No. 161

James D. Lee,
Respondent,
v.
Astoria Generating Company, L.P., et al.,
Appellants,

Astoria Generating Company, L.P., et al.,
Third-Party Plaintiffs-Appellants.
v.
Elliott Turbomachinery Co., Inc., et al.,
Third-Party Defendants-Appellants.

Barbara Goldberg, for appellants/third-party appellants Astoria Generating Company, L.P., Orion Power New York GP, Inc., Orion Power New York, L.P. and Orion Power New York LP, LLC.

Curt J. Schiner, for third-party appellants Elliott Turbomachinery Co., Inc. and Elliott Company.

Paul T. Hofmann, for respondent.

JONES, J.:

In this appeal, we are called upon to determine whether a barge containing an electricity generating turbine is a vessel under 33 USC § 905(b) of the Longshore and Harbor Workers'

Compensation Act (LHWCA) and whether that provision preempts New York State Labor Law §§ 240(1) and 241(6) claims. We hold that the barge is a vessel and plaintiff's Labor Law §§ 240(1) and 241(6) claims are preempted.

The Gowanus Gas Turbines electric generation facility in Brooklyn is a facility owned and operated by defendants Astoria Generating Company, L.P., Orion Power New York, GP, Inc., Orion Power L.P. and Orion Power New York, LP, LLC (Astoria/Orion). The site, located on navigable waters in the Gowanus Canal, is comprised, in part, of four barges that are each 80 feet wide by 200 feet long that collectively house eight individual gas turbine generating units. While stationed, the barges are afloat in the bay and connected to a power grid. Periodically, approximately once a decade, the barges are moved to drydock for maintenance. They are also capable of being moved for the purpose of providing electric power at other locations. Two of the barges had been so moved on at least one occasion.

In 2000, Astoria/Orion hired third-party defendants Elliott Turbomachinery, Co., Inc. and Elliott Company (Elliott), a company based in Pennsylvania, to perform an overhaul of the turbines at the Gowanus facility. This involved disassembling the entire turbine, shipping parts of it back to Elliott's shop in Pennsylvania for restoration or replacement, and returning it to the site for Elliott's millwrights to reassemble. In 2001, plaintiff, a millwright employed by Elliott, injured his back

while performing work on a turbine on barge number one at the facility. According to plaintiff, he was ordered by his supervisor to enter the turbine's exhaust well through a hatch to weld some fixtures inside. To reach the location of the repair, plaintiff used a ladder to access the exhaust well and entered the hatch. From there, he was to climb down the base of the exhaust well, but his feet slipped from under him and he fell eight feet to the base of the exhaust well, injuring his back.

After the accident, plaintiff claimed and was awarded benefits under the LHWCA, which "provides workers' compensation to land-based maritime employees" (Stewart v Dutra Constr. Co., 543 US 481, 488 [2005]). He also commenced this state court action against Astoria/Orion, asserting Labor Law §§ 200, 240(1) and 241(6) claims and common law negligence claims. Astoria/Orion subsequently filed a third-party complaint against Elliott seeking indemnification.

Elliott moved for summary judgment dismissing the complaint and third-party complaint, arguing, among other things, that 33 USC § 905(a)[1] precludes lawsuits against it as an employer of the injured worker and that plaintiff's state claims

[1] "The liability of an employer prescribed in section 904 of this title shall be exclusive in place of all other liability of such employer to the employee" (33 USC § 905[a]). Section 904 provides that "[e]very employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908 and 909 of this title."

were preempted by section 905(b)[2] and federal maritime law. The barge owners cross-moved for summary judgment, also arguing that the plaintiff's claims were preempted. In opposition, plaintiff argued that the claims were not preempted because (1) the barge did not constitute a vessel under section 905(b) and (2) maritime jurisdiction did not apply to his claims against the barge owners.

Supreme Court granted summary judgment dismissing the complaint and third-party complaint. It concluded, among other things, that section 905 of the LHWCA preempted the Labor Law 240(1) and 241(6) claims. The court adopted the Department of Labor's determination that plaintiff is a covered employee under the LHWCA and concluded the barge is a vessel under recent federal case law. It also dismissed plaintiff's Labor Law § 200 and common law negligence claims.

The Appellate Division "reversed" the Supreme Court order, reinstated plaintiff's Labor Law §§ 240(1) and 241(6) claims and granted summary judgment as to the Labor Law § 240(1)

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[2] "In the event of injury to a person covered under this chapter 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 . . . 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 . . . The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter" (33 USC § 905[b]).

claim in plaintiff's favor.[3] It held that the Labor Law claims are not precluded by the LHWCA because the barge is not a vessel. It further stated, "even if the barge were a vessel, federal maritime jurisdiction would not preempt these claims" (55 AD3d 124, 126 [1st Dept 2008]). The Appellate Division granted Astoria/Orion and Elliott leave to appeal and certified the following question to this Court: "Was the order of this Court, which reversed the order of Supreme Court, properly made?" We now reverse and answer the certified question in the negative.

The LHWCA provides compensation to workers injured on navigable waters of the United States in the course of their employment (Director, Office of Workers' Compensation Programs, United States Department of Labor v Perini North River Associates 459 US 297, 325 [1983]; see Chandris, Inc. v Latsis, 515 US 347, 360 [1995]).[4] It operates as a no-fault workers' compensation

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[3] It appears that the Appellate Division affirmed the dismissal of plaintiff's Labor Law § 200 and common law negligence claims. Astoria/Orion did not appeal the denial of that part of their summary judgment motion that sought relief on the third-party complaint.

[4] In Perini North River, the Supreme Court explained the history of the LHWCA. Prior to 1972, the LHWCA applied only to injuries that occurred on navigable waters (Perini North River, 459 US at 313). In 1972, Congress expanded the coverage landward and created a scope of persons covered, which became the situs and status test (id. at 317-318). The Perini North River Court then held that "when a worker is injured on the actual navigable waters in the course of his employment on those waters, he satisfies the status requirement . . . and is covered under the

scheme for eligible workers and precludes recovery of damages against their employer (33 USC § 905[a]). The LHWCA also permits an injured employee to recover damages against a third person other than his or her employer (33 USC § 933[a]). Section 905(b) of the LHWCA, consistent with § 933(a), permits an injured person covered under the Act to bring an action in negligence against a vessel, but provides that such remedy "shall be exclusive of all remedies against the vessel except remedies available under this chapter." Contrary to the dissent's position, one need not conclude that plaintiff is entitled to assert a maritime tort claim to invoke section 905(b) where the worker was injured on navigable waters (see e.g. Stewart, 543 US 481 [discussing the application of section 905(b) without any maritime tort inquiry]).[5] Section 905(b) of the LHWCA applies to the "injury

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LHWCA (id. at 324). The Court noted that "Congress was concerned with injuries on land, and assumed that injuries occurring on the actual navigable waters were covered, and would remain covered" (id. at 319).

[5] The dissent's reliance upon Executive Jet Aviation, Inc. v City of Cleveland (409 US 249 [1972]) and McLaurin v Noble Drilling, Inc. (529 F3d 285 [5th Cir 2008]) is misplaced -- neither of those cases involved claims traditionally covered under the LHWCA. The Supreme Court created the maritime tort inquiry in Executive Jet. There, the Court "concluded that maritime locality alone is not a sufficient predicate for admiralty jurisdiction in aviation tort cases" (409 US at 261). In McLaurin, the Fifth Circuit continued the use of such inquiry in the context of a shipyard accident. The court, noting that "[i]njury on navigable waters is a sine qua non of the maritime tort, . . . held that a maritime worker injured on dry land cannot sustain a cognizable injury under § 905(b) of the LHWCA" (529 F3d at 290 [internal quotation marks and citation omitted]).

of a person covered under this chapter" where the liability of a vessel is at issue. Thus, because the LHWCA covers plaintiff's injury upon navigable waters, whether section 905(b) applies in this case hinges upon whether the structure upon which plaintiff was injured is a vessel. Although the LHWCA does not define "vessel," the United States Supreme Court has provided detailed guidance concerning the definition and characteristics of a vessel, holding that the statutory definition of the term in 1 USC § 3 is applicable in this context.

A "'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water" (Stewart v Dutra Construction Company, 543 US 481, 489 [2005], quoting 1 USC § 3). Structures temporarily stationed in a particular location maintain their status as vessels. However, floating structures that are "not practically capable of being used as a means of transportation" do not qualify as vessels (id. at 493 [internal quotation marks and citation omitted]). Such floating structures (non-vessels) are permanently fixed or moored "to shore or resting on the ocean floor" (id. at 493-494).

Here, the barge, located on navigable waters in the Gowanus Bay, is a vessel within the LHWCA. The barges owned by Astoria/Orion have been tugged on water approximately once a decade to a maintenance station and, at least once, to provide

energy to another part of New York City in an emergency. Thus, the barge at issue is practically capable of being used as a means of transportation on water. Although the barge is stationed at the Gowanus facility, because it is not permanently anchored or moored, it has not lost its status as a vessel. Accordingly, the barge is a vessel under section 905(b).

The remaining issue is whether section 905(b) preempts plaintiff's Labor Law §§ 240(1) and 241(6) claims. It is well recognized that the Supremacy Clause (U.S. Const., art VI, cl.2) "'may entail pre-emption of state law either by express provision, by implication, or by a conflict between federal and state law'" (Balbuena v IDR Realty LLC, 6 NY3d 338, 356 [2006], quoting New York State Conference of Blue Cross & Blue Shield Plans v Travelers Ins. Co., 514 US 645, 654 [1995]). Congress' intent to preempt "may be explicitly stated in the statute's language or implicitly contained in its structure and purpose. In the absence of an express congressional command, state law is pre-empted if that law actually conflicts with federal law (Cipollone v Liggett Group, Inc., 505 US 504, 516 [1992]). State law will not "be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress" (New York State Conference of Blue Cross & Blue Shield Plans, 514 US at 655).

Here, the LHWCA clearly states in section 905(b) that an action in negligence may be brought against a vessel and that such remedy "shall be exclusive of all other remedies against the

vessel except remedies available under this chapter" (33 USC § 905[b]). Congress clearly intends that actions maintained against a vessel be brought solely within the confines of the LHWCA and nowhere in the Act does it permit strict liability claims, as provided in Labor Law §§ 240(1) and 241(6). Therefore, section 905(b) of the LHWCA expressly preempts plaintiff's Labor Law §§ 240(1) and 241(6) claims. Contrary to the Appellate Division's alternative holding, Cammon v City of New York (95 NY2d 583 [2000]) does not support the premise that New York's Labor Law is not preempted by section 905(b). Cammon involved an injured worker receiving benefits under the LHWCA and a defendant landowner. Thus, this case did not involve section 905(b), "Negligence of vessel," as set forth in the LHWCA. While it is true that Federal maritime law does not generally supersede state law (see Cammon, 95 NY2d at 587), in this case, where Congress explicitly limited claims against the vessel owner to that Federal Act, state law claims are preempted.

Accordingly, the order of the Appellate Division should be reversed, with costs, the order of Supreme Court reinstated and the certified question answered in the negative.

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CIPARICK, J.(dissenting) :

Because plaintiff cannot assert a maritime tort claim for vessel negligence against the vessel owner, section 905 (b) of the Longshore and Harbor Workers' Compensation Act does not apply to preempt his state law claims. Accordingly, I respectfully dissent.

The Longshore and Harbor Workers' Compensation Act (LHWCA or the Act) (33 USC 901 et seq.) establishes workers' compensation benefits to "land-based maritime workers" (Stewart v Dutra Constr. Co., 543 US 481, 488 [2005]; see also McLaurin v Noble Drilling (US),Inc., 529 F3d 285, 289 [5th Cir 2008]). Under the LHWCA, qualified employees injured during the course of their employment may, regardless of fault, recover workers' compensation benefits from their employers (see 33 USC 904). An injured employee may also seek to recover against a vessel owner where the negligence of the vessel caused his or her injuries (see 33 USC 905 [b]). Specifically, section 905 (b) of the LHWCA provides,

> "In the event of injury to a person covered under [the LHWCA] 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 933 of this title, 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 . . . 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 chapter"

(emphasis added).

If there is no remedy provided by section 905 (b), there is no "exclusive remedy" that preempts state law actions. Section 905 (b) does not create a new statutory negligence cause of action or maritime tort, nor does it extend or create new admiralty jurisdiction (see Richendollar Diamond M Drilling Co., 819 F2d 124, 128 [5th Cir 1987]). Rather, it merely preserves an injured employee's right to recover for vessel negligence under existing maritime law (see Kerr-McGee Corp. v Ma-Ju Mar. Servs., Inc., 830 F2d 1332, 1339 [5th Cir 1987]; see also Matter of Donjon Mar. Co., 2008 WL 3153721 [SD NY 2008]). If a plaintiff cannot state a cause of action for a maritime tort, section 905 (b) does not provide any remedy and so does not apply to preempt state law causes of action against vessel owners (see McLaurin, 529 F3d at 289; see also Robertson v Arco Oil & Gas Co., 766 F Supp 535, 537-538 [WD La 1991] [where the plaintiff's claim fell within admiralty jurisdictions, "[h]is maritime law remedy against the vessel owner . . . consist[ed] of a section 905 [b] suit for negligence]). Thus, to determine whether a plaintiff's

state claims are preempted by the "exclusive remedy" language of section 905 (b), a court must first ascertain whether the plaintiff can state a maritime tort claim for vessel negligence against the vessel owner.[1]

A tort claim qualifies as a "maritime tort" and falls under the federal courts' admiralty jurisdiction where the injury satisfies a maritime situs/status test (see Richendollar, 819 F2d at 127).[2] That is, "where the wrong (1) took place on navigable waters ('situs') and (2) 'bear[s] a significant relationship to traditional maritime activity' ('status')," the alleged wrong may be susceptible to suit under a maritime tort cause of action

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[1] This Court has a history of preserving state claims where doing so is not inconsistent with the federal scheme (see e.g. Matter of People v Applied Card Sys., Inc., 11 NY3d 105 [2008]; Arons v Jutkowitz, 9 NY3d 393 [2007]). As the Appellate Division noted, this is particularly true in cases involving the health and safety of our workers (see e.g. Balbuena v IDR Realty LLC, 6 NY3d 338 [2006]; Cammon v City of New York, 95 NY2d 583 [2000]), a matter which has historically been within the police powers of the state.

[2] The majority conflates the issue of workers' compensation benefits under the Act with the potential maritime tort remedy under the Act (see majority op, at 5-6). As to the former, a covered worker need only sustain some injury on the navigable waters to satisfy the status test for workers' compensation benefits (see Director, Off. of Workers' Compensation Programs, United States Dept. of Labor v Perini N. River Assocs., 459 US 297, 324 [1983]). As to the latter -- the tort claim -- the alleged wrong must "bear[] a significant relationship to a traditional maritime activity" (Exec. Jet Aviation, Inc. v City of Cleveland, 409 US 249, 268 [1972]). The federal courts have recently used the Exec. Jet test to ascertain whether a plaintiff can assert a section 905 (b) vessel negligence claim (see e.g. McLaurin, 529 F3d at 289).

(Keene Corp. v United States, 700 F2d 836, 843 [2d Cir 1983], quoting Exec. Jet Aviation, Inc. v City of Cleveland, 409 US 249, 268 [1972]). In Jerome B. Grubart, Inc. v Great Lakes Dredge & Dock Co. (513 US 527 [1995]), the Supreme Court explained the status test, or "connection" test, as having two components:

> "The connection test raises two issues. A court, first, must 'assess the general features of the type of incident involved,' to determine whether the incident has 'a potentially disruptive impact on maritime commerce.' Second, a court must determine whether 'the general character' of the 'activity giving rise to the incident' shows a 'substantial relationship to traditional maritime activity.'"

(id. at 534 [internal citations omitted], quoting Sisson v Ruby, 497 US 358, 363, 364 n2, 365 [1990]). The federal courts have considered various factors to determining whether an alleged wrong bears a significant relationship to traditional maritime activity, including:

> "1) the functions and roles of the parties; 2) the types of vehicles and instrumentalities; 3) the causation and type of injury; 4) traditional concepts of the role of admiralty law; 5) the impact of the event on maritime shipping and commerce; 6) the desirability of a uniform national rule to apply to such matters, and 7) the need for admiralty 'expertise' in the trial and decision of the case"

(Ciolino v Sciortino Corp., 721 F Supp 1491, 1493 [D Mass 1989], citing Shea v Rev-Lyn Contr. Corp., 868 F2d 515, 517-518 [1st Cir 1989], Drake v Raymark Indus., Inc., 772 F2d 1007 [1st Cir 1985], Molett v Penrod Drilling Co., 826 F2d 1419, 1426 [5th Cir 1987],

Oman v Johns-Manville Corp., 764 F2d 224, 230 [4th Cir 1985]; Harville v Johns-Manville Prods. Corp., 731 F2d 775, 779-87 [11th Cir 1984], and Kelly v Smith, 485 F2d 520, 525 [5th Cir 1973]).

As stated by the majority opinion, here, plaintiff's injury occurred in navigable waters on a "vessel," as the Supreme Court recently broadly defined that term in Stewart (543 US at 495).[3] Thus, the "situs" test for a maritime tort sounding in negligence is satisfied (see Exec. Jet Aviation, 409 US at 268). However, the status test is not satisfied because plaintiff's activity on defendant's vessel bore no cognizable relationship to maritime activity or commerce. As a result, section 905 (b) cannot apply to preempt plaintiff's state law claims against the vessel owner (see e.g. McLaurin, 529 F3d at 291-292).

Plaintiff was employed by third-party defendant Elliot as a millwright to perform substantial mechanical work on gas turbine electrical generating units owned by defendant/third-party plaintiff. These generating units happened to be housed on defendant's barges, i.e., vessels; however, other than their

[3] Stewart, although instructive for limited purposes here, is distinguishable on its facts. In that case, the plaintiff, a marine engineer, was injured when a dredge collided with a vessel (a scow) upon navigable waters (see 543 US at 485). The plaintiff had been hired by the dredge's owner "to maintain the mechanical systems" of the dredge (id.). The Supreme Court observed that the "question in th[e] case [was] whether a dredge is a 'vessel' under § 2 (3) (G) of the Longshore and Harbor Workers' Compensation Act" (id. at 484). Notably, after answering that narrow question, the Court remitted the matter for further proceedings.

incidental location upon navigable waters, no other features of the gas turbine electrical generating units -- nor of plaintiff's employment working on those units -- bore any relation to a traditional maritime activity or to maritime commerce (see Jerome B. Grubart, Inc., 513 US at 534). Indeed, the gas turbines are part of a power-generating operation that includes land-based structures adjacent to the barge turbines. Electricity generated by the barge turbines are conveyed over power lines, which are land-based, for transmission to energy consumers.

In Matter of Consolidated Edison of New York, Inc. v City of New York (44 NY2d 536 [1978]), we determined that, for the purposes of taxation, the barges were properly "classified as structures affixed to the land on which is situated the land-based distribution system to which [the barges] are physically connected and integrally related," and, as such, could be taxed as real property rather than personal property (id. at 542). A structure so entwined with a land-based energy production operation that we saw fit to permit its taxation as real property plainly has no relation to any traditional maritime activity.[4]

[4] While Cammon v City of New York does not form the basis for this dissent, the majority is mistaken to reject that case out-of-hand as distinguishable. To be sure, Cammon involved an action by an employee against a property owner -- but so does this case. During an earlier hearing to determine plaintiff's eligibility for LHWCA workers' compensation benefits, the testimony of Astoria/Orion's asset manager, Liam Baker, indicated that, at a minimum, Astoria/Orion owned the electrical lines

That plaintiff recovered workers' compensation benefits under the LHWCA is of no import, inasmuch as the question whether plaintiff can recover no-fault benefits under the act is distinct from the question whether he can recover in maritime tort for vessel negligence under section 905 (b). Significantly, section 933 (a) of the LHWCA expressly recognizes that an employee covered by the LHWCA may have state law remedies against third parties other than his or her employer (see McLaurin, 529 F3d at 292). As the United States Court of Appeals for the Fifth Circuit explained in McLaurin,

> "[s]ection 933 specifically forbids a claim against the employer or a person in his employ, leaving [section] 904 [workers' compensation claims] as the only avenue of recovery against the employer or a negligent

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connecting the barges to Consolidated Edison's substation, and implied that Astoria/Orion owned the piers to which the barges were moored. Moreover, notably, when asked to describe the distance between Consolidated Edison's substation and Astoria/Orion's generating barges, Baker observed that substation abutted the "property line" of Astoria/Orion, approximately 100 yards from the barges. Thus, here, plaintiff was injured while working on a barge attached to Astoria/Orion's land, and, as noted, we have already determined -- albeit for tax purposes -- that the barges are taxable as real property. In short, plaintiff was injured while working on the vessel portion of Astoria/Orion's integrated power generating station. In my view, the holding of Cammon would apply with equal force here, and bears repeating: "State application of strict liability here will not 'unduly interfere[] with the federal interest in maintaining the free flow of maritime commerce' . . . Local regulations that do not affect vessel operations, but rather govern liability with respect to landowners and contractors within the State, have no extraterritorial effect" (95 NY2d at 589, citing American Dredging Co. v Miller, 510 US 443, 458 [1994] [Souter, J., concurring]).

> coworker . . . Notably, unlike employers, vessel owners are not mentioned in [section] 933, so a maritime worker may attempt to recover against a vessel owner for vessel negligence under [section] 905 (b) [or] against a vessel owner as a third-party tortfeasor under [section] 933"

(529 F3d at 292, quoting 33 USC § 933 [quotation marks and original alterations omitted]).

The plain language of section 905 (b) makes recovery under that section the "exclusive remedy" where an injured employee has a cause of action for vessel negligence (33 USC 905 [b]). However, where, as here, the injured employee has no cause of action for vessel negligence under maritime law, section 933 of the LHWCA expressly recognizes and preserves state law causes of actions against third parties, including vessel owners who are not also employers.

Accordingly, I would affirm the order of the Appellate Division reinstating plaintiff's Labor Law claims against the owner of the barges, Astoria-Orion, and granting plaintiff partial summary judgment on the 240 (1) claim.

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Order reversed, with costs, order of Supreme Court, New York County, reinstated and certified question answered in the negative. Opinion by Judge Jones. Judges Graffeo, Read, Smith and Pigott concur. Judge Ciparick dissents and votes to affirm in an opinion in which Chief Judge Lippman concurs.

Decided November 23, 2009