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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JONATHAN ZERMENO,

Plaintiff,

v.

NORTH PACIFIC FISHING, INC.,

Defendant.

No. C16-1540RSL

ORDER GRANTING IN PART
DEFENDANT’S MOTION FOR
SUMMARY JUDGMENT

This matter comes before the Court on “Defendant’s Motion for Summary Judgment.” Dkt. # 10. Plaintiff asserts claims under the Jones Act (for negligence) and under general maritime law (for unseaworthiness, maintenance, and cure) based on injuries he suffered on a fishing vessel owned by defendant.¹ Defendant seeks dismissal of all of the claims asserted.

Summary judgment is appropriate when, viewing the facts in the light most favorable to the nonmoving party, there is no genuine issue of material fact that would preclude the entry of judgment as a matter of law. The party seeking summary dismissal of the case “bears the initial responsibility of informing the district court of the basis for its motion” (Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)) and “citing to particular parts of materials in the record” that show the absence of a genuine issue of material fact (Fed. R. Civ. P. 56(c)). Once the moving party has satisfied its burden, it is entitled to summary judgment if the non-moving party fails to designate “specific facts showing that there is a genuine issue for trial.” Celotex Corp., 477 U.S.

¹ Plaintiff has apparently abandoned his wage claim.

ORDER GRANTING IN PART DEFENDANTS’
MOTION FOR SUMMARY JUDGMENT

1 at 324. The Court will “view the evidence in the light most favorable to the nonmoving party . . .
2 and draw all reasonable inferences in that party’s favor.” Krechman v. County of Riverside, 723
3 F.3d 1104, 1109 (9th Cir. 2013). Although the Court must reserve for the jury genuine issues
4 regarding credibility, the weight of the evidence, and legitimate inferences, the “mere existence
5 of a scintilla of evidence in support of the non-moving party’s position will be insufficient” to
6 avoid judgment. City of Pomona v. SQM N. Am. Corp., 750 F.3d 1036, 1049 (9th Cir. 2014);
7 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). Factual disputes whose resolution
8 would not affect the outcome of the suit are irrelevant to the consideration of a motion for
9 summary judgment. S. Cal. Darts Ass’n v. Zaffina, 762 F.3d 921, 925 (9th Cir. 2014). In other
10 words, summary judgment should be granted where the nonmoving party fails to offer evidence
11 from which a reasonable jury could return a verdict in its favor. FreecycleSunnyvale v. Freecycle
12 Network, 626 F.3d 509, 514 (9th Cir. 2010).

13 Taken in the light most favorable to plaintiff, the non-moving party, the facts giving rise
14 to plaintiff’s claims are as follows:²

15 Plaintiff was working on a vessel assembly line processing fish in high seas. The man at
16 the next station in line tossed a bag of frozen fish toward a chute leading down to the freezer.
17 There were already bags of fish in the chute area, and the newest arrival fell onto the floor, then
18 onto plaintiff’s left leg, causing him injury. Plaintiff was given ice and an anti-inflammatory on
19 board, then referred to the local clinic for medical care. He did not return to the vessel. A series
20 of orthopedic, neurologic, and general medicine appointments were inconclusive regarding the
21 cause of plaintiff’s ankle weakness and pain.

22 On January 19, 2017, plaintiff’s doctor referred him for another neurological
23 examination. Defendant authorized the examination and guaranteed payment. Nevertheless,
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25 ² The Court has not considered the unsworn declarations plaintiff submitted on September 26,
26 2017.

1 defendant stopped paying maintenance and cure as of March 31, 2017. On April 10, 2017,
2 plaintiff was evaluated by an independent medical examiner at defendant's request. In a report
3 dated April 21, 2017, the examining doctor concluded that there was nothing objectively wrong
4 with plaintiff, that his condition was fixed and stable, and that he had reached maximum medical
5 cure. Meanwhile, the neurologist to whom plaintiff had originally been referred declined to offer
6 a second opinion in the case, and defendant authorized an examination by a different neurologist
7 on May 4, 2017. There is no evidence that the examination ever took place or that plaintiff
8 received any injury-related treatment after January 19, 2017.

9 **A. MAINTENANCE AND CURE**

10 Under general maritime law, a shipowner has a duty to provide maintenance (a per diem
11 allowance for room and board) and cure (nursing and medical expenses) to a seaman who
12 "becomes ill or is injured while in the service of the ship." Vella v. Ford Motor Co., 421 U.S. 1,
13 3 (1975). Justice Story articulated the underlying policy of maintenance and cure as follows:

14 Seamen are by the peculiarity of their lives liable to sudden sickness from change
15 of climate, exposure to perils, and exhausting labour. They are generally poor and
16 friendless, and acquire habits of gross indulgence, carelessness, and improvidence.
17 If some provision be not made for them in sickness at the expense of the ship, they
18 must often in foreign ports suffer the accumulated evils of disease, and poverty,
19 and sometimes perish from the want of suitable nourishment.... On the other hand,
20 if these expenses are a charge upon the ship, the interest of the owner will be
21 immediately connected with that of the seamen. The master will watch over their
22 health with vigilance and fidelity. He will take the best methods, as well to prevent
23 diseases, as to ensure a speedy recovery from them. He will never be tempted to
24 abandon the sick to their forlorn fate; but his duty, combining with the interest of
25 his owner, will lead him to succor their distress, and shed a cheering kindness over
26 the anxious hours of suffering and despondency. Beyond this, is the great public
policy of preserving this important class of citizens for the commercial service and
maritime defence of the nation.

24 Harden v. Gordon, 11 F. Cas. 480, 483 (C.C.D. Me. 1823) (Case No. 6,047). "[L]ogically and
25 historically the duty of maintenance and cure derives from a seaman's dependence on his ship,
26

1 not from his individual deserts, and arises from his disability, not from anyone's fault." Farrell v.
2 U.S., 336 U.S. 511, 515-16 (1949).

3 In the case at hand, defendant immediately recognized its duty to provide maintenance
4 and cure for the injuries plaintiff suffered on board its vessel and made appropriate payments
5 through March 31, 2017. It now seeks a summary determination that the duty expired on or
6 before that date. In this context, where the shipowner unilaterally discontinued payments, there
7 is a presumption that maintenance and cure continues and it is the shipowner's burden to prove
8 by a preponderance of the evidence that plaintiff reached maximum cure on or before March 31,
9 2017. See Hedges v. Foss Maritime Co., 2015 WL 3451347, at * 5 (W.D. Wash. May 29, 2015).
10 Defendant has not established this fact as a matter of law. As of March 31, 2017, plaintiff
11 remained under the care of Dr. Surratt and had been referred to a neurologist. Although there
12 were complications in scheduling an appointment, Dr. Surratt's office continued to pursue
13 treatment as late as May 9, 2017, and defendant authorized evaluation and treatment for
14 neurologic-related weakness at that time. At the time it discontinued the maintenance payments,
15 there was no medical determination or factual basis from which defendant could reasonably
16 conclude that maximum medical cure had been achieved. To the extent defendant relies on the
17 opinion of the IME, the examination report was not generated until April 21, 2017, and its
18 findings could not have justified a termination of benefits three weeks earlier. In addition, there
19 is no indication that plaintiff's treating physician agrees with the IME's assessment given his
20 continuing attempts to schedule a consult. The duty to pay maintenance and cure ends when
21 "maximum possible cure has been effected, and the seaman's physical condition has become
22 fixed beyond further improvement." Gypsum Carrier, Inc. v. Handelsman, 307 F.2d 525, 532
23 (9th Cir. 1962). "When there are ambiguities or doubts [related to maintenance and cure], they
24 are resolved in favor of the seaman." Vaughan v. Atkinson, 369 U.S. 527, 532 (1962). The
25 record does not support a finding that plaintiff reached maximum medical cure, as a matter of
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1 law, on or before March 31, 2017.

2 In the alternative, defendant argues that plaintiff has forfeited any right he had to
3 maintenance and cure by failing to pursue the neurologic assessment recommended by Dr.
4 Surratt. While it is true that a seaman must act with reasonable diligence to ascertain the nature
5 of his illness and seek treatment, plaintiff did so here. He was in the midst of scheduling another
6 examination when defendant stopped paying maintenance and, presumably, cure. A shipowner
7 may not withhold payments, thereby forcing a seaman to work or to refrain from seeking care,
8 then claim an advantage from the fact. See Vaughan, 369 U.S. at 533 (“It would be a sorry day
9 for seamen if shipowners, knowing of the claim for maintenance and cure, could disregard it,
10 force the disabled seaman to work, and then evade part or all of their legal obligation by having
11 it reduced by the amount of the sick man’s earnings. This would be a dreadful weapon in the
12 hands of unconscionable employers”); Permanente S.S. Corp. v. Martinez, 369 F.2d 297,
13 301-02 (9th Cir. 1966) (considering reasonableness of the seaman’s neglect, or even outright
14 refusal, to utilize medical care offered by shipowner when determining whether a forfeiture
15 occurred). There is at least an issue of fact regarding the reasonableness of plaintiff’s failure to
16 pursue the neurological consult after defendant declared that its obligation to pay seaman’s
17 benefits had come to an end.

18 **B. UNSEAWORTHINESS**

19 Under general maritime law, defendant had an obligation to provide a seaworthy vessel,
20 one reasonably fit for its intended use. Ribitzki v. Canmar Reading & Bates, Ltd. Partnership,
21 111 F.3d 658, 664 (9th Cir. 1997). Plaintiff argues that the F/T AMERICAN #1 was
22 unseaworthy because it lacked a railing to hold bags of frozen fish on the counter when they
23 were tossed into the chute area. Plaintiff’s claim is not based on his crew mate’s poor aim or
24 some other transitory condition that arose at sea. Rather, plaintiff argues that, in the absence of a
25 railing, the chute area was unreasonably dangerous for its known and intended use of holding
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1 stacked bags of frozen fish in the Bering Sea. Although plaintiff is not entitled to a perfect work
2 space, he is entitled to a space that is reasonably suited for its intended use. Mitchell v. Trawler
3 Racer, Inc., 362 U.S. 539, 550 (1960). Plaintiff has identified a modification that may have
4 prevented an entirely predictable occurrence, namely that a 40-80 pound bag of frozen fish
5 stacked two or three high on a counter top in close proximity to the crew might dislodge and fall
6 in rough seas. Defendant makes no effort to show that such modification was impracticable or
7 would otherwise impede the work flow on the assembly line. Plaintiff is entitled to present his
8 theory of unseaworthiness to the jury for a determination whether the work space was reasonably
9 fit for the known activities and conditions the crew experienced.

10 Plaintiff also argues that the vessel was unseaworthy because the crew was not trained to
11 stop placing bags in the chute area when the space was already occupied. There is no evidence to
12 support this claim. In his deposition testimony, the only reference to the training given to the
13 baggers of fish is that they are trained to use a throwing motion to get the bags to the chute. Dkt.
14 # 13-2 at 9. The only other reference to training suggests that the risks of working in the Bering
15 Sea, in huge waves that cause everything to sway, was part of the crew's training. Dkt. # 13-2 at
16 8. This part of plaintiff's claim is based on nothing more than speculation and the fact that an
17 accident happened. A reasonable fact finder cannot conclude, based on the existing record, that
18 the crew was incompetent or otherwise unfit for their tasks.

19 **C. JONES ACT**

20 To recover on his Jones Act claim, plaintiff must show that the shipowner or one of its
21 agents "was negligent and that this negligence was a cause, however slight, of his injuries."
22 Ribitzki, 111 F.3d at 662. If plaintiff is able to show that the fish processing area was not
23 reasonably fit for its intended use, he may also be able to establish negligence. The elements of
24 Jones Act negligence are duty, breach, notice, and causation. As noted above, the shipowner has
25 a duty to provide seamen with a safe place in which to work, and if plaintiff is able to show that
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1 the lack of a protective railing in the chute area made the assembly line unsafe, the jury would
2 likely find in his favor regarding breach, notice, and causation.

3 **D. REQUESTS FOR SANCTION**

4 Plaintiff has not cited any authority or support for his request for costs and fees incurred
5 in responding to this motion. The request is denied.

6 **E. EXTENSION OF DISCOVERY DEADLINE**

7 Pursuant to Fed. R. Civ. P. 16(b)(4), case management deadlines established by the Court
8 “may be modified only for good cause and with the judge’s consent.” The case management
9 order in this case likewise states “[t]hese are firm dates that can be changed only by order of the
10 Court, not by agreement of counsel or the parties. The Court will alter these dates only upon
11 good cause shown” Dkt. # 9 at 2. Rule 16 was amended in 1983 to require scheduling
12 orders that govern pre-trial as well as trial procedure. The purpose of the change was to improve
13 the efficiency of federal litigation: leaving the parties to their own devices until shortly before
14 trial was apparently costly and resulted in undue delay. Under the new rule, once a case
15 management schedule issues, changes will be made only if the movant shows “good cause.”

16 Rule 16(b)’s “good cause” standard primarily considers the diligence of the party
17 seeking the amendment. The district court may modify the pretrial schedule “if it
18 cannot reasonably be met with the diligence of the party seeking the extension.”
19 Fed. R. Civ. P. 16 advisory committee’s notes (1983 amendment)

20 Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 609 (9th Cir. 1992). See also Zivkovic v.
21 S. Cal. Edison Co., 302 F3d 1080, 1087-88 (9th Cir. 2002) (where plaintiff failed to
22 “demonstrate diligence in complying with the dates set by the district court,” good cause was not
23 shown).

24 The case management deadlines related to discovery are set sequentially to ensure that the
25 parties can prepare for trial in an orderly manner. In this case, discovery closed on July 9, 2017,
26 and all motions seeking to compel discovery had to be filed approximately three weeks before

1 that date. Plaintiff argues that these deadlines need to be extended because defendant never
2 provided dates for deposing key witnesses, instead “sandbagging” plaintiff by discussing
3 settlement, then filing a motion for summary judgment. Dkt. # 13 at 20. There is no evidence to
4 support this extraordinary accusation. The record contains only a statement from plaintiff’s
5 counsel that he would like to depose three or four crewmen (Dkt. # 13-2 at 84) and a single
6 inquiry from defense counsel regarding the possibility of settling the case (Dkt. # 13-2 at 77).
7 There is no evidence that plaintiff did anything more than put defendants on notice that he
8 intended to take depositions: there was no request for dates, no notices, and no motion to
9 compel. A vague hope or belief that the case will settle does not excuse the failure to comply
10 with the deadlines established by the Court. Plaintiff has not demonstrated diligence. His request
11 for an extension of the discovery deadline is denied.

12 For all of the foregoing reasons, defendant’s motion for summary judgment is
13 GRANTED in part and DENIED in part. Plaintiff’s unseaworthiness claim based on the
14 incompetence or lack of training of the crew is DISMISSED. Plaintiff’s other claims may
15 proceed to trial.

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17 Dated this 26th day of October, 2017.

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20 Robert S. Lasnik
21 United States District Judge
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