SUPERIOR COURT OF NEW JERSEY
CIVIL DIVISION
MIDDLESEX COUNTY
DOCKET NO. L-1795-04

RAMON REY,

Plaintiff,

v.

Motion for Summary Judgment

THE CAPSAN RAFAEL, MAERSK-SEALAND, SEALAND CARGO, SEA-LINE CARGO, HAMBURG SUD, COLUMBUS SHIP MANAGEMENT, UNIVERSAL MARITIME SERVICE CORP., et. al.

Defendants.

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UNIVERSAL MARITIME SERVICE CORP. and MAERSK, INC.

Third-Party Plaintiffs,

v.

A.G. SHIP MANAGEMENT CORP. and PORTSIDE SECURING SERVICES, INC.

Third Party Defendants.

Return Date: February 2, 2007

Appearances: Kirk Lyons (Lyons & Flood) for Defendants Hamburg Sud and Columbus Ship Management

John Karpousis (Freehill Hogan & Mahar) for Defendant Universal Maritime Services Corp.

David Nitti & Michael Percario (Michael A. Percario) for Plaintiff Ramon Rey

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R. Ruggiero Williams, J.S.C.:

I. BACKGROUND

This matter arises from a slip and fall accident that occurred aboard the Capsan Rafael on August 21, 2002. Before the Court is the summary judgment motion of Defendants Hamburg Sud and Columbus Ship Management and Defendant Universal Maritime's cross-motion for summary judgment. As such, the Court's "statement of the facts is based on consideration of the evidence in the light most favorable to the [Plaintiff]." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995).

THE PARTIES

Ramon Rey ("Plaintiff") was an employee of A.G. Ship Maintenance Corp. ("AG Ship") and was hired to perform lashing services. Lashing is the practice of fastening and unfastening containers aboard vessels while they are docked.

Carlos Perez ("Perez") was the AG Ship foreman on the night of the accident. Perez has been a lashing foreman for seventeen (17) years and has worked at both the Ports of Elizabeth and Newark. Generally, Perez inspects the ships before assigning longshoremen to do the lashing. Perez then assigns the longshoremen to a specific area of the vessel.

A.G. Ship was the stevedoring company hired to unlash the cargo. AG Ship is an independent contractor which distributes its employees throughout the vessel to perform lashing services.

Universal Maritime Services Corp. ("Universal") is an entity that contracts with many ships to perform lashing services while the ships are docked at the Port of Elizabeth. Universal

utilizes AG Ship to satisfy its staffing needs, but does not have a formal agreement with AG Ship.

Defendant **Hamburg Sud** ("Hamburg") was the time charterer of the vessel. Generally, a time charterer arranges for the rental of the vessel and the owner-provided crew to perform shipping services. Defendant **Columbus Ship Management** ("Columbus") was the commercial manager of the Capsan Rafael. (Columbus and Hamburg are collectively referred to as "Defendants.")

THE EVENTS OF AUGUST 21, 2002

On August 21, 2002, the Capsan Rafael ("Vessel") was moored starboard side to the marine terminal in Jersey City, New Jersey. Although he did not specifically remember this evening's events, Perez testified that he generally inspected the ship for possible safety hazards before assigning lashers to their position. Perez did not document the inspection of the Vessel that evening. While presumably waiting for Perez to finish his inspection, the lashers hired for that evening gathered at the office on the marine terminal at approximately 6:00 p.m. Plaintiff was among these lashers. Perez then assigned the lashers to a specific area of the ship where they were to begin their lashing duties.

Plaintiff boarded the Vessel in the waning sunlight between 6:30 and 7:00 p.m. Plaintiff was assigned to Vessel's front end, and began working alone. Plaintiff, using a ten (10) pound lashing bar, stood on a walkway on the ship's main deck and began removing the lashing equipment from the cargo stored in the hatch cover. Plaintiff removed three (3) to four (4) lashing apparatuses before Plaintiff suffered his injury.

PLAINTIFF'S FALL

While Plaintiff was engaged in casting the lashing gear to his left, Plaintiff saw an access opening. The open access way was generally bolted to the ship, but opened in order to allow the ship's crew to perform maintenance on the Vessel's ventilators and other equipment. The access way was located in the center of the walkway. There was no lip around the open access way or other distinguishing features. In order to avoid stepping into the open access way, Plaintiff stepped back. When he stepped back, Plaintiff stepped into a gap between the edge of the walkway and the hatch cover. Plaintiff fell rapidly, and holding the lashing equipment in his left arm, he injured his right leg and left shoulder and arm. Plaintiff got up, closed the access way, and continued working for two to three hours.

At the time of Plaintiff's accident, the sun had set. The Vessel did have lights, but in the area where Plaintiff was working, they were not turned on. Additionally, a crane on the deck provided lighting to the Vessel, but Plaintiff indicated that the crane was not helpful unless directly overhead. The lighting conditions did not prevent Plaintiff from carrying on his lashing duties. Plaintiff reported the accident to Perez, but the accident was not reported to the Vessel.

II. DEFENDANTS HAMBURG SUDAMERIKANSCHE DAMPFSCHIFFAHRTS-GESELLSCHAFT KF AND COLUMBUS SHIPMANAGEMENT GMBH – MOVANT'S POSITION

Initially, Defendants posit that the Longshore and Harbor Workers' Compensation Act ("LHWCA") is the controlling legal framework, and that Plaintiff is properly proceeding under §905(b). Defendants then set forth the controlling legal standard for maritime negligence actions under §905(b) that United States Supreme Court established in Scindia v. De Los Santos, 451 U.S. 156 (1981) and revisited in Howlett v. Birkdale Shipping Co., 512 U.S. 92 (1994). Having laid their legal groundwork, Defendants argue that the Supreme Court cases set forth three (3) specifically defined duties a Ship Owner owes to Longshoreman and reject a "general duty by

way of supervision or inspection to exercise reasonable care." Schindia, supra, 451 U.S. at 172. Additionally, Defendants emphasize that in amending §905(b), Congress proceeded upon the policy consideration that the Stevedore, not the Ship Owner, is in the best position to provide a safe working environment.

Defendants first address a Ship Owner's "turnover duty." Defendants defined the turnover duty as the duty to:

> [E]xercise ordinary care under the circumstances to turn over the ship and its equipment and appliances in such condition that an expert and experienced stevedoring contractor, mindful of the dangers he should reasonably expect to encounter, arising from the hazards of the ship's services or otherwise, will be able by the exercise of ordinary care to carry on cargo operations with reasonable safety to persons and property. A corollary to the turnover duty requires the vessel to warn the stevedore of any hazards on the ship or with respect to its equipment so long as the hazards are known to the vessel or should be known to it in the exercise of reasonable care and would likely be encountered by the stevedore in the course of his cargo operations, are not known by the stevedore, and would not be obvious to him or anticipated by him.
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> Howlett, supra, 512 U.S. at 98.

Defendants then analyze a litany of cases setting forth different factual scenarios in which a court held that a Ship Owner could not be held liable to Longshoremen. Based upon these cases and the applicable legal standard, Defendants' principal argument is that the open access way was an open and obvious danger. In particular, Defendants cite Lipari v. Kawasaki Kisen Kaisha, Ltd., 923 F.2d 862 (9th Cir. 1991) for the proposition that an open access way is an open and obvious danger.

Applying these principles to the facts present here, Defendants argue that Plaintiff's own statements establish that he saw the open access way before stepping back and falling. As such, Defendants argue that because Plaintiff was aware of the open access way, they cannot be held

liable. Alternatively, Defendants submit that a reasonably competent lasher should have detected and corrected the open access way. Insofar as Plaintiff's Complaint alleges that deficient lighting may have caused Plaintiff's injuries, Defendants argue that Matthews v. Pan Ocean Shipping Co., Ltd., 1992 U.S. Dist. LEXIS 3590 (E.D.Pa. 1992) establishes that inadequate lighting is not a latent defect as a matter of law. Defendants submit that cases passing on this lighting issue have emphasized the Stevedore's regulatory obligation to provide a safe working environment.

In addressing the "active control" duty, Defendants argue that they did not control the subject walkway on which the alleged accident occurred, and therefore, the active control duty is not at issue. Defendants assert that they had vacated the ship and did not participate in the lashing work that Plaintiff was undertaking. Defendants then submit that Plaintiff has not presented a prima facie showing of a breach of active control duty because the open access way did not pose an unreasonable risk of harm. Defendants argue that a condition is open and obvious if a "reasonable longshore worker under all circumstances would actually have noticed the hazardous condition exist[ed] and have actually have appreciated the true significance of the threatened harm." Davis v. Portline Trans. Maritime Intl., 16 F.3d 532, 533 (3d Cir. 1994). Defendants argue that the open access way was obvious under this standard, and therefore, they cannot be held liable.

Defendants next address the "duty to intervene" standard. Defendants argue that the Ship Owner has a duty to intervene only if they had actual knowledge that the access way was open, that the open access way posed an unreasonable risk of harm, and that the Stevedore was not exercising reasonable care to protect Plaintiff. Defendants argue that none of these factors were present, and point out that the open access way did not present an unreasonable risk of harm as

Plaintiff easily closed it after his fall. After discussing several cases, Defendants assert that Plaintiff had no knowledge of the fashion in which the Stevedore intended to conduct the lashing, and therefore, they cannot be held liable.

In their reply, Defendants attempt to discredit Plaintiff's assertion that the ship's maintenance crew opened the accessway to perform maintenance on the ventilator. First, Defendants argue that Plaintiff has not presented any evidence in form of depositions, affidavits or documents that a jury could draw a permissible inference that maintenance was performed. Defendants have submitted the certification of Claudio Crivici, a certified marine surveyor, which indicates that maintenance on the ventilators was first performed more than two (2) years after Plaintiff's alleged accident. Second, Defendants attack the validity of Plaintiff's experts report as lacking proper basis because Plaintiff has never identified the area where the fall took place.

Defendants refute Plaintiff's assertion that the question of obviousness must be submitted to the jury and submit a slew of cases where Courts have issued summary judgment on this question. Defendants argue that the subject walkway was not under the substantial control of Defendants, and therefore, the active control duty is not applicable. Defendants contends that the duty to intervene is also inapplicable as Plaintiff easily corrected the open accessway and that they were entitled to rely on the expertise of their stevedoring contractor, AG Ship.

III. PLAINTIFF RAMON REY – OPPONENT'S POSITION

Plaintiff argues that the obviousness of the open accessway is a genuine issue of material fact that requires a trial. Plaintiff specifically points to the type and placement of the hatch, the hatch's flat cover and lack of identifying marks, and the likelihood that the ship's crew removed the hatch cover without informing AG Ship as creating genuine issues of material fact. Plaintiff

adds that the lighting conditions further shroud the obviousness of the accessway. Plaintiff argues that the courts examining the issue of obviousness in the §905(b) negligence context consistently state that the question of obviousness is one properly within the jury's province. Plaintiff then addresses the cases cited in Defendants' briefs and attempts to distinguish or discredit their applicability to the case at bar.

In response to Defendants' arguments regarding the turnover duty, Plaintiff argues that the cases cited by Defendants are inapposite. Plaintiff argues that Jackson v. Egyptian Navigation Co., 264 F.3d 113 (3d Cir. 2004) is distinguishable based on the fact that the Plaintiff there was clearly aware of the danger of walking across a 10 centimeter wide plank. Here, Plaintiff argues that the lighting and indistinguishable nature of the hatch cover prevented Plaintiff from realizing the proximity of the open access way until it was too late. Similarly, Plaintiff points out that the Plaintiff in Kirsch v. Prekookeanska Plovidba, 971 F.2d 1026 (3d Cir. 1992) was clearly aware of the oil spill and walked right through it. Therefore, Plaintiff argues, the Court held that Plaintiff's slipping from the oily residue left on his sneakers hours later did not create a genuine issue of material fact.

Plaintiff then asserts that Lipari v. Kawasaki Kisen Kaisha, Ltd., 923 F.2d 862 (9th Cir. 1991) was not intended for publication and is improperly referred to. Nonetheless, Plaintiff distinguishes the facts of that case based upon the fact that Plaintiff there boarded the ship at 3:00 a.m. in total darkness and did not make any provision for lighting. Here, Plaintiff asserts that he boarded the ship at dusk while there was sufficient light for working; there was not, however, sufficient light to notice an inconspicuous hatch cover. Plaintiff similarly dismisses Conway v. Anders-Wilhelmsen & Co., 440 Pa. Super 683 (Pa. Sup. Ct. 1995) and Chapman v. Bizet Shipping SA, 1996 AMC 1414 (S.D. Ga. 1996) based upon factual differences.

Plaintiff addresses Howlett, supra, and asserts that Howlett is applicable only to claimed negligent acts occurring in the cargo hold. Here, Plaintiff submits that Howlett is inapplicable because Plaintiff's injury and the Vessel's negligence occurred on the walkway, which is a common area. Finally, Plaintiff argues that Icabalzeta v. Sea-Land, 143 N.J. 521 (1996) militates in favor of denying Defendants' summary judgment motion. There, Plaintiff argues, the New Jersey Supreme Court found an issue of material fact as to the obviousness as to the danger posed to the stevedore's employees where the employees were working in the dark, and there was no guard rail.

In addressing the Vessel's obligations under the Active Control Duty, Plaintiff argues that summary judgment is inappropriate as only the ship's crew could have opened the accessway. Plaintiff submits that the current facts satisfy the four prong test commonly applied to determine if the active control duty has been violated. First, Plaintiff argues that the ship's crew created the condition. Second, Plaintiff posits that the Vessel should have known that the condition posed an unreasonable risk of harm because the accessway was, in effect, in a state of disrepair. Third, Plaintiff asserts that it was reasonable that a longshoreman would not discover the condition due the compromised lighting conditions and the lack of any discernible marks identifying the accessway. Further, Plaintiff argues that Davis, supra, held that the active control duty imposes a less onerous standard on the longshoreman. Plaintiff asserts that Davis imposes the standard of a worker possessing the minimum qualifications, not those of an expert. Fourthly, Plaintiff argues that the Vessel failed to take reasonable steps to remediate the danger because the Vessel must have known that the accessway was open and could easily have closed it before the lashers boarded the ship.

Finally, Plaintiff argues that the Defendants breached the Duty to Intervene because, as stated above, the Vessel had actual knowledge of the condition and knew of the unreasonable nature of the harm it posed. Plaintiff argues that the prong requiring the Vessel to know that AG Ship was not acting reasonably is satisfied in light of Defendants' argument that Plaintiff should not have been working under the lighting conditions present at the time of the accident.

IV. DISCUSSION[1]

The Summary Judgment standard requires the moving party to establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. R. 4:46-2; Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 73, 75 (1954); Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520 (1995). It is then the opposing party's burden to submit proof that the facts are not as the moving party asserts. Spiotta v. Wm. H. Wilson, Inc., 72 N.J.Super. 572, 581 (App. Div.), certif. denied, 37 N.J. 229 (1962).

In considering the evidential materials presented, this Court's function is to determine whether there is a genuine issue for trial. Id., citing Anderson v. Liberty Lobby Inc., 477 U.S. 242, 249 (1986). The determination of whether a material fact has been presented, "requires the motion judge to consider whether competent evidential materials presented, when viewed in the light most favorable for the non-moving party, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party." Brill, supra, 142 N.J. at 540. If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a genuine issue of material fact for purposes of Rule 4:46-2. Anderson, supra, 477 U.S. at 249. Moreover, when the evidence is so one-sided

[1] Neither party disputes that the negligence framework established under §905(b) is the controlling analytical framework. As such, the Court does not begin its Discussion with this analysis.

that one party must prevail as a matter of law, the trial court should not hesitate to grant Summary Judgment. Id.

However, Summary Judgment is a stringent remedy and should not be granted unless the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to judgment as a matter of law. Shanley & Fisher, P.C. v. Sisselman, 215 N.J.Super. 200, 211 (App.Div. 1987). All inferences of doubt are drawn against the moving party and in favor of the opponent of the motion. Judson v. Peoples Bank & Trust Co. of Westfield, supra, 17 N.J. at 74-75. If there is the slightest doubt as to the existence of a material issue of fact, the motion should be denied. Shanley & Fisher, P.C. v. Sisselman, supra, 215 N.J.Super at 211. With these principles in mind, the Court addresses the merits of the parties' arguments.

The LHWCA states:

> In the event of injury to a person covered under this Act caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 33 of this Act, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel… The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this Act.

The statute, in its current form, is said to have been designed with the goal of placing primary responsibility with the stevedoring company because the stevedore is generally in the best

position to assess the safety of the longshoreman's working environs. Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156, 171 (1981).

Broadly defined, the shipowner has a duty to exercise due care under the circumstances. Id. at 166. In construing the ship's specific responsibilities, the United States Supreme Court has identified three separate, but often intermingled duties. Howlett, supra, 512 U.S. at 98. The first of these, the "turn over duty," defines the ship's responsibility prior to the commencement of stevedoring operations and requires the ship to:

> [H]ave the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property, and to warning the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known to it in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of his cargo operations and that are not known by the stevedore and would not be obvious to or anticipated by him if reasonably competent in the performance of his work. (citation omitted). The shipowner thus has a duty with respect to the condition of the ship's gear, equipment, tools, and work space to be used in the stevedoring operations; and if he fails at least to warn the stevedore of hidden danger which would have been known to him in the exercise of reasonable care, he has breached his duty and is liable if his negligence causes injury to a longshoreman.
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> Scindia Steam, supra, 451 U.S. at 167.

For analytical purposes, Courts applying this duty have distilled it into two separate elements: (1) the duty to turn the ship over in a condition that an experienced stevedore could expect to carry out stevedoring services in a safe manner; and (2) the duty to warn of latent hazards of which a competent stevedore would not expect that the ship knows or should know about in the exercise of reasonable care. Howlett, supra, 512 U.S. at 98-99. "Absent actual knowledge of a hazard, then, the duty to warn may attach only if the exercise of reasonable care would place

upon the shipowner an obligation to inspect for, or discover, the hazard's existence." Id. at 99-100.

The second duty, known as the "active control duty," requires the shipowner to "exercise reasonable care to prevent injuries to longshoremen in areas that remain under the 'active control' of the vessel." Howlett, supra, 512 U.S. at 98. The longshoremen's commencement of cargo operations triggers this duty. Ibid. In order for the active control duty to be applicable, it must be determined that "the vessel, whether acting jointly with the stevedore or individually, breached a duty it owed to the injured worker." Davis v. Portline Transportes Maritime Internacional, 16 F.3d 532, 540 (3d Cir. 1994). Thus, a Plaintiff proceeding under the active control duty must demonstrate, "the vessel must have substantially controlled or been in charge of (i) the area in which the hazard existed, (ii) the instrumentality which caused the injury, or (iii) the specific activities the stevedore undertook." Ibid. The Davis court acknowledged that this framework effectively served to prevent the imposition of the duties to warn and intervene "in areas under the stevedore's control." Id. at 541.

The final duty, which the Court established in Scindia Steam, supra, is the duty to intervene. The duty to intervene is implicated when the shipowner knows of a defect that the stevedore continues to use which may pose an unreasonable risk of harm to the longshoremen. Scindia Steam, supra, 451 U.S. at 175-76. The Court, however recognizing that the LHWCA sought to impose the primary obligation on the stevedore, stated, "absent a contract provision, positive law or custom to the contrary … the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore." Id. at 172.

ACTIVE CONTROL DUTY / DUTY TO INTERVENE

In applying the facts here to the various duties, the Court finds it expedient to first address the duty of active control and the duty to intervene. In arguing that the Vessel may be found liable under each of these duties, Plaintiff would have the Court strictly apply the multi-pronged analytical tests without regard to the sequence of events that preceded Plaintiff's fall. This position overlooks the threshold inquiry that requires the Court to investigate whether the shipowner or the stevedore is in control. In Howlett, supra, the United States Supreme Court expressly incorporated the timing of the accident in relation to the Vessel's negligence. The active control duty is only applicable after the stevedoring company has commenced cargo operations. Howlett, supra, 512 U.S. at 98. Like the active control duty, the duty to intervene is only implicated after cargo operations have begun, and involves areas under the principal control of the stevedore. Ibid.

Plaintiff has not alleged that the ship's crew was working on the ventilators contemporaneously to Plaintiff's lashing operations; rather, Plaintiff alleges that the shipowner knew or should have known of the unreasonable harm the open accessway caused. Plaintiff's argument improperly conflates the separate duties without due regard to the temporal requirement. Plaintiff does not argue that the ship's crew was working alongside Plaintiff and improperly opened the hatch while he was performing the lashing operations. Serbin v. Bora Corp., 96 F.3d 66 (3d Cir. 1996) is illustrative of the typical fact pattern implicating the active control duty. There, longshoremen were unloading fruit stored on the ship. Id. at 68. The longshoremen would unload the cargo one deck at a time descending from the top deck to the bottom deck. Ibid. In order to facilitate the longshoremen's work, the ship's crew operated the crane and pulley system that opened the hatch covers which enabled the longshoremen to unload

the cargo from the next deck. Ibid. Thus, the ship's crew and the longshoremen collaborated and exercised some quantum of control over the entire operation. Similarly, in Davis, supra, the Judge Becker, writing for the panel, found that the duty of active control may have been breached. Davis, supra, 16 F.3d at 534. There, the injured longshoreman was unloading dry cement from the ship. Ibid. Due to faulty equipment, more cement spilled onto the deck than normal. Ibid. Due to the amount of cement on the deck, a ship member hosed down the deck. Id. at 535. Due to the frigid temperatures, the deck froze over, and Plaintiff fell on the ice. Ibid. Unlike Serbin and Green, there is no evidence here that the vessel contemporaneously exerted control over the area Plaintiff was working. The facts indicate that the open accessway preexisted Plaintiff's arrival at his post. Under these conditions, the "substantial control" necessary to invoke the active duty to control is not present.

In addressing the applicability of the duty to intervene, Plaintiff again would have the Court apply the multi-pronged test without first deciding the threshold inquiry of whether Plaintiff had begun lashing work while the ship's crew was working on the ship. In Scindia Steam, supra, the Court held unequivocally that, "absent contract provision, positive law, or custom to the contrary… the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore." Scindia Steam, supra, 451 U.S. at 172. In determining whether a duty to intervene exists, the Scindia Steam Court stated the dispositive question, "[w]hat are the shipowner's duties when he learns that an apparently dangerous condition exists or has developed in the cargo operation, which is known to the stevedore and which may cause injury to the longshoreman?" Id. at 172-73.

Here, the complained of defect was the open accessway. Plaintiff does not contend that the shipowner opened the accessway while he was unlashing the cargo. Therefore, the duty to intervene is inapposite because the complained of defect did not develop during the lasher's operation. Moreover, there is no evidence that the open accessway was known to the stevedore. Perez walked the length of the entire ship and did not report an open hatch. Perez stated that it was not abnormal to notice open accessways, but his custom was to alert the ship's superintendent, and the ship repaired the condition prior to the longshoremen's boarding. Here, Perez made no such report, and therefore, knowledge cannot be imputed. Thus, there is no evidence that either the shipowner or the stevedore knew of the open accessway.

Perhaps realizing that the open accessway is insufficient, Plaintiff argues that Defendants knew of the poor lighting conditions in which Plaintiff was working. Plaintiff argues that because AG Ship knew of the poor lighting conditions but continued to permit the longshoremen to work in any event, it may be found liable under the duty to intervene. Fading light alone, however, does not constitute a dangerous condition. The current facts support this statement. Plaintiff closed the open accessway and resumed lashing activities for two to three hours. After the incident, he did not report it to the shipowner. The fading light relates to the obviousness of the open accessway but does not constitute an independent ground to invoke the duty to intervene. Furthermore, requiring the shipowner to intervene in every instance of fading sunlight contravenes the Court's guidance in Scindia Steam. There, the Court held that the shipowner has no duty inspect or investigate those cargo operations that are in the province of the stevedore. There is no factual evidence to support Plaintiff's position that the shipowner monitored the conditions at the time of the accident, and although aware of the sub-par lighting conditions, failed to take remedial action. .

THE TURNOVER DUTY

Plaintiff's negligence claim is properly analyzed under the jurisprudence addressing the turnover duty. As stated above, the turnover duty requires the shipowner to:

> [H]ave the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property, and to warning the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known to it in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of his cargo operations and that are not known by the stevedore and would not be obvious to or anticipated by him if reasonably competent in the performance of his work. (citation omitted). The shipowner thus has a duty with respect to the condition of the ship's gear, equipment, tools, and work space to be used in the stevedoring operations; and if he fails at least to warn the stevedore of hidden danger which would have been known to him in the exercise of reasonable care, he has breached his duty and is liable if his negligence causes injury to a longshoreman.
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> Scindia Steam, supra, 451 U.S. at 167.

The Third Circuit has addressed the turnover duty in Kirsch v. Prekookeanska Plovidba, 971 F.2d 1026 (3d Cir. 1992) and Jackson v. Egyptian Navigation Co., 364 F.3d 113 (3d Cir. 2004). In these cases, the Third Circuit specifically pointed out that the question of obviousness is often a question falling within the jury's province. Kirsch, 971 F.2d at 1030; Jackson, 364 F.3d at 118,

In Kirsch, Judge Becker's analysis moved §905(b) negligence claims closer to the rubric of premises liability. There, the court held, "a shipowner may be negligent for failing to eliminate an obvious hazard that it could have eliminated, but only when it should have expected that an expert stevedore could not or would not avoid the hazard and conduct cargo operations

reasonably safe." Kirsch, 971 F.3d at 1031. Thus, similar to Restatement §343A,[2] which addresses obvious conditions, a shipowner may be held liable if an obvious condition exists, and the shipowner has reason to know that the stevedore would not avoid it. The second significant contribution the Kirsch court made to this negligence analysis is the importation of the Scindia Steam Court's use of positive law, custom or contractual provision set forth in discussing the duty to intervene when analyzing a turnover duty claim. Id. at 1030-31.

The Kirsch court addressed the situation in which the Plaintiff acknowledged the obviousness of oil on the cargo area's floor, but still claimed that the turnover duty was breached. Kirsch had walked through the oil and slipped approximately twenty minutes after doing so while attempting to climb a cargo container. Id. at 1027-28. The Third Circuit upheld the award of summary judgment in favor of the shipowner, and noted that custom and the parties' expectations may be informative. Id. at 1031. In Jackson, supra, the Third Circuit held that the trial court properly granted summary judgment on the ground of obvious danger to the shipowner when the Plaintiff attempted to cross a ten (10) centimeter wide wooden board from a fixed ladder to a cargo area. Jackson, 364 F.3d at 118. The Court held that the shipowner had a reasonable expectation that the stevedore would remove the board after he had descended the ladder. Id. at 117.

Succinctly stated, a shipowner has a duty to turnover the ship in a condition that an "expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property." Scindia Steam, 451 U.S. at 167. When, as here, the alleged defect is claimed to have been obvious, Kirsch and Jackson indicated that there are two separate inquiries to make that determination. First, the Court must

[2] Restatement §343A states, in relevant part, "Known or Obvious Dangers. (1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

inquire if the condition was open and obvious. Jackson, supra, 364 F.3d at 117. Only if the Court answers that inquiry affirmatively must the court determine if the shipowner knew or had constructive knowledge that an expert stevedore knew of the defective condition but was unlikely to avoid it. See Kirsch, 971 F.2d at 1031.

There is a serious question in the court's mind as to the obviousness of the hatch, and therefore, the court need not address the second prong. Summary judgment, therefore, is inappropriate. The location of the open hatch, the fading light and the timing of its discovery all present questions as to the obviousness. Although Plaintiff has not established where the accident took place, Plaintiff's position has been consistent that it could only have taken place near the ventilator because the hatch was in the middle of the walkway. Plaintiff has successfully differentiated expected access hatches positioned at the ends of the walkway and the unexpected renovation hatches positioned in the middle of Plaintiff's work area. Furthermore, Plaintiff has presented an expert report that supports his theory of the case that the ship's crew must have repaired the cargo hold ventilators. While Defendants have set forth the certification of their expert, Claudio Crivici, which indicates that maintenance on the subject cargo hold ventilators was not conducted until more than two (2) years after the Plaintiff's accident, this does not end the inquiry. There may be credibility issues to test and that is not within the Court's province.

Here, the open hatch not marked with safety paint, tape or other warning in combination with the lack of light presents a jury question. Plaintiff's sight of the open hatch immediately prior to his fall definitively decide the issue of obviousness. A jury must determine whether the danger posed was open and obvious in advance so that Plaintiff had the opportunity to protect himself. The ship's turnover duty is to turn the ship over in a condition in which an expert

stevedore can competently perform stevedoring operations in reasonable safety. Whether or not this happened is an inquiry over which reasonable minds could differ.

V. DECISION

Accordingly, the motions for summary judgment of Defendants Hamburg Sud and Columbus Ship Management are HEREBY DENIED with respect to the turnover duty. Defendants' motions are HEREBY GRANTED with regard to the active control duty and the duty to intervene.

RRW – OUT.