

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-7621
Summary Calendar

DEAL EBANKS and YVETTE EBANKS,
Plaintiffs-Appellants,

VERSUS

SABINE TOWING, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas

(G-92-CV-387)

(February 17, 1994)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.

PER CURIAM:*

BACKGROUND

On March 20, 1991, Deal Ebanks ("Ebanks") was employed as a seaman on board the vessel "SS *Concho*" owned and operated by Sabine Towing and Transportation Co., Inc. ("Sabine"). The SS *Concho* was docked at Oil Dock No. 4 at Corpus Christi, Texas. As Ebanks was

* 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

leaving the vessel and crossing the adjacent dock, he struck his head on the metal flange of a loading hose which was hanging in the air suspended by the arm of a mobile loading crane. Someone had parked the crane in the pathway that provided access to and from the vessel. On August 6, 1992, Ebanks filed suit in federal district court in Galveston, Texas, seeking to recover damages from various defendants. In March, 1993, Ebanks filed his Fifth Amended Complaint naming Sabine, Coastal Refining & Marketing, Inc. ("Coastal"), Amerada Hess Corporation ("Amerada"), Weaver Industries ("Weaver") and Citgo Petroleum Company ("Citgo") as the parties responsible for his injuries. Subsequently, he took nonsuits against Amerada, Weaver and Citgo. Coastal denied ownership or operation of the crane from which the loading hose was hanging, and after a status conference at which the question of who owned and operated the crane was discussed at some length, the trial judge dismissed Coastal without prejudice because "the plaintiffs are unable to assert any responsible information indicating that Coastal has any active responsibility with regard to the incident made the basis of this litigation." Plaintiff moved the trial judge to reopen the issue of liability on the part of Coastal, and at a settlement conference held several months later at which Ebanks offered additional evidence in the form of pictures and affidavits outside of the pleading record, the trial court determined that Ebanks' motion to reconsider should be denied. Ebanks then apparently indicated that his case was "substantially compromised" by the dismissal of Coastal, and the

judge and the parties went into a "Rule 408" settlement conference, which was not transcribed. At the conclusion of that settlement conference, the trial judge entered an order dismissing plaintiff Ebanks' claims against all remaining defendants with prejudice. The court's order recites that "the parties elected instead to move for dismissal," which we and appellee Sabine interpret to mean that Ebanks at least joined in the motion to dismiss his suit against Sabine, a proposition that Ebanks does not dispute.

OPINION

Neither Sabine nor Coastal filed a motion to dismiss under Rule 12 or a motion for summary judgment. Ebanks argues, therefore, that the trial judge could have been acting only under some claim of deficiency in the pleadings, and Ebanks contends that his pleadings regarding ownership and operation of the crane were sufficient on their face. From our reading of the record and transcript, however, we are satisfied that what the trial judge effectively did was to conduct an impromptu summary judgment hearing on the issue of ownership and operation of the crane. Ebanks had an opportunity to present testimony by affidavit and deposition extracts on that issue, and the trial judge found that evidence wanting. We are puzzled, as the trial judge obviously was, as to why Ebanks was unable to establish with certainty the ownership and operation of the crane, given the length of time that elapsed from the date of injury to the time the trial judge considered that issue. Nevertheless, on a general negligence claim against Coastal, Ebanks obviously had the burden of proof on

ownership and operation. Certainly, the better practice would be to use the established procedures under Rule 56 to reach such a disposition, but when, as here, the essence of such procedures are achieved, we see no merit in insisting upon procedural technicalities. Consequently, we AFFIRM the order of dismissal without prejudice entered by the trial judge under date of April 22, 1993 as to Coastal.

We also AFFIRM the order of dismissal entered by the trial judge relating to the claims of Yvette Ebanks for loss of consortium.

We are less sanguine about the dismissal with prejudice insofar as Sabine is concerned. The relationship of seaman and shipowner/employer between Ebanks and Sabine was apparently not disputed, and Ebanks' petition asserted claims under both the Jones Act, 46 U.S.C. App. § 688, and general maritime law, which would include maintenance and cure as well as unseaworthiness. Given the solicitude with which federal courts have traditionally looked at seamen's cases, and given the fact that whatever transpired in the "Rule 408 settlement hearing" was not transcribed and therefore not subject to our review, we are uncomfortable with the trial judge's dismissal with prejudice insofar as it affects Sabine. Accordingly, we modify the final judgment herein so that the dismissal of Ebanks' claims against Sabine is without prejudice, and we AFFIRM the judgment as so modified.