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Sobieski v. Ispat Island, Inc. United State Court of Appeals for the 7th Circuit 413 F.3d 628 (Decided June 29, 2005)

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Six crewmembers of the cruise ship S/S Norway were killed when the vessel's boiler exploded on May 25, 2003 while docked in Miami; four crewmembers were injured. Plaintiffs, injured crewmembers and representatives of the decedents, filed ten separate suits in a Florida circuit court against defendants Star Cruises and Norwegian Cruise Line ("NCL"), seeking damages for negligence and unseaworthiness under the Jones Act, 46 U.S.C. § 688. NCL removed the cases to federal district court pursuant to §205 of 9 U.S.C. §§ 202-208 (the "Convention Act") which implemented the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"), permitting removal prior to trial in disputes relating to an arbitration agreement or award covered by the Convention.

The crewmembers' employment contracts contained clauses that required arbitration in cases of claims and disputes arising from a seaman's employment. The contracts were executed in the Philippines, and their form and content was regulated by a Philippine administrative agency, the Philippine Overseas Employment Administration. The district court granted NCL's motion to compel arbitration in the Philippines and denied plaintiffs' motion to remand to state court. The court retained jurisdiction to enforce or confirm and resulting arbitral award.

Plaintiffs challenged the district court's jurisdiction by claiming that the case was not covered by the Convention. The Court of Appeals noted that a district court must order arbitration unless 1) the four jurisdictional prerequisites are not met or 2) one of the Convention's affirmative defenses applies. *DiMercurio v. Sphere Drake Ins. ' PLC*, 202 F.3d 71 (1st Cir. 2000). The four prerequisites require that 1) there is an agreement in writing within the meaning of the Convention; 2) the agreement provides for arbitration in the territory of a signatory of the Convention; 3) the agreement arises out of a legal relationship, whether contractual or not, which is considered commercial; and 4) a party to the agreement is not an American citizen, or that the commercial relationship has some reasonable relation with one or more foreign states. *Std. Bent Glass Corp. v. Glassrobots Oy*, 333 F.3d 440 (3d Cir. 2003). The court, finding the second and fourth conditions fulfilled, turned to an analysis of the first and third conditions, observing that the Convention established a strong presumption in favor of arbitrating international commercial disputes. Despite language in 9 U.S.C. §§ 1-16, the Federal Arbitration Act ("FAA"), providing that "...nothing herein contained shall apply to contracts of employment of seamen...", the Court of Appeals held that the exemption's application outside the FAA was restricted by the second and third chapters of title 9. The court stated that Congress gave the treaty-implementing statutes primacy over the FAA, with the provisions of the latter applying only where they did not conflict. The court viewed this hierarchical structure as consistent with the premise that the Convention trumped prior inconsistent rules of law, in keeping with an exercise of Congress' treaty power and federal law. The court continued its analysis by engaging in a lengthy technical dissection of §§ 202 and 208 of the Convention before arriving at the conclusion that the arbitration provisions were commercial legal relationships under the Convention, regardless of the FAA exemption.

Finally, the court concluded that the plaintiffs' affirmative defenses – that the arbitration provision was unconscionable and that the underlying dispute was not arbitrable – failed and that the district court had properly granted NCL's motion to compel arbitration.

Alan Katz
Class of 2006

VESSEL IS NOT VICARIOUSLY OR DIRECTLY LIABLE UNDER THE JONES ACT FOR THE AMATEUR CHIROPRACTIC ACTIVITIES OF ITS EMPLOYEES ABOARD THE VESSEL, ABSENT EMPLOYER AUTHORIZATION.

Under the Jones Act, traditional respondeat superior principles are used to determine vicarious liability of a sea vessel, and a sea vessel is directly liable only if an officer with supervisory duties over the tortious employee has direct or constructive notice of that employee's tortious activities.

Sobieski v. Ispat Island, Inc.
United State Court of Appeals for the 7th Circuit
413 F.3d 628
(Decided June 29, 2005)

Plaintiff-appellant Paul Sobieski (“Sobieski”) was a crewman on defendant-appellee’s M/V *Joseph L. Block* (“the Block”). On April 4, 2001, he was sitting in a chair in the Block’s recreation room, when fellow crewman Mike Barrett (“Barrett”) snuck up behind him and slammed his head against Sobieski’s right shoulder, doing it for chiropractic reasons. This caused plaintiff’s neck to crack, leading to injuries and pain which continued after the Block went ashore on April 15, 2001, and which was exasperated after Sobieski had a “lock up pinch” in his neck in November 2001.

Sobieski and his wife Gail (“the plaintiffs”) filed two separate complaints; the United States District Court for the Northern District of Indiana granted summary judgment for defendant-appellee on all of the plaintiffs’ claims. Plaintiffs appealed to the 7th Circuit on their Jones Act claims and the court affirmed.

Plaintiffs’ first argument to the 7th Circuit alleged that the defendant was vicariously liable for Barrett’s conduct. The Sobieskis asked the court to abrogate the common law scope of employment rule, as it applied to the Jones Act, because seamen are always within the scope of employment when aboard sea vessels, even while off-duty. The plaintiffs then advocated an “enterprise liability” theory favored by § 229 of the Restatement (Second) of Agency. *Wilson v. Chi., Milwaukee, St. Paul & Pacific R.R.*, 841 F.2d 1347, 1355-56 (7th Cir.1988). However, the court rejected this approach because a vicarious liability claim requires a plaintiff to prove an employee’s tortious act was committed in furtherance of the employer’s business, and the court was not prepared to ignore traditional respondeat superior principles, absent express statutory language in the Jones Act. Barrett’s off-duty act of neck-cracking was not a “necessary incident” or “essential” to his duties as a mate’s assistant. *Rogers v. Chi. & N.W. Trans. Co.*, 947 F.2d 837, 839 (7th Cir.1991). Rather, it was done for personal reasons, not with defendant’s express authorization, and therefore the act fell outside the scope of employment. *Id.* at 839 (quoting *Wilson* 841 F.2d at 1355).

The plaintiffs’ second argument alleged direct liability, a claim which makes an employer liable regardless of whether an employee’s tortious conduct was in furtherance of the employer’s business. *Lancaster v. Norfolk & W. Ry.*, 773 F.2d 807, 818 (7th Cir.1985). They supported their contention with Barrett’s deposition, where he stated that defendant’s officers had seen him crack necks aboard the Block, and the plaintiffs argued the defendant therefore had at least constructive knowledge of Barrett’s neck-cracking reputation. However, the court did not accept this analysis because plaintiffs failed to provide sufficient evidence demonstrating the defendant had proper notice through its officers of Barrett’s neck-cracking activities. Not only was Barrett’s neck “tractioning” on the Block not known to be “common and continuous,” but the only person the plaintiffs identified as an officer with notice was assistant steward George Oram (“Oram”), who failed to classify as an “officer” since he held no supervisory duties over Barrett.

The Court held that the summary judgment for defendant was appropriate, since no reasonable juror could conclude the defendant was liable under the Jones Act claims for vicarious and direct liability.

Gregory Bougopoulos
Class of 2006

DISTRICT COURT'S AWARD OF DAMAGES AND IMPOSITION OF A MARITIME LIEN ON A VESSEL WERE CLEARLY ERRONEOUS

The Court of Appeals for the Eleventh Circuit affirmed the district court's exercise of jurisdiction in a diversity suit brought by a Cayman Islands Corporation, the owner of a motor yacht, against a Florida contractor. However, the Court vacated the district court's judgment awarding damages to the contractor and imposing a maritime lien on the yacht because the contractor failed to provide any evidence by which a trier of fact could infer that its charges were reasonable according to industry standards. Reasonable price was a required element of the contractor's burden of proof in establishing such a lien and collecting damages.

Sweet Pea Marine, Ltd. V. APJ Marine, Inc.
United States Court of Appeals for the 11th Circuit
411 F.3d 1242
(Decided June 8, 2005)

Defendant-appellee/Cross-appellant APJ Marine, Inc. ("APJ") appealed the district court's exercise of diversity jurisdiction over claims brought by Plaintiff-appellant/Cross-appellee Sweet Pea Marine, Ltd. ("Sweet Pea"), owner of the vessel M/V SWEET PEA ("the Vessel"). Sweet Pea appealed the district court's award of damages to APJ and imposition of a maritime lien on the Vessel.

In September of 1999, representatives of APJ and Sweet Pea reached an oral agreement to redesign and refit the interior of the Vessel, a 127-foot motor yacht. The agreement established various hourly wage rates for labor and allowed APJ to charge Sweet Pea a 15% mark-up on materials and supplies which it purchased for the Vessel. After paying APJ \$4.3 million according to the agreed-upon rates, Sweet Pea terminated APJ in November of 2001 for work completion delays as well as billing irregularities revealed by an audit. In March of 2002, APJ sent Sweet Pea a bill for \$1.292 million in outstanding costs incurred prior to termination. Sweet Pea refused to pay and on May 17, 2002 filed a complaint against APJ in federal court, based on diversity jurisdiction, containing several allegations including breach of an oral contract, negligent misrepresentation and fraud in the inducement. On May 22, 2002, APJ filed a complaint in federal court under admiralty jurisdiction; in personam against Sweet Pea and in rem against the Vessel for \$1.292 million. The complaint alleged breach of an oral contract under maritime law and a claim for a maritime lien. The district court consolidated the two actions for discovery purposes, but allowed them to proceed on separate dockets.

On October 20, 2003, both actions were tried together. After a two-week trial, the jury awarded Sweet Pea \$239,000 in damages on its breach of warranty claim. In its advisory capacity, the jury found for APJ on its maritime claims in the amount of \$244,000. The district court found that APJ was not entitled to compensation for labor by subcontractors because Sweet Pea had already paid for work performed. However, because evidence showed that APJ had paid vendors \$1,631,262.15 for goods and