UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CHERYL A. MOREAU,	:	
Plaintiff,	:	
	:	
v.	:	No. 01 CV 1637 (SRU)
	:	
UNITED STATES OF AMERICA,	:	
Defendant.	:	

RULING ON MOTION TO DISMISS AND MOTION FOR SUMMARY JUDGMENT

This case arises from an accident on board the United States Navy submarine USS Connecticut. The plaintiff, Cheryl A. Moreau, alleges that the Navy negligently left a hose on the deck of the ship, and that she tripped over the hose while working on board, injuring her knee. Moreau filed suit against the defendant, the United States of America, pursuant to the Suits in Admiralty Act, 46 U.S.C. §§ 741 et seq., and the Public Vessels Act, 46 U.S.C. §§ 781 et seq. The United States has moved to dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, arguing that it has not waived sovereign immunity and, therefore, the court lacks subject matter jurisdiction. In the alternative, the United States moves for summary judgment pursuant to Rule 56, arguing that the presence of the hose did not constitute a negligent condition. For the reasons discussed below, those motions (Dkt. No. 11) are DENIED.

FACTS

Moreau is employed by Electric Boat Corp. as a pipe lagger and a safety instructor. (Moreau Dep. at 10-11.) She has been working for Electric Boat for more than 22 years. Id. at 6, 11. On September 2, 1999, Moreau was working with her partner, William Shaw, in the engine room of the

USS Connecticut at the Naval Submarine Base in New London, Connecticut. (Cooper Aff. at 1; Moreau Dep. at 21-22.) At approximately 2:00 p.m., they walked to the middle escape trunk hatch to leave the ship to get parts. (Moreau Dep. at 21-22.) Moreau was carrying a tool bag around her shoulder and was wearing steel-toed safety shoes. Id. at 24. As they waited for others to descend the ladder at the middle escape trunk hatch, Moreau stepped backward to allow people to pass, caught her heel on a hose lying on the deck, and fell. Id. at 22-23. Moreau split her knee open on the water way lip, a six inch metal deck lip that serves as a splash guard. Id. at 25.

The hose that Moreau tripped over was an orange, cloth Navy collapsible hose. Id. at 24. It was approximately three inches in diameter when filled with water or "charged." (Shaw Dep. at 15.) At the time of the accident, the hose was lying right next to the deck lip. (Def.'s Ex. 1; Moreau Dep. at 29.) However, Peter Sandt, a supervisor at Electric Boat investigated the accident scene shortly after Moreau fell and found that the hoses were out of place. He stated:

> They were out a little bit too far. They weren't directly in the middle of the passageway, but they were out too far. . . . And coming around the corner, they were sticking out too far into the passageway. They weren't in the center of the passageway.

(Sandt Dep. at 12.) At the time Sandt saw the hoses, they had already been moved. Id. at 17.

The hose is only left on the deck when the tank is being filled. (Cooper Aff. at 2.) The hose runs from the pier, approximately mid-ship to the trim tanks, passing though the middle escape trunk hatch, the middle of three hatches on the submarine. Id. at 1. United States Navy Lieutenant Shane Cooper stated the hose could not be placed in a different place:

> I do not believe that it is possible to run either hose in another manner. The location of the fittings dictates the path over which the hose is run. As a matter of practice, these hoses are always run through the middle escape trunk hatch and never through either the aft engine room

hatch or the forward weapons shipping hatch.

Id. at 2. The submarine does not have any fittings or hooks that would allow the crew to hang the hose from the overhead. Id. Ordinarily the hoses have some slack, particularly around corners. (Sandt Dep. at 17 ("You usually will have a little bit of movement with the hose. Especially when you come around a curve or a corner like this here. When you come around you will have some little play here.").)

At the time the accident occurred, lighting conditions were fine. (Moreau Dep. at 26.) Moreau was particularly tired at the time the accident occurred because she had been working long hours. Id. at 22. While Moreau did not notice the hose until after she fell, Id. at 24-25, Shaw noticed the hose prior to the accident (Shaw Dep. at 14).

As a safety instructor for Electric Boat, Moreau conducts safety training for her co-workers once per year. (Moreau Dep. at 11.) In providing this safety training, Moreau discusses the necessity of "being aware of your surroundings on the boat." Id. at 12.

STANDARDS FOR DECISION OF MOTIONS

Motion to Dismiss

The court is obligated to grant a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure whenever subject matter jurisdiction is lacking, without regard to the merits of the lawsuit.[1] See Fed. R. Civ. P. 12(h)(3) ("Whenever it

[1] A dismissal pursuant to Rule 12(b)(1) may be made by motion of a party or raised sua sponte by the Court. See, e.g., Westmoreland Capital Corp. v. Findlay, 100 F.3d 263, 266 (2d Cir. 1996) (the court has the power, and duty, to raise the issue of jurisdiction sua sponte when it is questionable whether complete diversity exists between

appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court *shall* dismiss the action.") (emphasis added). The party invoking the court's jurisdiction has the ultimate burden of proving such jurisdiction by a preponderance of the evidence. See Malik v. Meissner, 82 F.3d 560, 562 (2d Cir. 1996) ("The burden of proving jurisdiction is on the party asserting it.") (internal quotation marks and citation omitted).

The function of a motion to dismiss is "merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof." Ryder Energy Distribution Corp. v. Merrill Lynch Commodities, Inc., 748 F.2d 774, 779 (2d Cir. 1984) (*quoting* Geisler v. Petrocelli, 616 F.2d 636, 639 (2d Cir. 1980)). The court must therefore accept the material facts alleged in the complaint as true, and all reasonable inferences are drawn and viewed in a light most favorable to the plaintiff. See Leeds v. Meltz, 85 F.3d 51, 53 (2d Cir. 1996); Staron v. McDonald's Corp., 51 F.3d 353, 355 (2d Cir. 1995); Skeete v. IVF America, Inc., 972 F. Supp. 206, 207 (S.D.N.Y. 1997).

In deciding a motion to dismiss, consideration is limited to the facts alleged in the complaint or in documents attached thereto as exhibits or incorporated therein by reference. See Kramer v. Time Warner, Inc., 937 F.2d 767, 773 (2d Cir. 1991). Despite the liberality of this standard, only the "well pleaded" factual allegations of the complaint will be taken as true. Papasan v. Allain, 478 U.S. 265, 283 (1986). Conclusory statements that fail to give notice of the basic events of which the plaintiff complains need not be credited by the court. Haviland v. J. Aron & Co., 796 F. Supp. 95, 97

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the parties).

(S.D.N.Y. 1992), aff'd, 986 F.2d 499 (1992), cert. denied, 507 U.S. 1051 (1993).

Summary Judgment

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 a judgment as a matter of law." Fed. R. Civ. P. 56(c); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255-56 (1986). A fact is "material" if it "might affect the outcome of the suit under the governing law, under the applicable substantive law." Anderson, 477 U.S. at 248. An issue of fact is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id.; see also Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 670 (10th Cir. 1998). Thus, if reasonable minds could differ in the interpretation of evidence that is potentially determinative under substantive law, summary judgment is not appropriate. See R.B. Ventures, Ltd. v. Shane, 112 F.3d 54, 59 (2d Cir. 1995).

When ruling on a summary judgment motion, the court must construe the facts in a light most favorable to the non-moving party and must resolve all ambiguities and draw all reasonable inferences against the moving party. Anderson, 477 U.S. at 255 ("The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor."); Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (quoting United States v. Diebold, Inc., 369 U.S. 654, 655 (1962)); Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59 (1970) (quoting Diebold, 369 U.S. at 655); see also Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520, 523 (2d Cir. 1992), cert. denied, 506 U.S. 965 (1992). The court may not weigh the evidence, even when the court believes such evidence is implausible. See Anderson, 447 U.S. at 249; R.B. Ventures, 112 F.3d at 58-59. Ultimately, "[c]redibility determinations, the weighing of the evidence, and the drawing of

legitimate inferences from the facts are jury functions. . . ." Anderson, 447 U.S. at 255.

The moving party bears the initial burden of showing the lack of a genuine issue of material fact and entitlement to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 323, 327 (1986); Langman Fabrics v. Graff Californiawear, 160 F.3d 106, 110 (2d Cir. 1998). However, the movant need not prove an absence of a genuine issue of material fact where the nonmoving party bears the burden of proof. In such circumstances, "the burden on the moving party may be discharged by 'showing' -- that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case." Celotex, 477 U.S. at 325.

ANALYSIS

Motion to Dismiss

The United States argues that the court lacks subject matter jurisdiction over the Moreau's claim. "The doctrine of sovereign immunity prevents suits against the United States unless the United States has waived the immunity." Monti v. United States, 223 F.3d 76, 78 (2d Cir. 2000) (citing United States v. Testan, 424 U.S. 392, 399 (1976)). If the United States has not waived immunity, the court lacks jurisdiction to hear the claims brought against the government. See Lunney v. United States, 319 F.3d 550, 2003 U.S. App. LEXIS 2679, *10-11 (2d Cir. 2003) ("Sovereign immunity is a jurisdictional bar, and a waiver of sovereign immunity is to be construed strictly and limited to its express terms.") (citations omitted); Up State Fed. Credit Union v. Walker, 198 F.3d 372, 374 (2d Cir. 1999) ("It is well established that in any suit in which the United States is a defendant, a waiver of sovereign immunity with respect to the claim is a prerequisite to subject matter jurisdiction."). The

plaintiff bears the burden of establishing that subject matter jurisdiction exists. Lunney, 319 F.3d 550, 2003 U.S. App. LEXIS 2679, at *10.

Both the Suits in Admiralty Act and the Public Vessels Act waive the United States' sovereign immunity for certain maritime claims involving public vessels. The Suits in Admiralty Act provides that "[i]n cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States or against any corporation mentioned in section 1 of this Act." 46 U.S.C. § 742. Similarly, the Public Vessels Act provides that "[a] libel in personam action in admiralty may be brought against the United States . . . for damages caused by a public vessel of the United States . . . ." 46 U.S.C. § 781. Courts have found that stevedores and longshoremen are entitled to sue the United States for negligence pursuant to both acts. See, e.g., Shenker v. United States, 322 F.2d 622 (2d Cir. 1963) (stevedore who was injured when he tripped over piece of lumber left on deck was entitled to sue under Public Vessels Act); Caldarola v. United States, 98 F. Supp. 987 (S.D.N.Y. 1951) (longshoreman who was injured when boom broke was entitled to sue for negligence under Suits in Admiralty Act).

The broad, explicit waivers of sovereign immunity included in both the Suits in Admiralty Act and the Public Vessels Act are limited by the discretionary functions exception. The Second Circuit has held that the discretionary functions exception applies in cases arising under the Suits in Admiralty Act. In re Joint E. and S. Dists. Asbestos Litigation, 981 F.2d 31, 35 (2d Cir. 1989) ("[W]e find the SAA to be subject to the discretionary function exception."). In holding that the discretionary functions

exception applies in cases arising under the Suits in Admiralty Act, the Second Circuit stated that the principles of separation of powers require courts to refrain from deciding questions consigned to other branches of government. Id. at 35 ("The wellspring of the discretionary function exception is the doctrine of separation of powers. Simply stated, principles of separation of powers mandate that the judiciary refrain from deciding questions consigned to the concurrent branches of the government."). Because the courts must always adhere to the principles of separation of powers, the Second Circuit held that the discretionary functions exception applied even though the Suits in Admiralty Act does not explicitly require its application. Id. at 35 ("The doctrine of separation of powers is a doctrine to which the courts must adhere even in the absence of an explicit statutory command.") (internal quotation marks and citation omitted). This same logic applies to the application of the discretionary functions exception to claims arising under the Public Vessels Act.

The discretionary functions exception shields the government from liability for the acts of an employee where such employee was exercising or performing a discretionary function. As defined in the Federal Tort Claims Act, the discretionary function exception provides that the government is not liable for:

> any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a). The Supreme Court has held that the exception covers only acts that (1) are "discretionary in nature, acts that involve an element of judgment or choice," and (2) are based on "considerations of public policy." United States v. Gaubert, 499 U.S. 315, 322-23 (1991) (internal

quotation marks and citations omitted).

The United States argues the discretionary function exception applies in the present case because the placement of the charged hoses is part of the submarine design. That argument lacks merit for several reasons. First, although the design of the ship requires the exercise of discretion, Boyle v. United Technologies Corp., 487 U.S. 500 (1988), the manner in which the Navy runs the hose into the ship on a particular day does not require the exercise of discretion. Even if the government could demonstrate that the submarine design plotted a precise route for the hose, which it has not done, there is no evidence that the hose was where it should have been when Moreau tripped over it. The precise location of the hose on September 2, 1999 was not a part of the ship's design. Rather, the actual task of running the hose from the pier to the tank was a routine, non-discretionary task. Second, although the design of the ship may be an exercise of public policy, the placement of the hose on a particular day is not. Whether the hose is placed flush against a corner or is "out too far" does not require any sort of policy judgment. Accordingly, the discretionary function exception is inapplicable in the present case, the United States has waived its sovereign immunity, and, therefore, this court has jurisdiction.

Summary Judgment

The government also moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The government argues that "because the presence of the hose was open, obvious and known, it did not present a negligent condition and cannot support an allegation of negligence against the United States." (Mem. in Supp. of Mot. to Dismiss or for Summ. J. at 14.) Although both Shaw and Sandt stated that they could see the hose, Moreau did not see it before she fell. Sandt also stated that the hose was out of place when he saw it, creating a hazard. (Sandt Dep. at 18.) In light of

this testimony, a reasonable factfinder could find that the presence of the hose was not open and obvious, and that its placement was negligent. Accordingly, summary judgment is not appropriate.

CONCLUSION

For the reasons discussed above, the United States' Motion to Dismiss or, Alternatively, for Summary Judgment (Dkt. No. 11) is DENIED.

So ordered.

Dated at Bridgeport, Connecticut this ___ day of March 2003.

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Stefan R. Underhill
United States District Judge