UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ROBERT VADAS,	:	
Plaintiff,	:	
	:	Civil Action No.
v.	:	3:97 CV 2521 (SRU)
	:	
J. LAURITZEN HOLDINGS, ET AL.,	:	
Defendants.	:	

RULING ON THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Robert Vadas ("Vadas") filed this action claiming that he was injured while working as a longshoreman loading and unloading cargo from the "African Reefer," a vessel owned by the defendant J. Lauritzen A/S ("Lauritzen").[1] Vadas alleges that he fell from a steel ladder attached to a cargo crane aboard the vessel when a defective rung on the ladder broke. Vadas has sued Lauritzen under section 905(b) of the Longshoremen and Harborworkers' Compensation Act (33 U.S.C. § 901, *et seq.*) (the "LHWCA"), alleging that Lauritzen was negligent in failing to: (1) provide a safe place for Vadas to perform his duties; (2) provide a safe and adequate ladder; (3) maintain a safe and adequate ladder; (4) properly and adequately inspect the ladder; (5) warn Vadas of the defective ladder; and (6) use due care under the circumstances. (Compl. Count Two ¶ 8.).

By its present motion, Lauritzen seeks summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Lauritzen argues that it is entitled to summary judgment

[1] The parties entered into a Stipulation, dated July 2, 1999, agreeing that, for purposes of this litigation, the defendant J. Lauritzen A/S was the owner of the African Reefer. Vadas has therefore agreed to abandon his claims as to all of the remaining defendants. Accordingly, the court will treat the parties' stipulation as a stipulation of dismissal of the claims against the defendants J. Lauritzen Holdings A/S, J. Lauritzen (U.S.A.), Inc., and New England Shipping Co. and therefore dismisses those claims pursuant to Rule 41(a)(1)(i) of the Federal Rules of Civil Procedure.

because the undisputed facts demonstrate that Lauritzen did not violate any duty owed to Vadas under the LHWCA. In response, Vadas argues that there are several disputed issues of material fact precluding summary judgment.

Lauritzen has demonstrated that it is entitled to summary judgment. It has presented probative evidence demonstrating that Vadas' injuries were not caused by any wrongdoing by Lauritzen and Vadas has failed to come forward with any probative evidence to defeat Lauritzen's motion. Accordingly, Lauritzen's Motion for Summary Judgment is granted.

A. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when the evidence demonstrates that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." Id. Thus, although the court must construe the facts in the light most favorable to the non-moving party and must resolve all ambiguities and draw all reasonable inferences against the moving party, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986), when a motion is properly supported by documentary and testimonial evidence, the nonmoving party must present significant probative evidence to establish a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986); Colon v. Coughlin, 58 F.3d 865, 872 (2d Cir. 1995). If the nonmoving party submits evidence that is "merely colorable," or is not "significantly

probative," summary judgment may be granted. Anderson, 477 U.S. at 249-50.

B. DISCUSSION

The parties do not dispute the legal posture of this case. Vadas' sole claim is for shipowner negligence under section 905(b) of the LHWCA. Section 905(b) provides, in pertinent part, that "[i]n 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 ...." 33 U.S.C. § 905(b) (2000). Liability under section 905(b) may only be based on the negligence of the vessel's owner and may "not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred."[2] Id.

The Supreme Court has identified three general duties that, if breached, can constitute negligence under section 905(b): (1) the "turnover" duty; (2) the "active involvement" duty; and (3) the duty "to intervene." Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156, 167 (1981); Howlett v. Birkdale Shipping Co., 512 U.S. 92, 98 (1994). The parties do not dispute that only the "turnover" and "active involvement" duties are at issue in this case.

[2] Prior to the 1972 amendments that added section 905(b) to the LHWCA, longshoremen had been able to hold shipowners liable for any failure to "supply a safe ship irrespective of fault and irrespective of the intervening negligence of crew members," by proving a breach of the warranty of seaworthiness. Miles v. Apex Marine Corp, 498 U.S. 19, 25 (1990); see also Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946) (applying warranty of seaworthiness in stevedoring context).

1. *Vadas' "Turnover" Duty Claim.*

The Supreme Court has defined the "turnover" duty as follows:

> A vessel must exercise ordinary care under the circumstances to turn over the ship and its equipment and appliances in such a condition that an expert and experienced stevedoring contractor, mindful of the dangers arising from the hazards of the ship's service 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 equipment, so long as the hazards are known to the vessel or should be know by it in the exercise of reasonable care and would likely be encountered by the stevedore, and would not be obvious to or anticipated by him if reasonably competent in the performance of his work.

Howlett, 512 U.S. at 98 (internal quotations and citations omitted). Vadas claims that Lauritzen breached the "turnover" duty by failing to provide him with a safe and adequate ladder, to properly maintain and inspect the ladder, and to warn him of the defective condition of the ladder. (Compl. Count Two ¶ 8.) Thus, in order to succeed in his "turnover" duty claim, Vadas must demonstrate that his injuries were caused by Lauritzen's failure to adequately maintain and inspect the ladder or by Lauritzen's failure to warn him of the defective condition of the ladder. Biggs v. Logicon, Inc., 663 F.2d 52 (8th Cir. 1981).

In support of its motion, Lauritzen has provided ample evidence demonstrating that Vadas' injuries were not caused by Lauritzen's negligence. Specifically, Lauritzen has presented evidence indicating that the ladder was not defective, that Lauritzen routinely inspected the ladder, and that Lauritzen had no prior knowledge of any defect with the ladder. For example, Lauritzen has presented the affidavit testimony of the African Reefer's chief engineer to show that the vessel's cargo crane ladders were routinely inspected prior to arrival in port. The engineer further testified that the ladder from which Vadas fell was visually inspected prior to the accident

and that there were no known problems with the ladder prior to the accident. He also testified that the ladder was in use for two hours prior to the accident by at least one longshoreman other than Vadas and by the engineer himself. Finally, Lauritzen cites Vadas' deposition testimony to show that Vadas visually inspected the ladder prior to the accident and found nothing wrong with it. Lauritzen has thus presented compelling evidence that it did not breach the "turnover" duty. See, e.g., Reed v. ULS Corp., 178 F.3d 988 (8th Cir. 1999) (summary judgment granted on "turnover" duty claim where shipowner presented evidence that it conducted monthly visual inspection of gangway, conducted a visual inspection of gangway when deployed, and had a crew member walk gangway to observe problems when deployed).

In response, Vadas has failed to come forward with sufficiently probative evidence to defeat Lauritzen's motion. Vadas argues that the issue of whether Lauritzen knew or should have known of problems with the ladder prior to the accident presents a triable issue of fact.[3] In support of his argument, Vadas offers his own affidavit testimony and a photograph of the ladder after the accident. Vadas testified that "at some point after [his] fall [he] observed that the ladder had been welded in the vicinity of where the right side support had broken, causing [his] fall." (Vadas Aff. at ¶ 18). He also argues that the photograph shows that the ladder had been welded, prior to the accident, in the vicinity of the spot where it broke. (Pl's Memo. at 10.) Vadas argues that "[i]f the right side support [of the ladder] had been welded prior to [Vadas'] fall, then [Lauritzen] and its employees were made aware of the defective and hazardous condition before [Vadas'] fall." (Id.)

[3] Vadas's claim that Lauritzen was negligent by failing to provide a safe ladder is, in and of itself, legally insufficient because it is equivalent to a prohibited claim that Lauritzen breached the warranty of seaworthiness.

Vadas' claims are not, however, supported by the evidence he presents. The court will assume, because Vadas is the non-moving party, that a reasonable trier of fact[4] could conclude from the photograph and Vadas' affidavit testimony that the ladder was welded in the vicinity of the break prior to the accident. The existence of the weld alone is not sufficient evidence for Vadas to avoid summary judgment. The existence of a weld on a steel ship is not probative of negligence. Vadas has not presented competent evidence from which a rational trier of fact could conclude that welds are inherently dangerous or that the weld on the ladder was defective.

Similarly, a factfinder could not reasonably infer from the evidence presented that Lauritzen employees had actual knowledge of facts necessary to render Lauritzen culpable under section 905(b). Specifically, Vadas has presented no evidence that any employee knew that the ladder was welded in the vicinity of the break or, more importantly, even if an employee was aware of the weld, that he/she also knew that the weld was defective. Finally, Vadas has failed to offer evidence (e.g., expert testimony or documentation of industry standards) from which one could reasonably infer that, even if not actually aware of the defective weld, a Lauritzen employee should have known that the ladder presented a dangerous condition.

Evidence of a ship's defect, absent evidence demonstrating the shipowner's culpability, can not support a claim under section 905(b). See, e.g., O'Hara v. Weeks Marine, Inc., No. 94-CV-4322 (ILG), 1999 WL 1129620 at *2 (E.D.N.Y. Oct. 25, 1999) (summary judgment granted where "plaintiffs ... completely failed to proffer any evidence attributable to a defective condition

[4] Because this is a non-jury case, the court will be the trier of fact. It is therefore tempting to draw conclusions and inferences from the evidence presented. Given the procedural posture of this case, however, the court will treat the evidence as if some other fact finder were to rule, deciding only what inferences a reasonable fact finder could draw.

on the barge, nor any neglect on the part of the defendant ... [nor] any evidence as to [the defendant's] knowledge–actual or constructive–of a dangerous condition that would impose a duty to act."); Wright v. Daviesyndicate, Inc., No. Civ. A. 91-3423, 1993 WL 246020 at *6 (E.D. Pa. June 30, 1993) ("Evidence of various operational problems or malfunction of equipment, without evidence of negligence of the vessel, is not sufficient to establish liability on the part of the ship owner."). In contrast, where the longshoreman can come forward with proof of culpability, summary judgment is not appropriate. See, e.g., Scindia Steam Navigation Co., 451 U.S. at 175 (triable issue of fact where evidence presented that "for two days prior to the accident, it had been apparent to those working with the winch that this equipment was malfunctioning.").

In the closely analogous case of Delange v. Dutra Constr. Co., 183 F.3d 916 (9th Cir. 1999), the longshoreman argued that a hidden defect in one of the ship's pieces of equipment caused his injuries. Id. at 921. The shipowner moved for summary judgment on the longshoreman's claim of breach of the "turnover duty" and supported its motion with evidence indicating that the captain of the vessel had inspected the equipment the morning of the accident and discovered no problems. Id. In response, the longshoreman submitted an affidavit in which he claimed that the equipment was defective. Id.

The court held that summary judgment was appropriate because, even if there was an issue of fact as to whether the equipment was defective, the longshoreman had presented no evidence showing that the shipowner was aware of the defect. Id. The court explained that "[t]he mere assertion that the pin was bent without a showing of specific facts supporting negligence on the part of [the shipowner], amounts to a claim that the barge was unseaworthy, a

strict liability action not cognizable under section 905(b)." Id. Similarly, even assuming that the ladder at issue in this case was defective, Vadas' claim fails because he has failed also to present proof of Lauritzen's culpability.

Vadas next claims that a triable issue of fact exists concerning whether Lauritzen properly maintained or repaired the ladder. Specifically, Vadas asks the court to infer that Lauritzen never maintained or repaired the ladder because Lauritzen did not produce maintenance or repair documents to Vadas during the course of discovery. During discovery, Vadas requested from Lauritzen all repair and maintenance records (from both before and after the accident), relating to the ladder, and as well as records of "all services of any type performed by the Ship Engineer or other employees of J. Lauritzen Holding et al. on the metal ladder ...." (Vadas Ex. B.) Vadas thus argues that a triable issue of fact exists concerning whether Lauritzen properly maintained or repaired the ladder because Lauritzen presented no documentation of such repairs or maintenance. (Pl's Memo. at 14.)

Even if it were reasonable to infer from the absence of maintenance records that the ladder had never been maintenanced or repaired,[5] Vadas has presented no evidence from which it could reasonably be inferred that the failure to maintain or repair a fixed steel ladder constitutes negligence. For example, Vadas does not provide expert testimony or industry standards demonstrating how often such a ladder should be maintenanced, and when repairs are necessary, or even evidence about how long the ladder in question was in service. It would be wholly speculative for a factfinder to infer from the lack of production of maintenance records that no

[5] Any such inference would, of course, run counter to Vadas' claim that the ladder had been welded prior to the accident.

maintenance or repairs were ever performed on the ladder and that the lack of repairs or maintenance was improper. See, e.g., Tsotras v. U.S., No. 93 CV 4029 (SJ),1996 WL 652606 (E.D.N.Y. Nov. 6, 1996) (motion for summary judgment granted where plaintiff's proffered evidence was "'merely colorable' and 'not significantly probative ....'").

Finally, Vadas argues that Lauritzen's inspection of the ladder was negligent because the crew members only visually inspected the ladder. (Pl's Memo. at 13.) The court will assume, for purposes of this motion, that Lauritzen's inspection consisted solely of a visual inspection.[6] Vadas has failed, however, to offer any evidence demonstrating that a visual inspection was inadequate. For example, Vadas fails to present any expert testimony or evidence of industry standards concerning ladder maintenance or repair. See, e.g., Wixom v. TGM Shipping Agency, Civ. A. No. 91-1115, 1992 WL 115612 (E.D. La. May 1, 1992) (summary judgment appropriate where there was an "absence of evidence direct, circumstantial, inferential or otherwise regarding the essential elements" of the longshoreman's claims). Vadas has thus failed to demonstrate the existence of a triable fact concerning Lauritzen's allegedly negligent inspection.[7]

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[6] The court notes that Lauritzen has produced evidence that the chief engineer climbed the ladder prior to the accident. The record is silent, however, about his reasons for climbing the ladder.

[7] Vadas' opposition is rife with other unsupported, speculative and conclusory statements that are simply insufficient to create triable issues of fact. For example, Vadas claims that the "crew, who was familiar with the ship, knew or should have known how frequently the ladder was being used, and how long it had been since the ladder was last welded." (Pl's Memo. at 11.) He similarly claims that Lauritzen's employees "were in a better position to know the condition of the right side support than were the stevedore crew, as they were aware, or should have been aware, of the ladder's history before December 21, 1995." Vadas fails, however, to present any evidence whatsoever to support these claims.

2. *Vadas' "Active Involvement" Duty Claim.*

Lauritzen has also demonstrated that it is entitled to judgment as a matter of law on Vadas' claim that it breached the "active involvement" duty. The "active involvement" duty provides that a "vessel may be liable if it actively involves itself in the cargo operations and negligently injures a longshoreman or if it fails to exercise due care to avoid exposing longshoremen to harm from hazards they may encounter in areas, or from equipment, under the active control of the vessel during the stevedoring operations." Scindia, 451 U.S. at 167.

Lauritzen has provided evidence demonstrating that none of the African Reefer's crew involved themselves in the cargo operations. For example, the chief engineer testified that "[t]he cargo operations, including the operation of the cranes on the African reefer, were performed by the longshoremen at the Bridgeport terminal." (Mattig Aff. ¶ 13). He further testified that "the cargo operations were not performed, nor were they supervised by the officers or crew of the African Reefer." (Id. ¶ 14).

Vadas argues that there exists a genuine dispute concerning whether Laurtitzen had "active control" of the crane at the time of the accident, because the ship's chief engineer inspected and climbed the ladder prior to the accident and because Lauritzen repaired the ladder immediately after the accident. Although the vessel's chief engineer climbed the ladder thirty minutes before the accident, it is undisputed that a longshoreman, not the chief engineer was operating the crane at the time of the accident. (Id. ¶ 15.) Furthermore, the fact that Lauritzen employees repaired the ladder immediately following Vadas' fall does not permit the inference that they were in control of the crane at the time of the accident. Vadas has thus failed to demonstrate the existence of a triable issue of fact concerning Lauritzen's alleged violation of the

"active control" duty. See, e.g., Pimental v. Canadian Pacific Bulk Ship, 965 F.2d 13 (5th Cir. 1992) (directed verdict granted for shipowner because there could be no "active control" where crane was operated by longshoremen); Teply v. Mobil Oil Corp., 859 F.2d 375 (5th Cir. 1988) (summary judgment granted where shipowner's employees were not supervising longshoremen).

C. CONCLUSION

For the foregoing reasons, Lauritzen's Motion for Summary Judgment **(doc. # 28)** is granted. Vadas' claims against the remaining defendants are dismissed. The Clerk is instructed to prepare the judgment and close the file.

It is so ordered.

Dated at Bridgeport, Connecticut, this ____ day of November 2000.

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Stefan R. Underhill
United States District Judge