NOT DESIGNATED FOR PUBLICATION

FRED MCGEE	*	**NO. 2003-CA-1984**
VERSUS	*	**COURT OF APPEAL**
TETRA APPLIED TECHNOLOGIES, INC. AND TEXACO, INC.	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2001-1265, DIVISION "G-11"
Honorable Robin M. Giarrusso, Judge
* * * * * *
Judge Patricia Rivet Murray
* * * * * *

(Court composed of Chief Judge Joan Bernard Armstrong, Judge Patricia Rivet Murray, Judge David S. Gorbaty)

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APPEAL DISMISSED WITHOUT PREJUDICE IN PART, AND JUDGMENT OF TRIAL COURT AFFIRMED IN PART

Plaintiff/appellant Fred McGee (McGee) appeals an August 6, 2003 judgment of the trial court dismissing his Jones Act claim against defendant Tetra Applied Technologies, Inc. (Tetra). In addition, McGee seeks to appeal a purported judgment dismissing his general maritime negligence claims against defendant Texaco, Inc. (Texaco).

FACTS AND PROCEDURAL HISTORY

McGee injured his hand and wrist on December 11, 1999, while employed by Tetra and while working aboard a fixed platform owned by Texaco. On January 23, 2001, he filed this suit against Tetra and Texaco under the Jones Act, the general maritime law, and the savings to suitors clause, seeking general damages and maintenance and cure benefits. He alleged that the defendants were negligent and that they had created and maintained an unseaworthy vessel.

On March 16, 2001, the defendants removed the matter from the Civil District Court for the Parish of Orleans to the United States District Court, Eastern District of Louisiana, on the basis of federal question jurisdiction. Tetra claimed that, as McGee's employer, it was immune from suit pursuant

to the Longshore and Harborworker's Compensation Act (the Longshore Act), and that it had been fraudulently joined as a defendant to avoid removal to federal court. More specifically, Tetra alleged that McGee had fraudulently pled Jones Act status as he was not a seaman. Further, the defendants averred that the accident had occurred on a fixed platform, not on a rig or vessel as alleged by McGee in his petition. The petition for removal was supported by affidavits from Tetra's Safety Manager, Dennis Bourque, and one of Tetra's toolpushers, Tim Womack.

In response, McGee filed a motion to remand the matter to state court. The plaintiff acknowledged that his accident had occurred on a fixed platform, rather than on a vessel. Nevertheless, he claimed seaman status on the basis of his previous work assignments, supplying the court with an affidavit wherein he stated that he had been assigned to various vessels during more than 90% of his six-month employment with Tetra. McGee further submitted that Tetra's actions following his injury failed to support Tetra's claim that he was not a seaman, and that removal was proper. More specifically, McGee claimed that Tetra had a legal obligation through the Department of Labor (the Department) to file an Employer's First Report of Injury or Occupational Illness. Nevertheless, he submitted correspondence between his counsel and the Department indicating that there had been no

injury claim filed under the Longshore Act on his behalf relating to the subject accident. McGee argued that it was entirely inconsistent for Tetra to now claim that he was a longshoreman at the time of his injury when it had previously failed to comply with the reporting requirements of the Department.

By order dated August 29, 2001, the federal district court remanded this matter to Orleans Parish Civil District Court, finding that the state court could have reasonably determined that McGee was a seaman.

Upon remand, Tetra and Texaco filed a motion for summary judgment regarding McGee's alleged seaman status. Tetra claimed that because the plaintiff was not a seaman at the time of the accident, his exclusive remedy against it, as his employer, was under the Longshore Act, and thus, plaintiff's claims against it under the Jones Act and the general maritime law should be dismissed. While the bulk of the motion related to seaman status, Texaco submitted, in the final two sentences of the motion, that the claims against it should be dismissed as well, as McGee had failed to allege any operational negligence on its part. Texaco claimed that plaintiff's allegation that it had failed to provide a seaworthy vessel was inapplicable because no vessel was involved in the accident. Plaintiff opposed defendants' motion.

Following a hearing on July 25, 2003, the trial court on August 6,

2003, granted summary judgment in favor of Tetra. In its reasons for judgment, the court found that McGee "cannot satisfy the modern test for seaman status by alleging previous work assignments on vessels", citing Harbor Tug and Barge Company v. Papai, 520 U.S. 548, 117 S.Ct. 1535 (1997), wherein the U.S. Supreme Court found that an employee's status is to be determined by reference to the shorter, post-reassignment period and not to his entire employment with the employer.

McGee timely filed a motion for new trial and/or reconsideration regarding the court's grant of summary judgment in favor of Tetra. The motion was denied *ex parte* on August 19, 2003.

McGee filed a petition for devolutive appeal, seeking to appeal from the August 6, 2003 judgment dismissing his Jones Act claim against Tetra, as well as the subsequent denial of his motion for new trial in regard to that judgment. McGee "further [sought] to appeal the Court's partial Judgment dismissing as a matter of law defendant Texaco, Inc."

DISCUSSION

The initial issue that we must address in this appeal is whether McGee may properly appeal the trial court's dismissal of Texaco. We have conducted a thorough review of the record and can find no judgment disposing of the motion for summary judgment as it relates to Texaco. No

such judgment is attached to either McGee's petition for devolutive appeal or to his appellant brief filed in this court. Counsel for appellees states in his brief to this court that the trial judge granted Texaco's motion for summary judgment from the bench following the hearing on July 25, 2003. The record on appeal does not include a transcript from the July 25, 2003 hearing, however, and the parties have not made reference to any such transcript, should one actually exist.

The judgment rendered and signed is what forms the basis of the appeal in any case; in its absence the appeal will not lie. Kling v. De Armand, 57 So. 2d 233, 234 (La. App. 1 Cir. 1952)(citing Vidrine v. Soileau, 33 So. 2d 107 (La. App. 1 Cir. 1947). In La Frenz v. La Baw, 21 So. 2d 71, 72 (La. App. 2 Cir. 1945), the orders of appeal were granted from a "ruling" of the Court, and not from any judgment, and as a matter of fact, no judgment existed. Our brethren on the second circuit held that "[i]t is elementary that a judgment is the basis of an appeal, and, accordingly, there is nothing before this Court for determination." The appeal was then dismissed at the appellant's cost. More recently, relying on La. C.C.P. arts. 1911 and 2083, the Second Circuit in McElwee v. McElwee, 244 So. 2d 35, 36 (La. App. 2 Cir. 1971), ruled that because an appeal is premature in the absence of a signed judgment in the record, an appellate court should

dismiss any such appeal *ex proprio motu*.

Accordingly, because no signed judgment appears in the record in relation to the trial court's supposed grant of summary judgment in favor of Texaco, we dismiss as premature that portion of plaintiff's appeal, without prejudice.

Because the August 6, 2003 judgment granting summary judgment in favor of Tetra appears to have dismissed all of the claims against it, as alleged in McGee's petition, that judgment is a final judgment subject to immediate appeal pursuant to La. C.C.P. art. 1915(A)(3). We thus turn to a discussion of whether summary judgment was properly granted in favor of Tetra.

In his sole assignment of error in relation to Tetra, McGee asserts that the trial court erred in granting summary judgment denying his seaman status.

Appellate courts review summary judgment *de novo*, using the same criteria applied by trial courts to determine whether summary judgment is appropriate. Independent Fire Ins. Co. v. Sunbeam Corp., 99-2181, 99-2257, p.7 (La. 2/29/00), 755 So. 2d 226, 230. The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of actions. The procedure is favored and shall be construed to

accomplish these ends. La. C.C.P. art. 966 A(2). After adequate discovery or after a case has been set for trial, summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966 B and C.

According to La. C.C.P. art 966 C(2):

> The burden of proof remains with the movant. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact.

This court discussed seaman status at length in Waller v. American Seafoods Co., 97-0302, pp.3-5 (La. App. 4 Cir. 10/1/97), 700 So. 2d 1306, 1308-1309:

> There are two essential requirements for seaman status. First, the employee's duties must contribute to the function of the vessel or to the accomplishment of its mission. Second, a seaman must have an employment related connection to a vessel in navigation. McDermott Intern., Inc. v. Wilander, 498 U.S. 337, 355, 111 S.Ct. 807, 817, 112 L.Ed.2d 866 (1991). It is

> not the employee's particular job that is determinative, but the employee's connection to a vessel. Wilander, supra, 498 U.S. at 354, 111 S.Ct. at 817.
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> The inquiry into the nature of the employee's connection to the vessel must concentrate on whether the employee's duties take him to sea and prior work history with the employer may not affect the status inquiry if the injury occurred on an assignment with different essential duties than his previous assignment. Harbor Tug and Barge Co. v. Papai, 520 U.S. 548, 117 S.Ct. 1535, 1540, 137 L.Ed.2d 800 (1997).

We begin our analysis of whether McGee was a seaman at the time of his accident by examining the United States Supreme Court's decision in Harbor Tug and Barge Company v. Papai, 520 U.S. 548, 117 S.Ct. 1535 (1997). As evidenced in its written reasons for judgment, the trial court relied upon Papai to provide the modern test for determining seaman status. Moreover, in his brief to this court, McGee refers to Papai as the seminal case on the subject, and he acknowledges that it applies to the issue before this court.

In Papai, a deckhand was injured while painting a tug and brought suit against his employer, Harbor Tug and Barge Company (Harbor Tug), claiming negligence under the Jones Act. Harbor Tug had employed Papai on twelve previous occasions in the two and one-half months before his injury, having received those jobs through a boatman's union hiring hall. In addition, Papai had been getting short-term jobs with various vessels

through the hiring hall for about two and one-half years, most of which jobs involved deckhand work. The job on which he was working the day of the accident was expected to last one day and would not involve sailing with the vessel.

The District Court granted summary judgment in favor of Harbor Tug , finding that Papai was not a seaman, and plaintiff appealed. The Ninth Circuit reversed and remanded for a trial of, among other things, Papai's seaman status, holding that the issue presented a question for the jury to decide. The Supreme Court granted Harbor Tug's writ of certiorari to determine whether the record would permit a reasonable jury to conclude that Papai was a Jones Act seaman. The Court stated that the writ was granted to provide clarification of a statement it had made in Chandris Inc. v. Latsis, 515 U.S. 347, 368, 115 S.Ct. 2172, 2189-2190 (1995), that a worker may establish seaman status based on the substantiality of his connection to "an identifiable group of … vessels" in navigation.

In denying Papai seaman status, the U.S. Supreme Court held that an employee's prior work history with a particular employer does not affect the seaman status inquiry if the employee was injured on a new assignment with the same employer, where such assignment entails different essential duties from his previous assignments. In other words, the Court found that the

inquiry into the nature of the employee's duties for seaman-status purposes may concentrate on a narrower period than the employee's entire employment with his current employer. Papai, 520 U.S. at 556-557, 117 S.Ct. at 1541.

In the case at hand, McGee was injured on December 11, 1999 while performing plug and abandon (P & A) work on Texaco High Island 582-C (582-C platform), a fixed platform located on the Outer Continental Shelf. More specifically, he was working on the floor of the platform attempting to latch an elevator when a set of power tongs swung toward the elevator and struck his left hand.

According to McGee's own deposition, his stint on the 582-C platform began on December 8, 1999. While on this job, McGee assisted a welder for three days. He was then instructed to assist with the operation being conducted with the platform crane. Another worker, named Nate, had told him what the elevators were and how to operate them. The accident occurred approximately forty-five minutes after McGee had begun operating the elevators.

Prior to his assignment on the 582-C platform, McGee had performed as a roustabout on two barge rigs in Tetra's inland drilling division. His duties were limited to entry-level roustabout/manual labor type work such as

painting and chipping, washing down the deck, and loading groceries.

Tetra premised its motion for summary judgment on its assertion that at the time of his accident, McGee had been reassigned from its inland drilling division to its offshore P & A division, which performed jobs on fixed platforms. Citing St. Romain v. Industrial Fabrication and Repair Service, Inc., 203 F.3d 376 (5th Cir. 2000), Tetra submitted that the federal Fifth Circuit has specifically held that a "plug and abandon" helper on an offshore platform, such as McGee, is not a seaman. Tetra further pointed out that since the federal district court's remand of the instant matter, that same court had applied Papai and St. Romain to deny seaman status to a Tetra P & A worker injured on a fixed platform. Bourque v. Chevron USA, Inc., 2003 WL 21276356 (E.D. La. 6/2/2003) (not reported in F. Supp 2d.).

In support of its motion, Tetra submitted an affidavit from Dennis Bourque, its Safety Manager. Bourque stated that McGee had been hired by Tetra in anticipation of Tetra's being able to obtain future plug and abandon jobs from Texaco. He stated that McGee was working as a roustabout on the date of the accident, assisting other Tetra employees in pulling pipe from a well on Texaco's High Island 582-C in preparation for a plug and abandon job. He stated that the 582-C is not a vessel and that no Tetra rig was involved on the 582-C job. Tetra also supplied an affidavit from Tim

Womack, a toolpusher whom it employed, which basically echoed the statements of Bourque.

In opposing Tetra's motion for summary judgment, McGee argued that he had only been temporarily assigned to the 582-C platform. He claimed to have been specifically told by Tetra employee "Chubby" Thibodeaux that the assignment to Texaco's 582-C was temporary. He pointed out that he had worked on four different vessels during his employment with Tetra, including a brief period of time following his accident, resulting in more than 50% of his employment being spent aboard vessels. McGee stated that he was told during the hiring process that he was being hired as a roustabout to work in Tetra's inland drilling division aboard its rigs. He noted that in the post-accident forms completed by both Texaco and Tetra, he was listed as a roustabout at the time of his injury. Attached to McGee's opposition was a copy of his Motion to Remand from federal court back to state court, his own affidavit, excerpts from his deposition, copies of accident reports completed by Tetra and Texaco, a copy of a medical history questionnaire statement on which he listed the position to which he was applying at Tetra as a roustabout, along with a copy of his notice of separation from Tetra listing his title as that of roustabout, and correspondence between his attorney and the Department of Labor which

indicated that Tetra had not filed an injury claim under the Longshore Act on behalf of Fred McGee.

Tetra filed a reply to McGee's opposition, arguing that McGee's claim to seaman status rested on two patently false premises: the first being that Papai required that an employee be permanently reassigned in order for his seaman status to be determined by his post-reassignment job duties; the second being McGee's claim that his essential duties remained the same when he was assigned to the 582-C platform. In challenging McGee's first premise, Tetra offered the following quote from Papai:

> In any event, the context of our statement in *Chandris* makes clear our meaning, which is that the employee's prior work history with a particular employer may not affect the seaman inquiry if the employee was injured on a new assignment with the same employer, an assignment with different "essential duties" from his previous ones. Papai, 520 U.S. at 556.

With regard to McGee's second premise, Tetra submits that McGee's own testimony clearly established that even if his title of roustabout did not change, his assignment, location, situs, status and essential job duties certainly did. More specifically, it pointed to McGee's statements in his deposition that prior to his assignment to the 582-C platform, his duties were limited to entry-level manual labor/roustabout work, including loading/unloading groceries and cargo, and washing the deck, and that after his Texaco assignment, he had to be instructed on how to operate the

elevators and other tools and equipment on the platform. Tetra also submitted deposition testimony from Billy Ray Chandler, a toolpusher employed by Tetra. According to Chandler, the job of roustabout on a rig barge is completely different from that of a platform floor hand. While a roustabout cleans and paints, offloads supplies, and does general maintenance, a floor hand operates the elevators and tongs as part of a platform P & A operation. He stated that normally there are no roustabouts on a platform job, unless they are being promoted to floor hand and are receiving training.

Tetra admitted that although it agreed with McGee's statement that he had not been permanently assigned to the 582-C platform at the time of his injury, such fact is of no moment as none of Tetra's offshore platform P & A workers are assigned to any particular platform. Tetra attached to its reply memorandum the affidavit of Ronald Thibodeaux, Tetra's rig superintendent. Thibodeaux stated that prior to his December 11, 1999 accident, he had personally reassigned McGee from inland rig work, where McGee had been temporarily assigned to various P& A barges for training, to offshore platform work. While admitting that he did not tell McGee that he was permanently assigned to Texaco's High Island 582-C platform, Thibodeaux stated that none of Tetra's offshore platform P & A workers are

permanently assigned to any particular platform. He explained that Tetra performed P & A work for its customers on various offshore platforms as needed, with the work assignments lasting as long as the job, from a few days to many months. Thibodeaux stated that when McGee was assigned to platforms, Tetra expected future additional platform work from Texaco, both in the High Island field and elsewhere in the Gulf of Mexico, and that McGee's offshore platform crew assignment was expected to last as long as the work held out.

Finally, Tetra dismissed McGee's assertion that his having worked on a barge rig for several days after his accident created a fact issue as to his seaman status at the time of his injury. It explained that because McGee's doctor had released him to restricted duty, his duties had changed once again, with McGee working on a rig for several days, while the remainder of his work for Tetra was performed in Houma on land. In summary, Tetra submitted that McGee had been reassigned and was working as an offshore platform P & A worker at the time of his injury, and that he had no connection with any vessel that could be classified as substantial in nature and duration. Accordingly, Tetra argued that there were no disputes as to any material facts that bore upon the issue of McGee's seaman status, thereby entitling it to summary judgment as a matter of law.

We conclude that the trial court properly granted summary judgment in favor of Tetra. Tetra clearly submitted sufficient evidence to show that McGee lacked factual support for his claim of seaman status. The burden then shifted to McGee to prove that he would be able to satisfy his evidentiary burden of proof at trial. The law on seaman status requires that McGee prove that his duties contributed to the function of the vessel or to the accomplishment of its mission, and that he had a connection to a vessel, or group of vessels, in navigation that was substantial in terms of both nature and duration. McGee argues that his pre- and post-accident associations with various vessels owned by Tetra should be taken into account in determining whether he should enjoy seaman status. We disagree. McGee's own testimony clearly reveals that his injury occurred after he had been given a new assignment with dramatically different duties from those given to him on his previous assignments. McGee has produced no evidentiary support for his arguments to the contrary. We agree with Tetra's assertion that Papai does not require that McGee's reassignment be permanent. We further agree that it is of no moment that McGee worked on a vessel several days after his accident, as Tetra explained that McGee's duties had to be changed again following his doctor's order that he be placed on restricted duty. In that same vein, we attach no significance to the fact that Tetra listed

McGee's title as that of roustabout in its accident report and in McGee's notice of separation. What is of vital importance is that shortly before McGee's injury, his job had been significantly altered. He had been reassigned from a roustabout working on inland rigs to a floor-hand doing P & A work on an offshore platform, and his duties had changed from manual labor, such as unloading groceries and washing down the deck, to that of a member of a P & A crew pulling pipe from a platform. As a P & A worker, McGee had no connection to any vessels.

The trial court correctly concluded that McGee cannot satisfy the modern test for seaman status, as enunciated by the U.S. Supreme Court in Papai.

CONCLUSION

Because no signed judgment appears in the record in relation to the trial court's supposed grant of summary judgment in favor of Texaco, we dismiss as premature that portion of plaintiff's appeal, without prejudice.

Tetra successfully proved that no genuine issues of material fact exist as to McGee's status as a seaman. Accordingly, we affirm the trial court's grant of summary judgment in favor of Tetra.

APPEAL DISMISSED WITHOUT PREJUDICE IN PART, AND

JUDGMENT OF TRIAL COURT AFFIRMED IN PART