UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 93-3894

Summary Calendar

DAVID J. DAUZAT, ET. AL.,

Plaintiffs,

DAVID J. DAUZAT, individually and on behalf of Phillip Joel Dauzat,

Plaintiff-Appellant,

versus

MASSMAN CONSTRUCTION COMPANY, ET. AL.,

Defendants,

MASSMAN CONSTRUCTION COMPANY, and LUHR BROS., INC.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana

(CA-92-1413-M)

(January 24, 1995)

Before JONES, BARKSDALE and BENAVIDES, Circuit Judges:

BENAVIDES, CIRCUIT JUDGE:*

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

The appellant, David Dauzat ("Dauzat"), appeals the district court's granting of summary judgment dismissing his Jones Act (46 U.S.C.App. § 688), and General Maritime Law suit against the appellees Massman Construction Company ("Massman"), Luhr Brothers, Inc. ("Luhr"), and Massman-Luhr, A Joint Venture ("M-L"). The principal issue in this appeal is whether Dauzat raised a fact issue as to his status as a seaman in order to maintain his action under the Jones Act. Finding that the district court correctly granted summary judgment, we affirm.

FACTS AND PROCEDURAL HISTORY

Massman and Luhr together formed a joint venture, M-L, to fulfill the terms of a contract with the U.S. Army Corps of Engineers to enlarge and refurbish the stilling basin of the Wilbur D. Mills Dam on the Arkansas River near Dumas, Arkansas. M-L pursued this endeavor by cutting holes in the decks of old barges and filling them with concrete. M-L then sunk the barges on the bed of the river, thereby refurbishing the stilling basin.

On October 8, 1990, M-L hired Dauzat to work on the dam as a field engineer. Later, Dauzat technically became an employee of Massman (a change in payrolls but not in duties). Dauzat was responsible for surveying the land-based office park where M-L's office trailers and equipment for the project were located. Dauzat also performed topographical, hydrographic, and cross-sectional surveys of the dam area. He sometimes performed soundings of the water depths around the dam to determine exactly where the barges would be sunk. Dauzat also installed control lines and ascertained

the specific coordinates of where items and equipment would have to be placed in the river and along the bank. Finally, Dauzat prepared the barges for sinking and assisted in moving the barges.

On June 10, 1991, Dauzat boarded a concrete-filled barge to check certain measurements of the barge. While walking on the barge, he fell and injured his back, allegedly because of the negligence of M-L employees. On February 24, 1992, Dauzat filed a Jones Act and General Maritime Law suit against Massman and Luhr in the United States District Court for the Eastern District of Louisiana. Massman and Luhr responded with Motions to Dismiss and/or for Summary Judgment. On March 22, 1993, the district court granted the motions, holding that Dauzat was not a seaman under the Jones Act. The district court also held that Luhr was neither an employer of Dauzat nor the owner or operator of the barge on which he was injured. The district court then entered judgment dismissing Dauzat's claims against Massman and Luhr with prejudice.

On March 23, 1993, Dauzat filed a First Amended Complaint against M-L.[1] On November 2, 1993, M-L filed a Motion to Dismiss and/or for Summary Judgment. On January 4, 1994, the district court granted the motion, finding that M-L, as an employer of Dauzat, was entitled to tort immunity pursuant to the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 905(a).

[1]In its March 22, 1993 decision dismissing the claims against Massman and Luhr, the district court reserved Dauzat's right to proceed with his lawsuit against M-L.

Dauzat appeals the district court's rulings on the actions against Massman and M-L.[2] Dauzat attacks the basis of the summary judgment, contending that (1) he is a seaman under the Jones Act; and (2) M-L cannot be deemed an employer entitled to tort immunity under the LHWCA.

STANDARD OF REVIEW

Appellate courts review summary judgments *de novo*, applying the same standard as the district court. Bodenheimer v. PPG Industries, Inc., 5 F.3d 955, 956 (5th Cir. 1993). Summary judgment shall be rendered if there is no genuine issue of material fact and if the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). In making its determination, the court must draw all justifiable inferences in favor of the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

ISSUES

I. Seaman

Ruling on Massman's summary judgment motion, the district court dismissed Dauzat's action against Massman because it found that Dauzat was not a seaman. Under the Jones Act, only a seaman may recover, and the burden of proving seaman status rests with the party asserting the status. Bernard v. Binnings Constr. Co., Inc., 741 F.2d 824, 827 (5th Cir. 1984). Although this question of fact

[2]Because Dauzat's brief is vague on whether he seeks reversal of the dismissal of his action against Luhr and because Dauzat has not assailed an independent basis relied upon by the district court in granting summary judgment in favor of Luhr, we proceed with the assumption that Dauzat has abandoned the appeal of the district court's granting of summary judgment in favor of Luhr.

is usually reserved to the jury, under certain circumstances summary judgment is appropriate. "The question of whether a particular person is a seaman is ordinarily a question of fact for the jury. . . . However, summary judgment may be appropriate where `the facts establish [the lack of seamen status] beyond question as a matter of law' and no reasonable evidentiary basis exists to support a jury finding that the injured person is a seaman." Ellender v. Kiva Constr. & Engineering, Inc., 909 F.2d 803, 805 (5th Cir. 1990).

In deciding whether the issue should go to the jury, the court must undertake a two-step analysis.

> [T]here is an evidentiary basis for a Jones Act case to go to the jury: (1) if there is evidence that the injured workman was assigned permanently to a vessel (including special purpose structures not usually employed as a means of transport by water but designed to float on water) or performed a substantial part of his work on the vessel; and (2) if the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips.

Offshore Company v. Robison, 266 F.2d 769, 779 (5th Cir. 1959). Here, the first prong is at issue. In order to satisfy this first requirement, the individual must meet one of the two prongs: he must either be permanently assigned to the vessel or have performed a substantial part of his work on the vessel. Dauzat argues that he was permanently assigned to a skiff, and in the alternative, he also performed a substantial part of his work on board a fleet of tugs and barges owned by M-L and used in all phases of the project.

A. Skiff. Dauzat first focuses on the skiff and the permanent assignment clause of the Robison analysis. Dauzat argues that he was assigned to the 20-foot skiff in order for him to perform his duties, as the skiff carried the equipment necessary for the soundings and the surveys. Dauzat points to his affidavit in which he states that he was the only person authorized to use the skiff, that he had control over the keys of the skiff, that he was responsible for the maintenance and upkeep of the skiff, that he was the pilot and navigator of the skiff, that the skiff was necessary for conducting the hydrographic surveys, and that he transported personnel and materials from vessel to vessel on the skiff.

In granting summary judgment against Dauzat, the lower court held "that the time plaintiff spent on board the skiff as a percentage of his job was not near substantial enough to constitute `permanent assignment.'" Minute Entry, March 22, 1993, at 3. The summary judgment evidence establishes that Dauzat spent only two percent of his working time on board the skiff. Dauzat argues that the lower court erred in focusing on the percentage of time he spent on board the skiff, a factor that should apply only to the substantial work prong.

Although there are many cases in which the percentage of time spent on board the vessel is a factor that applies to the substantial work prong, see, e.g., Easley v. Southern Shipbuilding Corp., 965 F.2d 1, 4-5 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 969 (1993); Barrett v. Chevron, U.S.A., Inc., 781 F.2d 1067, 1076

(5th Cir. 1986), none of these cases hold that this factor exclusively applies to this prong. Instead, it appears that the analysis of the substantial work prong is identical to the permanent assignment prong, except that a formal assignment to the vessel is not necessary with the latter. For example,

> [t]his circuit has given the term "permanent" . . . an extensive judicial gloss. We have said that, in order to prove "substantial work" equivalent to permanent assignment "it must be shown that [the claimant] performed a significant part of his work aboard the vessel with at least some degree of regularity and continuity." We have also described the necessary relationship as one "evincing a vessel relationship that is substantial in point and time and not merely spasmodic." In perhaps the broadest description we have said, "[T]he permanency requirement is, we think[,] best understood as indicating that in order to be deemed a `seaman' within the meaning of the Jones Act `a claimant [must] have more than a transitory connection' with a vessel or a specific group of vessels."

Barrett v. Chevron, U.S.A., Inc., *supra*, at 1073-74 (footnotes omitted). Accordingly, we see no reason why the percentage of time spent on board a vessel cannot be a key factor for determining whether an individual has been permanently assigned to a vessel. Indeed, we utilized the percentage factor in Palmer v. Fayard Moving & Transp. Corp., 930 F.2d 437 (5th Cir. 1991), where we determined that, "[o]bviously, Palmer was not permanently assigned to the" vessel, because she spent only nineteen percent of her working time aboard the vessel, id. at 439.

Accordingly, because Dauzat spent only two percent of his working time aboard the skiff, he was not permanently assigned to the skiff and the trial court was correct in so holding.

B. Tugs and Barges. Dauzat next argues that he performed a substantial part of his work, such as soundings, on board a fleet of tugs and barges. Dauzat points to his affidavit in which he states that he charted the river for the tugs and barges, that he was responsible for making sure that the vessels did not run aground, that he tied up and helped move the barges around the project site, that after he became a salaried employee of Massman, he spent the majority of his time on the water, that he painted and stenciled the vessels, and that he assisted as necessary aboard the tugs and barges. Dauzat also testified that he ate and slept on board these vessels "several times."

In denying Dauzat's argument here, the lower court held that Dauzat's connection to the tugs and barges "was essentially transitory in nature." Staying on board the vessels for an extended period of time is an important factor in determining seaman status. In Ardoin v. J. Ray McDermott & Co., 641 F.2d 277 (5th Cir. 1981), for example, the court reversed the lower court's granting of summary judgment against Ardoin, emphasizing in part that the work always required that he eat and sleep on one of the barges and that he would often have to remain on the barge for more than a few days at a time, id. at 282. In White v. Valley Line Co., 736 F.2d 304 (5th Cir. 1984), although White spent approximately fifty percent of his time working on the barges, the court affirmed the granting of summary judgment against him because White ate on shore and went home every night, id. at 307. In Buras v. Commercial Testing & Engineering Co., 736 F.2d 307 (5th Cir.

1984), although Buras spent seventy-five percent of his time working on a vessel, the court held that he was not entitled to seaman status, in part because he "neither ate nor slept aboard a vessel," id. at 312. While Davis v. Hill Engineering, Inc., 549 F.2d 314 (5th Cir. 1977), affirmed the lower court's ruling that Davis was a seaman in part because he was required to remain on the vessel for twenty to thirty days, id. at 327, Kirk v. Land & Marine Applicators, Inc., 555 F.2d 481 (5th Cir. 1977), held that remaining on board the vessel for fourteen days at a time was not enough for seaman status, id. at 483.

We find Kirk v. Land & Marine Applicators, Inc., *supra*, to be instructive. Even though Kirk spent fourteen days at a time on board the vessel, this court found such case to be not sufficient. Id. Obviously, Kirk ate and slept on board the vessel during his fourteen-day stay. We find that Dauzat did not present evidence of an extended stay on board the vessels sufficient to raise a fact issue that he performed a substantial part of his work on the vessels with some degree of regularity and continuity. While he had an association and occasion to work on the tugs and barges, the fact that he ate and slept on the tugs and barges "several times" does not raise a fact issue on his status as a seaman.

II. Employer

Because Dauzat is not a Jones Act seaman, Massman, pursuant to the LHWCA, as the employer of Dauzat, is immune from any tort suit that may be asserted by Dauzat against it. LHWCA, 33 U.S.C. §

905(a). But the district court also held that M-L was an employer of Dauzat and hence also immune to any such suits. Dauzat appeals the decision of the lower court in regards to M-L.

The following facts are undisputed. When Dauzat initially began work at the dam in October 1990, he was an employee of M-L. Approximately one month later, he became an employee of Massman. The transfer, however, was technical in nature, as Dauzat's job duties and responsibilities did not change with the move.

It is well-established that the non-employer members of a joint venture, and hence the joint venture itself, are accorded the same immunity as the employer member of the joint venture. Bertrand v. Forest Oil Corp., 441 F.2d 809, 811 (5th Cir.), *cert. denied*, 404 U.S. 863 (1971). These cases are premised on the doctrine that an employee of a partner of a joint venture is also an employee of the joint venture as a matter of law.

Dauzat attempts to distinguish his particular situation. He argues that, here, M-L, with its own payroll, removed Dauzat from employment and transferred him to the payroll of Massman. According to Dauzat, because M-L specifically declined to employ Dauzat, it cannot now claim the benefits of employing Dauzat. Dauzat presents no case law supporting his position, and we find no merit in his argument. We see no difference between an individual initially employed by a partner of the joint venture and an individual initially employed by the joint venture or a partner and subsequently transferred to another partner.

For the foregoing reasons, the judgment of the district court is **AFFIRMED.**