Taveniere v American Export Lines
2013 NY Slip Op 31850(U)
August 6, 2013
Sup Ct, New York County
Docket Number: 107016/08
Judge: Sherry Klein Heitler
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SCANNED ON 8/12/2013

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SHERRY KLEIN HEITLER
Justice

PART 30

WARREN W. TAVENIERE,

Plaintiffs,

- v -

AMERICAN EXPORT LINES f/k/a
FARRELL LINES INCORPORATED, et al.,

Defendants.

INDEX NO. 107016/08

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

The following papers, numbered 1 to ____ were read on this motion to/for ____________

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

This motion is decided in accordance with the memorandum decision dated Aug 6, 2013

FILED
AUG 12 2013
COUNTY CLERK'S OFFICE
NEW YORK

Dated: Aug 6, 2013

SHERRY KLEIN HEITLER J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

-- X

WARREN W. TAVENIERE,

Plaintiffs,

-against-

AMERICAN EXPORT LINES f/k/a
FARRELL LINES INCORPORATED, et al.,

Defendants.

-- X

Index No. 107016/08
Motion Seq. 002

DECISION & ORDER

FILED
AUG 12 2013
COUNTY CLERK'S OFFICE
NEW YORK

SHERRY KLEIN HEITLER, J.:

In this asbestos personal injury action, defendant Farrell Lines Incorporated ("Farrell") moves pursuant to CPLR § 3212 for summary judgment dismissing the complaint and all other claims asserted against it on the ground that plaintiff failed to duly serve Farrell with the summons and complaint herein and because there is no evidence to show that Farrell is liable for plaintiff's injuries under federal maritime law.

Plaintiff Warren W. Taveniere, now deceased[1], commenced this action on May 20, 2008 to recover for asbestos-related injuries sustained, in part, while serving as a United States Merchant Marine. It is undisputed for purposes of this motion that Farrell is responsible for two of the vessels upon which Mr. Taveniere sailed during the mid-1950's, the USS Constitution and the USS Explorer.

Service of the summons and complaint herein was effectuated upon Farrell pursuant to New York's Business Corporation Law ("BCL") § 306, which provides that service of process

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[1] Plaintiff is directed to take appropriate action so that the caption of this case can be amended.

on a domestic or authorized foreign corporation together with the statutory fee is complete once two copies thereof have been served on New York's Secretary of State. Defendant argues that plaintiff's claims against it must be dismissed for lack of personal jurisdiction because, as a foreign corporation not authorized to do business in New York, service upon it is governed by BCL § 307, which imposes different service requirements upon non-domiciliaries such as Farrell.[2]

BCL § 307, in addition to service upon the Secretary of State as set forth in BCL § 306, requires that notice of such service and copies of the summons and complaint be either delivered personally to the foreign corporation or sent to the foreign corporation by registered mail, return receipt requested. (BCL § 307(b)(1) and (2)). It is undisputed that Farrell was not served pursuant to BCL § 307 in this case, nor that Farrell is a non-domiciliary corporation subject to the requirements of BCL § 307.Defendant contends that plaintiff's counsel was advised of the lack of proper service upon it but did not correct it, and that the time to properly serve the defendant has now passed.

While strict compliance with BCL procedures is ordinarily required to effect service upon a foreign corporation, (*Flick v Stewart-Warner Corp.*, 76 NY2d 50, 57 [1990]), plaintiff correctly points out that "an objection that the summons and complaint ... was not properly served is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading, unless the court extends the time upon the ground of undue hardship." CPLR 3211(e). Defendant answered the complaint on November 7, 2008 and preserved therein its affirmative defense of improper service. However,

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[2] The defendant is a Delaware corporation with it's principal place of business in New Jersey.

defendant failed to move for dismissal within the prescribed sixty days, nor has it made any showing of undue hardship so as to extend its time to move on that ground pursuant to the statute. Therefore, defendant's improper service defense has been waived, and defendant's request for summary judgment on that ground is denied.

Defendant also argues that it is entitled to summary judgment because it did not have the opportunity to depose Mr. Taveniere before he died and plaintiff has failed to provide any admissible evidence to show that Mr. Taveniere was exposed to asbestos while serving as a Merchant Marine aboard one of its vessels.

Mr. Taveniere's deposition was commenced on July 30, 2008 in Fishkill, New York. Plaintiff's counsel adjourned the deposition after approximately three hours of testimony, before plaintiff's counsel or defendant had an opportunity to question Mr. Taveniere. The deposition was adjourned and rescheduled ten times over the next two years. It was eventually scheduled for March 18, 2010.[3] On March 9, 2010, however, the deposition was adjourned to a date "yet to be determined."[4] No further date was ever established, and more than two years later in or about November of 2012, the plaintiff died. At his deposition, which among others was attended by a Farrell representative, Mr. Taveniere testified that during his third year at the Merchant Maritime Academy he spent approximately two months traveling aboard the USS Explorer cargo ship as an engine cadet where he was exposed to asbestos from gasket and packing material. Defendant asserts that this incomplete, uncross-examined testimony is inadmissible and may not be considered by the court.

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3 Defendant's exhibit E.

4 Defendant's Exhibit F.

This matter is subject to federal maritime law, namely the Jones Act which provides a right of action by a seaman against a shipowner for personal injuries sustained in the course of his employment due to the shipowner's negligence. 46 U.S.C. § 30104. A shipowner also has an absolute duty to furnish a seaworthy ship, which duty is "completely independent of his duty under the Jones Act to exercise reasonable care," (*Scoran v Overseas Shipholding Group, Inc.*, 703 F. Supp. 2d 437, 447 [SDNY March 31, 2010] quoting *Mitchell v Trawler Racer, Inc.*, 362 U.S. 539, 549 [1960]), and requires an owner "to furnish a ship, crew, and appurtenances reasonably fit for their intended service." *Oxley v New York*, 923 F.2d 22, 24 (2d Cir. 1991).

Defendant argues that the only evidence offered by plaintiff in this case against it is plaintiff's unverified complaint, his unverified interrogatories, and an incomplete and inadmissible deposition transcript. In this regard, defendant asserts that plaintiff cannot sustain a cause of action against it under either the Jones Act or the common law duty to provide a seaworthy vessel because there is no admissible evidence that may be considered by the court that Mr. Taveniere was exposed to asbestos during his employment on the defendant's vessels.

Plaintiff contends that the issue whether or not Mr. Taveniere's deposition testimony is admissible for purposes of trial is really in the nature of a motion *in limine* that is more properly made before the judge assigned to the trial of this matter, but for purposes of this motion it may be considered. *See Oken v A.C.&S.*, 7 AD3d 285, 285 (1st Dept 2004) (courts may consider hearsay evidence in opposition to a summary judgment motion so long as it does not form the sole basis for the court's determination). Plaintiff further argues that while defendant did not get to cross-examine Mr. Taveniere, it sat on its rights to do so without objection while the deposition was repeatedly adjourned, and thus waived its right to cross-examination.

"[T]he 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 demonstrate the absence of any material issues of fact." *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). "Once this showing has been made . . . the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Id.* Unlike the proponent, however, the non-moving party is not required to prove his claim to defeat summary judgment. *Ferrante v American Lung Ass'n*, 90 NY2d 623, 630 (1997); *see also Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957) ("issue-finding, rather than issue-determination, is the key to the procedure") (citation omitted).

Summary judgment is a "drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue of fact . . . or where such issue is even arguable . . . ." *Tronlone v Lac d'Amiante Du Quebec*, 297 AD2d 528, 528-29 (1st Dept 2002) (citations omitted). All reasonable inferences should be resolved in the non-movant's favor. *Dauman Displays, Inc. v Masturzo*, 168 AD2d 204, 204 (1st Dept 1990).

I find that under the unique circumstances of this case summary judgment would be premature. It has not been made clear to this court what, if any, developments regarding this case took place during the more than two years following the March 9, 2010 indefinite adjournment of Mr. Taveniere's deposition, including who requested such adjournments, or whether anyone, including the defendant, attempted to re-notice his deposition during such period. Similarly, it is unclear whether the parties knew of Mr. Taveniere's failing health and whether they sought to complete his deposition in light of same. *See Duttle v Bandler & Kass*, 127 FRD 46, 49 (SDNY

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July 6 1989) ("counsel had ample opportunity to cure any problems resulting from the inconvenient scheduling of the deposition by arranging for cross examination at some later time.").

Defendant notes that the discovery schedule for this case called for the completion of depositions by December 12, 2012.[5] In light of the foregoing, however, and in the interests of justice, plaintiff's counsel and defendant's counsel should be permitted to conduct further discovery on the issues.

Accordingly, it is hereby

ORDERED that Farrell Lines Incorporated's motion for summary judgment is denied; and it is further

ORDERED that the parties are directed to promptly coordinate their discovery with the Special Master but in no even later than 30 days from the date hereof.

This constitutes the decision and order of the court.

FILED

AUG 12 2013

COUNTY CLERK'S OFFICE
NEW YORK

DATED: Aug. 6, 2013

SHERRY KLEIN HEITLER
J.S.C.

[5] This matter is included in the February 2013 FIFO cluster, the discovery schedule for which can be found at the NYCAL website, http://nycal.net/FIFO.htm.