir.1994) (citations omitted). The burden rests on the moving party to demonstrate the absence of a genuine issue of material fact. *See Goenaga v. March of Dimes Birth Defects Found.*, 51 F.3d 1418 (2d Cir.1995). If the moving party meets its burden, the opposing party must produce evidentiary proof in admissible form sufficient to raise a material question of fact to defeat the motion for summary judgment, or in the alternative, demonstrate an acceptable excuse for its failure to meet this requirement. *See AGV Prods. v. Metro-Goldwyn-Mayer, Inc.*, 115 F.Supp.2d 378, 386 (S.D.N.Y.2000) (citation omitted). When reasonable minds could not differ as to the import of the proffered evidence, then summary judgment is proper. *See Anderson*, 477 U.S. at 250-52; *Bryant v. Maffucci*, 923 F.2d 979, 982 (2d Cir.1991).

Moreover, "conclusory allegations, speculation or conjecture will not avail a party resisting summary judgment." *Cifarelli v. Village of Babylon,* 93 F.3d 47, 51 (2d Cir.1996).

B. Right to Maintenance

***3** A seaman who becomes sick or injured while in service to a vessel has a common law right to maintenance payments to cover the cost of his food and lodging. *Vaughan v. Atkinson,* 369 U.S. 527, 531 (1962). These payments are intended to compensate the seaman for those costs comparable to that which he would have received aboard ship had he not been incapacitated. *Calmar S.S. Corp. v. Taylor,* 303 U.S. 525, 528 (1938). The payments should be made during the period the seaman is incapacitated and should continue until such time as he reaches maximum medical recovery. *Vaughan,* 369 U.S. at 531. Maximum medical recovery is the point at which it is determined that the seaman is cured or his condition is declared permanent and incurable. *Vella v. Ford Motor Co.,* 421 U.S. 1, 3 (1975).

Dating back to the medieval sea codes, the right of maintenance has existed as a matter of federal common law since the early nineteenth century, and was designed to provide an incentive for shipowners to guard the health and welfare of their seamen as well as an incentive for prospective seaman to enter into the shipping industry. *See Gillikin v. United States,* 764 F.Supp. 261, 264 (E.D.N.Y.1991) (citing *Harden v. Gordon,* 11 F. Cas, 480, 482-83 (C.C.D.Me.1823) (No. 6,047) (Story, J.)). Viewing seamen as "wards of the admiralty," the Supreme Court has emphasized that the right to maintenance is to be construed liberally and has consistently expanded its scope; doubts or ambiguities relating to the right must be resolved in favor of the seaman. *Vaughan,* 369 U.S. at 531-34. Further, although the maintenance right has its origin in a relationship that is contractual in nature, the right cannot be abrogated by contract. *See, e.g., De Zon v. Am. President Lines,* 318 U.S. 660, 667 (1943); *Cortes v. Baltimore Insular Line,* 287 U.S. 367, 371 (1932). However, while the Supreme Court has yet to consider the question, several circuits have held that an incapacitated, unionized seaman was bound by the rate of maintenance prescribed in a collective bargaining agreement even where such rate was insufficient to provide for the seaman's food and lodging. *See Frederick v. Kirby Tankships, Inc.,* 205 F.3d 1277, 1291-92 (11th Cir.2000); *Baldassaro v. United States,* 64 F.3d 206, 212 (5th Cir.1995); *Macedo v. F/V Paul & Michelle,* 868 F.2d 519, 522 (1st Cir.1989); *Al- Zawkari v. Am. Steamship Co.,* 871 F.2d 585, 588 (6th Cir.1989); *Gardiner v. Sea-Land Serv., Inc.,* 786 F.2d 943, 948 (9th Cir.1986).

In *Gardiner,* a divided decision of the Ninth Circuit upon which the other circuits rely, the court found that "the national labor policy of encouraging the use and reliability of collective bargaining agreements, together with the realistic give and take occurring within the collective bargaining process, justify enforcement of the specified rate of maintenance contained in the [collective bargaining agreement]." *Gardiner,* 786 F.2d at 950. Thus, the Ninth Circuit concluded that the rate specified in a collective bargaining agreement should be enforced unless the collective bargaining process was unfair or inadequate or there was no real negotiation over the specified rate. *Id.* at 949. However, the Third Circuit has taken a different approach. In *Barnes v. Andover Co., L.P.,* 900 F.2d 630, 640 (3d Cir.1990) , the court held that "it [was] inconsistent both with the traditional doctrine of maintenance and with [the court's] rejection of preemption of maintenance by the labor laws to hold that the maintenance rate set in [a] collective bargaining agreement was binding on a seaman who can show higher daily expenses." [FN3] Recognizing that "[i]n most instances, national labor law governs the relations between seamen, their unions, and their employees," the court stated that, in the absence of any provision of the national labor statutes that speaks directly to the question of maintenance, the unionized seaman is entitled to that long-established right." *Id.* at 639. This holding has been uniformly

followed by the district courts of this circuit despite the fact that the Second Circuit itself has not yet addressed the issue. *See Bachir v. Transoceanic Cable Ship Co.*, No. 98 Civ. 4625, 1998 WL 831035, at *2 (S.D.N.Y. Nov. 24, 1998); *Ruiz v. Buchanan Marine, Inc.*, No. 95 Civ. 9861, 1996 WL 200301, at *1 (S.D.N.Y. Apr. 25, 1996); *Covella v. Buchanan Marine, Inc.*, No. 95 Civ. 6514, 1996 WL 16442, at *2 (S.D.N.Y. Apr. 9, 1996); *Brown v. United States*, 882 F.Supp. 1424, 1427 (S.D.N.Y.1995); *Gillikin*, 764 F.Supp. at 264-65.

> FN3. The *Barnes* court acknowledged, as the *Gardiner* court had, that the "changed circumstances of the unionized seaman may undercut the rationale supporting the traditional right to maintenance." *Barnes*, 900 F.2d at 637; *Gardiner*, 786 F.2d at 949 . However, it noted that "the Supreme Court has shown no inclination to depart from its long-established solicitude for seamen [and][u]ntil it does so, we see no basis to assume that the emergence of powerful seamen's unions ... justifies our ignoring the Court's clear and frequent pronouncements that seamen remain wards of the admiralty." *Id.* (citations omitted).

***4** The *Barnes* court determined that the contractually bargained for maintenance rate in that case, which was $8 per day, effectively abrogated the seaman's right to maintenance because it was inadequate to provide him food and lodging in his locality, Philadelphia. *Barnes*, 900 F.2d at 640. The court explained that "a union cannot bargain away the individual seaman's common law right to maintenance by agreeing to a wholly inadequate figure as a daily maintenance rate." *Id.* The court remanded the case so that a proper maintenance rate could be awarded based on the plaintiff's monthly expenses. *Bachir*, *Brown*, and *Gillikin* each came to same conclusion based on an $8 per day rate; in *Covella* and *Ruiz*, the courts held that the collective bargaining agreement's 90-day cutoff for payment of a $15 maintenance rate clearly abrogated the plaintiffs' maintenance right. Each of the courts found that the maintenance provisions of the collective bargaining agreements in question were unenforceable "in the absence of preemption of the ancient right to maintenance by federal labor laws." FN4 *Covella*, 1998 WL 164482, at *2.

> FN4. Although it determined that the maintenance rate provisions of collective bargaining agreements were binding on unionized seamen, the *Gardiner* court notably concluded that the right to maintenance was not preempted by federal labor statutes. *SeeGardiner*, 786 F.2d at 948.

C. Plaintiff's Maintenance Rate

This Court agrees with the holding of *Barnes* and its progeny in this circuit that a unionized seaman plaintiff, as a "ward of the admiralty," shall not be bound by an inadequate rate of maintenance contained in his collective bargaining agreement. Based on the evidence submitted by plaintiff, the Court finds that the $15 per day rate provided for in plaintiff's collective bargaining agreement is inadequate.

A seaman is entitled to the reasonable cost of food and lodging in his locality, provided he individually has incurred the expense. A plaintiff makes a prima facie showing of entitlement to a particular amount of maintenance when he submits evidence of such "actual living expenditures." *Incandela v. Am. Dredging Co.*, 659 F.2d 11, 14 (2d Cir.1981); *see also Hall v. Noble Drilling (U.S.) Inc.*, 242 F.3d 582, 587-88 (5th Cir.2001). The courts consider many forms of proof, including evidence of the plaintiff's actual expenditures and expert testimony concerning the cost of living in the area of the plaintiff's residence. The plaintiff's burden of proof is, however, "feather light," such that it may be satisfied by the plaintiff's own testimony regarding these elements. *Gillikin*, 764 F.Supp. at 267 (citing *Yelverton v. Mobile Labs, Inc.*, 782 F.2d 555, 558 (5th Cir.1986)); *Incandela*, 659 F.2d at 14 ("[T]o require every injured seaman seeking a court award for maintenance to go to the

expense of putting on expert witnesses before he will be permitted to recover more than a fixed nominal maintenance rate would be to place an unfair burden on those whom the idea of maintenance was designed to assist.") The burden then shifts to the defendants to submit rebuttal evidence showing that the seaman's expenditures were unreasonable or excessive. *Incandela*, 659 F.2d at 14. A court may award reasonable expenses even if the precise amount of actual expenses is not conclusively proved, *Hall*, 242 F.3d at 588, and, as noted *supra*, any ambiguities or doubts with respect to maintenance are resolved in favor of the seaman. *Vaughan*, 369 U.S. at 532.

***5** Here, plaintiff asserts that the $15 rate is inadequate, and has submitted affidavits and exhibits on his motion indicating the following monthly expenses in Philadephia, where he currently resides: (i) Rent: (a) $500 between June 22, 1999 and January 14, 2000, for a two-bedroom dwelling occupied by himself, his wife and child; and (b) $375 between January 15, 2000 and the present, for a one-bedroom dwelling he solely occupies; (ii) Utilities: an average of $138.65 over the period between July 2000 and January 2001; (iii) Food: $300; and (iv) Telephone: $54.99. (Pl. Aff. ¶ 6, Exs. 2-4; Pl. Rep. Aff. ¶¶ 4-7, Exs. 1-3; Plaintiff's Reply Memorandum of Law in Support of Motion for an Order Increasing the Rate of Maintenance ("Pl.Rep.") at 8-9.) Based on these submissions, plaintiff contends that his reasonable living expenses are (i) $33.12 per day from June 22, 1999 to January 14, 2000, and (ii) $28.96 per day from January 15, 2000 to date. (Pl. Rep. at 9.)

In rebuttal, defendants point out that maintenance "is strictly personal" and argue that any housing expenses attributable to plaintiff's wife and children should be deducted from the total, such that plaintiff's prorated share of the initial rent expense is $166.67 per month (1/3 x $500). (Sur Reply Affirmation of Thomas M. Canevari ("Def. Sur Rep.") ¶¶ 4-5.) Defendants also contend that telephone expenses are not recoverable as maintenance. (*Id.* ¶ 6; Memorandum of Law in Opposition to Plaintiff's Motion to Increase the Maintenance Rate ("Def.Mem.") at 18.) Accordingly, they contend that, should the Court grant plaintiff's motion, he would only be entitled to (i) $20.17 per day prior to January 15, 2000 and (ii) $27.12 per day afterward, figures which, in defendants' view, do not vary enough from the prescribed $15 figure to constitute an "abrogation" of plaintiff's right to maintenance as contemplated by *Barnes*, *Brown*, *Gillikin*, and *Bachir* .[FN5] (Def. Sur Rep. ¶¶ 7-8.)

FN5. Defendants also request, pursuant to Fed.R.Civ.P. 56(f) ( "Rule 56(f)"), that the Court permit them to conduct further discovery "regarding the reasonableness of the amounts claimed as maintenance expenses and whether these expenses were actually incurred." (Def. Sur. Rep. at 3; Def. Mem. at 19-20.) Rule 56(f) requires the Court to ensure that parties have a reasonable opportunity to make their record complete before ruling on a motion for summary judgment. *See Ursa Minor Ltd. v. AON Fin. Prods., Inc.*, No. 00 Civ. 2474(AGS), 2000 WL 1010278, at *9 (S.D.N.Y. July 21, 2000) (citation omitted). However, the rule is not a shield against all summary judgment motions. Litigants seeking relief under the rule must show that the material sought is germane to the defense, and that it is neither cumulative nor speculative. *See id.* The requesting party must file an affidavit demonstrating: (i) the facts sought and how they will be obtained; (ii) how the facts sought are reasonably expected to create a genuine issue of material fact; (iii) efforts to obtain the facts previously; and (iv) why those efforts were unsuccessful. *See Sage Realty Corp. v. Ins. Co. of N. Am.*, 34 F.3d 124, 128 (2d Cir.1994); *Ursa Minor*, 2000 WL 1010278, at *9. Here, defendants claim that they require "possible document discovery" and the deposition of plaintiff in

order to "present evidence regarding the reasonableness of the charges claimed." (Def. Mem. at 19.) This argument is insufficient to justify a continuance in this case. First, defendants fail to indicate what they believe the "possible" documentary evidence and deposition would establish. Plaintiff has met his burden by presenting testimonial and documentary evidence of his claimed expenses, and defendants have sufficiently rebutted certain of such expenses by scrutinizing the evidence that has been presented and marshaling relevant caselaw in support of their own position. Their arguments in opposition to plaintiff's motion led plaintiff to plaintiff's introduction of an additional reply affidavit and exhibits in further support of his claimed expenses, evidence which the Court permitted defendants to rebut in a sur-reply. (*See* Def. Mem. at 15-18; Pl. Rep. at 7-10; Def. Sur. Rep. ¶¶ 1-8.) Second, defendants have neither indicated how the discovery they seek could create a genuine issue of material fact, stating only that the "issues raised in Plaintiff's motion ... will be explored during Plaintiff's deposition." (Def. Mem. at 20.) Accordingly, because defendants have not demonstrated that their proposed discovery is reasonably likely to yield evidence that would raise a genuine issue of fact as to the reasonableness of plaintiff's claimed expenses, the Court denies their Rule 56(f) request. *Cf. Ursa Minor,* 2000 WL 1010278, at *9 (denying defendants' Rule 56(f) request where the requested information, while potentially interesting to defendants, was not material to their defense); *Frankel v. ICD Holdings, S.A.,* 930 F.Supp. 54, 67 (S.D.N.Y.1996) (same).

With regard to rent, the Court finds that plaintiff's claimed individual expense is a reasonable cost. Although maintenance payments are intended only to compensate the individual convalescent seaman, as opposed to other members of his family, *see Macedo,* 868 F.2d at 522 (noting that "[m]aintenance ... is strictly personal, not family support"); *Hall,* 242 F.3d at 589 (noting that "the expenses of the seaman's spouse of children are not properly included in maintenance"), the seaman is nevertheless entitled to those expenses he actually incurs, to the extent they are reasonable. As the Fifth Circuit recently held:

> A seaman who pays for the rent or mortgage of a home he shares with his family actually spends out-of-pocket the entire amount. He cannot pay any less without losing his home. If a seaman would incur the lodging expenses of the home even if living alone, then the entire lodging expense represents the seaman's actual expense.

***6** *Hall,* 242 F.3d at 589. Thus, the court concluded that, contrary to defendants' contention here, "[r]easonableness, not proration, is the proper limit on maintenance awards for seamen living with their families." *Id.* The requirement of reasonableness will guard against excessive spending by seamen on a home that is in excess of his individual needs. *Id.* On the basis of the above, the Court finds that the reasonable maintenance charge for rent over the entire period in question is $375 per month. Although plaintiff purportedly paid $500 per month for a two-bedroom apartment while he was living with his family, the fact that he has paid $375 per month for a one-bedroom apartment in the same locality since leaving his family demonstrates that he would not have paid $500 in rent "even if living alone." FN6 *Hall,* 242 F.3d at 589; (Pl.Rep.Aff.¶ 4, Ex. 1.) Moreover, each of plaintiff's other claimed expenditures is a charge that he has incurred individually, following separation from his family. FN7

> FN6. The Court notes that plaintiff clearly has a right to lodging expenses for the period when he was living with his wife and child, notwithstanding the fact that he may have incurred such expense even if he were working. *See Barnes,* 900 F.2d at

644, *Gillikin,* 764 F.Supp. at 273-74.

FN7. This finding does not conflict with the holdings of the three principal cases cited by the parties which address the proration of housing expenses. *See Ritchie v. Grimm,* 724 F.Supp. 59, 61 (E.D.N.Y.1989) (considering the "total cost of rent for the seaman's apartment" as maintenance, on the ground that plaintiff would likely pay the same amount in rent even if residing alone); *Gillikin v. United States,* 764 F.Supp. 270, 274-75 (E.D.N.Y.1991 (finding that plaintiff seaman's fixed lodging expenses should be prorated); *Hall,* 242 F.3d at 589-91 (affirming maintenance award of full cost of mortgage payments for seaman and his family), because there was no evidence in these cases of plaintiff's individual housing expenses, as there is here.

With regard to the remainder of the expenses, the Court agrees with defendants that telephone expenses must be excluded from the maintenance calculation. *See Gillikin,* 764 F.Supp. at 273 ("[A]s common as telephone service is, it is not an integral element of lodging and may not be recovered as 'maintenance." ') (citing *Barnes,* 900 F.2d at 644); *Hall,* 242 F.3d at 585. However; the Court disagrees with defendants to the extent that they contend that plaintiff's claimed expenses for utilities and food are unreasonable, as the evidence presented by plaintiff is sufficient to estimate plaintiff's actual expenditures. *See Hall,* 242 F .3d at 590. Accordingly, the Court concludes that plaintiff has incurred actual expenditures since his accident in the amount of $27 .12 per day.[FN8] Based on plaintiff's proof that he has incurred reasonable daily expenditures higher than the $15 rate fixed by the collective bargaining agreement, the Court finds that such rate effectively abrogates plaintiff's right to maintenance, because it is insufficient to compensate plaintiff for his expenditures. *See Barnes,* 900 F.2d at 640; *Gillikin,* 764 F.Supp. at 266. The Court also takes judicial notice of the fact that $15 per day is ordinarily inadequate to provide food and lodging in Philadelphia.[FN9] *Cf. id.* (taking judicial notice of the fact that, in 1990, $8 per day was ordinarily inadequate to provide food and lodging in Philadelphia, as well as San Francisco).

FN8. The relevant per diem figures are: (i) $375/30 = $12.50 for rent; (ii) $138.65/30 = $4.62 for utilities; and (iii) $300/30 = $10 for food.

FN9. A 1996 study of the impact of *Gardiner* on the condition of seaman reported that, in 1995, "the poverty threshold for an adult under the age of 65 and living alone, the appropriate description of most seaman, was $7,929." Eugene A. Brodsky & Karen M. Houston, *From Subsistence to Starvation: A Call for Judicial Reexamination of* Gardiner v. Sea Land Service, Inc., 9 U.S.F. Maritime L.J. 71, 81 (1996). Even assuming that such threshold has remained constant over the previous six years, which is unlikely, a $15 per day rate only yields an income of $5,475. "To survive on such amount, insufficient for either food or lodging, an injured or ill seaman would be forced to seek welfare assistance, or the charity of family or friends, if available" which would undermine the maintenance right to payments sufficient to cover the seaman's actual expenses on shore. *Id.*

III. Conclusion

For the foregoing reasons, the Court (i) grants plaintiff's motion for an increase in his rate of maintenance, and (ii) orders that defendants compensate plaintiff at a rate of $27.12 per day from the date of plaintiff's injury, June 22, 1999, to the date when plaintiff reaches the point of maximum medical recovery. Based on the evidence submitted on the instant motion, the total amount plaintiff is owed as of the date of this Order is $9,283.92 (766 days x $12.12 [$27.12-15.00] ), such amount being payable immediately.[FN10]

FN10. Defendants state that they paid plaintiff a total of $12,106.46 in settlement advances between June 22, 1999 and mid-August 2000, and request a credit in such amount against any settlement, award, or judgment that plaintiff may obtain as a result of this lawsuit. (Facinelli Aff. ¶ 21.) As noted *supra*, the Court recognizes that such payments were settlement-related, rather than maintenance payments. However, the treatment of such advances with respect to a judgment or award will be determined after trial.

***7** SO ORDERED.

S.D.N.Y.,2001.
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Not Reported in F.Supp.2d, 2001 WL 856612 (S.D.N.Y.), 2001 A.M.C. 2390

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