SUPREME COURT OF THE STATE OF NEW YORK : Part 50
ALL COUNTIES WITHIN THE CITY OF NEW YORK

----------X Index No. 190029/2015

IN RE NEW YORK CITY ASBESTOS LITIGATION

----------X

ANN M. SOUTH, Individually and as Executor of the Estate of MASON T. SOUTH, deceased

Seq.004

Plaintiff

-against-

CHEVRON CORPORATION, individually and as successor by merger to TEXACO, INC. et al

Defendants

----------X

Texaco Inc. ("Texaco") moves to dismiss plaintiff's Jones Act complaint based on a release signed in connection with a settlement of her husband Mason South's 1997 Jones Act/maritime action. That action was commenced in Ohio federal court by The Maritime Asbestosis Legal Clinic, a Division of the Jaques Admiralty Law Firm (the "Maritime Asbestos Clinic").[1] The release settled Mason South's lawsuit for damages caused by exposure to products manufactured, sold or used by Texaco including known and unknown injuries resulting from exposure to asbestos, silica, smoke and carcinogenic chemicals (except for benzene products). The release provides that it is interpreted under the Jones Act and general maritime law. Texaco also seeks sanctions.

[1]The firm of Motley Rice LLC is co-counsel with the Jaques Admiralty Law Firm, P.C. in this action.

Plaintiff opposes the motion based on the heightened release standards of the Federal Employment Liability Act ("FELA"). In response, Texaco maintains that FELA is inapplicable, but even under heightened requirements of FELA, Texaco maintains that the release is still enforceable.

Background

On or around November 7, 1997, the Maritime Asbestos Clinic filed a Jones Act claim on behalf of Mason South in the Northern District of Ohio against 117 defendants, including Texaco. The complaint was signed by the Maritime Asbestos Clinic, not by Mason South. The complaint sought damages for Mason South's exposure to asbestos as a result of his life long career in the Merchant Marines.

On December 26, 1997, less than two months later, Mason South signed a release in connection with his lawsuit.[2] While counsel does not reveal the amount paid to Mason South under the release, the amount was disclosed to the court and opposing counsel in an email.[3] Based on this court's experience, the figure was extremely low, given Mason South's alleged extensive asbestos exposure. Seventeen years later, in 2014, Mason South was diagnosed with mesothelioma and died less than seven months later. On or about February 4, 2015, plaintiff initiated this asbestos-related Jones Act action arising from her husband's exposure to asbestos as a result of his life long career in the Merchant Marines.[4]

---

[2]The court is not privy to whether Mason South received any other amounts in connection with his 1997 claim.

[3]Counsel states that the amount was not disclosed "out of concerns for the confidentiality of settlement; however, the settlement provides that Plaintiffs' attorney may do so if requested by the Court." The reference is to paragraphs 8 and 9 of the release.

[4]Mason South was in the Merchant Marines from 1945 to 1982.

The release provides in relevant part:

> Claimant..does hereby forever discharge and release Texaco...from any and all actions or causes of actions...Claimant has now, has ever had, or which may accrue in the future against the Released Parties, or any of them, whether in admiralty, in contract or in tort, whether under Section 33 of the Act of Congress of 1920 known as the "Jones Act," and whether for maintenance and cure, loss of financial support, loss of inheritance, loss of consortium, loss [sic] hearing, mental anguish and medical expenses, on account or in any way arising out of any and all known or unknown, present or future, foreseen or unforeseen bodily and/or personal injuries, sickness or death, including claims for emotional distress, or any other injury, sickness or death or damages of Claimant allegedly caused by Claimant's exposure to products and/or materials, including components thereof, allegedly manufactured, sold, distributed, used or specified by the Released Parties, or any of them including, but not limited to, any and all claims for damages as alleged, or which could be alleged, for the injuries, sickness and/or disease allegedly caused as a result of the exposure to asbestos, silica, asbestos fibers, and asbestos dusts, and/or silica or asbestos-containing products, smoke and carcinogenic chemicals (not including benzene or products containing benzene). Further, Claimant understands that the long term effects of exposure to asbestos substances found in industrial materials may result in obtaining a new and different diagnosis from the diagnosis as of the date of this Release. Nevertheless, Claimant understands that by entering into this agreement, he is giving up the right to bring an action against the Released Parties, or any of them, in the future for any new or different diagnosis that may be made about Claimant's condition as a result of exposure to any product, including components thereof and materials included therein, manufactured, distributed, sold, used or specified by the Released Parties.

Arguments

To support its motion, Texaco refers to the language of the release. Texaco also maintains that the heightened release standards of FELA are inapplicable. Texaco maintains that FELA only applies to railroad workers and the release provides that it should be interpreted under the Jones Act and general maritime law, without reference to FELA. Even if FELA is applicable, Texaco maintains that the release would be enforceable. Texaco also points to Mason South's complaint (signed by his counsel), seeking damages for fear of developing "cancer and other asbestotic disease"

as evidence that he must have understood that he was releasing a future claim for mesothelioma.

Plaintiff maintains FELA applies because while the release states that it is governed by the Jones Act claims and general maritime law, the Jones Act incorporates "[l]aws of the United States regulating recovery for personal injury to, and death of, a railway employee" (46 U.S.C.A. § 30104). According to plaintiff, the release does not comply with the specificity requirements of FELA. It is replete with boiler plate and does not mention cancer or mesothelioma or the "quantity, location and duration of potential risks" as required under federal law. Additionally, plaintiff maintains that the very modest amount paid in settlement to her husband bolsters her argument that Mason South did not understand or intend to release defendant for a future mesothelioma claim. Accordingly, plaintiff argues that at a minimum, there is a question of fact as to whether Mason South was aware of the risk of mesothelioma when he signed the 1997 release and whether he intended to release that claim.

Plaintiff points to a split among the federal courts in determining whether a FELA release can bar a claim for future injuries. Plaintiff discusses *Babbitt v Norfolk & Western R.R. Co.* (104 F3d 89 [6th Cir 1997] ["to be valid, a release must reflect a bargained-for settlement of a known claim for a specific injury, as contrasted with an attempt to extinguish potential future claims the employee might have arising from the injuries known or unknown by him"]) and *Wicker v Consolidated Rail Corp.* (142 F3d 690 [3rd Cir 1998] [future claims may be released for specifically known risks if the release is not boilerplate and identifies the "quantity, location and duration of potential risks" but the writing alone is not conclusive]). Plaintiff maintains that the release fails to comply with the specificity requirements delineated in *Wicker*.[5]

---

[5]Plaintiff does not explain why she applies the *Wicker* test given that the underlying action was commenced in Ohio (which applies *Babbitt*), and the release was in settlement of the Ohio action. Plaintiff does not state that the action was among the thousands of cases transferred

Plaintiff alternatively argues that Texaco could not have obtained a release for a future claim of mesothelioma because FELA parties may only release claims when there is an "existing controversy." *Wicker* highlights "[t[he explicit requirement is that a controversy must exist" (142 F3d at 697). Ten months before Mason South signed the release, the United States Supreme Court held that a FELA plaintiff cannot recover for the fear of developing cancer or the cost of future medical monitoring, absent evidence of physical harm beyond mere exposure (*Metro-North Commuter R.R. v Buckley*, 521 US 424 [1997]). Because Mason South was not entitled to recover those damages, mesothelioma was not in "controversy" under *Wicker* and therefore, Texaco was not released for that claim.

In reply, Texaco argues that the release is not boilerplate and contains specific language which "clearly contemplated a second injury." Texaco also points to a new release used by plaintiff's counsel in Jones Act cases. The new release includes a separate paragraph that excludes future claims "for primary lung cancer or mesothelioma." Texaco further notes that plaintiff's counsel controlled distribution of the settlement amounts because the settlement involved a number of cases for which a lump sum was paid to the Maritime Asbestos Clinic and then distributed by the

---

to the Eastern District of Pennsylvania (which applies *Wicker*) (*see e.g., Maynor v Illinois Central Gulf R.R. Co.*, 2011 US District LEXIS 121485 [ED Pa 2011] [in denying summary judgment to plaintiff's railroad employer who claimed that an asbestos release barred the action, the court applied *Wicker* stating that "the MDL transferee court applies the federal law of the circuit where it sits, which in this case is the law of the United States Court of Appeals for the Third Circuit"]). Texaco, on the other hand, cites state law and the law in the Fifth Circuit, as well as *Oliverio v Consolidated Rail Corp.* (14 Misc 3d 219 [Sup Ct, New York County 2006]). *Oliverio* notes that neither the Second Circuit, the New York Court of Appeals, nor any of the Appellate Divisions have addressed the proper standard to be applied in judging whether a particular release may be enforced against a claim under the FELA. *Oliverio* adopted *Wicker* as the best approach.

Clinic to its clients.[6]

Discussion

The following discussion proceeds under federal law because the release provides that it should be interpreted under the Jones Act and general maritime law.[7] A maritime action instituted in state court is governed by federal maritime principles *(see Celeste v Prudential-Grace Lines, Inc.*, 35 NY2d 60 [1974]). Despite the grant of concurrent jurisdiction in federal and state courts over maritime actions, state courts are bound to apply federal law in the resolution of such disputes *(see* 28 U.S.C. § 1333). In admiralty cases, the responsibility is on the defendant to sustain a release, rather than on a plaintiff to overcome it (*see Garrett v Moore-McCormack Co.*, 317 US 239 [1942]). In determining the validity of a release, the Jones Act pre-empts a different state burden of proof (*id.* [Pennsylvania state court improperly applied the state's burden of proof, as opposed to the burden of proof under the Jones Act and admiralty law, on the mistaken belief that the burden of proof does not affect substantive rights]). The Jones Act states:

> A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer. Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section.

(46 U.S.C. § 30104[a]).

---

[6]In a telephone conference with the court and counsel for both sides, plaintiff's counsel maintained that Texaco knew how much each plaintiff received in settlement because it was common practice to discuss and assign a value to each case when settling in bulk. However, the court need not determine whether Texaco knew or assigned a value to Mason South's case. The amount paid to Mason South governs, absent proof that the Maritime Asbestos Clinic distributed the incorrect sum to its client.

[7]Texaco's citation to cases discussing state law is not useful.

Under the Jones Act seamen are:

> emphatically the wards of the admiralty; and though not technically incapable of entering into a valid contract, they are treated in the same manner as courts of equity are accustomed to treat young heirs, dealing with their expectancies, wards with their guardians, and *cestuis que trustent* with their trustees. . . . If there is any undue inequality in the terms, any disproportion in the bargain, any sacrifice of rights on one side, which are not compensated by extraordinary benefits on the other, the judicial interpretation of the transaction is that the bargain is unjust and unreasonable, that advantage has been taken of the situation of the weaker party, and that pro tanto the bargain ought to be set aside as inequitable.

(*Garrett v Moore-McCormack Co.*, 317 US at 246, *supra* [internal citations omitted]).

As a result of the wardship theory "releases are subject to careful scrutiny." (*id.* at 248). Accordingly:

> One who claims that a seaman has signed away his rights to what in law is due him must be prepared to take the burden of sustaining the release as fairly made with and fully comprehended by the seaman . . . the burden is upon one who sets up a seaman's release to show that it was executed freely, without deception or coercion, and that it was made by the seaman with full understanding of his rights. The adequacy of the consideration and the nature of the medical and legal advice available to the seaman at the time of signing the release are relevant to an appraisal of this understanding.

id. [internal citations omitted]).

The Jones Act incorporates not only the FELA statutes but also its "entirely judicially developed doctrine of liability" (*Kernan v. American Dredging Co.*, 355 US 426, 439 [1958]; *see also Pure Oil Co. v. Suarez*, 346 F2d 890, 892 [5th Cir. 1965] ["[i]nstead of devising separate standards to be applied in personal injury suits by seamen Congress adopted the expedient of incorporating by reference the more detailed provisions which govern the liability of railroads to their employees"]); *Rabenstein v Sealift, Inc.*, 18 F Supp 3d 343 [ED NY 2014] [in determining whether a Jones Act case was settled citation to case law interpreting the Federal Employers' Liability Act is appropriate because the Jones Act "is based upon and incorporates by reference the

Federal Employers' Liability Act . . . and both 'require[] uniform interpretation'"]).

Section 5 of FELA restricts a railroad company's attempts to exempt itself from liability through a release. It provides:

> Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

(45 U.S.C. § 55).

Section 5 of FELA does not prevent an employer from settling a specific claim with an employee for a specific disputed liability (*see Callen v Pennsylvania R.R. Co.*, 332 US 625, 631 [1948]). The *Callen* Court articulated that "where controversies exist as to whether there is liability, and if so for how much, Congress has not said that parties may not settle their claims without litigation" (*id.*). Thus, releases from liability are enforceable as long as the release reflects a bargained-for settlement of a known claim for a specific, known injury suffered (*see Babbitt*, 104 F3d at 92-93, *supra*).

However, the issue of whether Section 5 of FELA permits a release of future claims for known risks is unsettled.[8] The Sixth Circuit has adopted a bright line test that holds that releases attempting to bar future claims for known or unknown injuries under Section 5 of FELA are void (*id.*). Thus, a release is only valid for the specific injury and cannot reach another injury which may

---

[8]An excellent overview of this issue is presented in a law review article (*see* Brooke Granger, Comment, *Known Injuries vs. Known Risks: Finding the Appropriate Standard for Determining the Validity of Releases under the Federal Employers' Liability Act*, 52 Hous L Rev 1463 2015]).

develop later. The Third Circuit, however, held that "a release does not violate § 5 provided it is executed for valid consideration as part of a settlement, and the scope of the release is limited to those risks which are known to the parties at the time the release is signed" (*Wicker*, 142 F3d at 701, *supra*). The Third Circuit has adopted a fact intensive inquiry focusing on an evaluation of the parties' intent at the time that the release is signed (*id.* at 700).[9] Thus, a release which allows the "employee to make a reasoned decision whether to release the employer from liability for future injuries of specifically known risks does not violate § 5 of FELA" (*id.* at 701). In making this determination, the writing alone is not conclusive (*id.*). The release can be attacked as boiler plate where it details "a laundry list of diseases or hazards" (*id.*). While the lower court in *Wicker* found the language of the release unambiguous, the Third Circuit found that the language recited "a series of generic hazards of which Wicker . . . might have been exposed, rather than the specific risks."[10] Because the *Wicker* defendant offered no other evidence other than the language of the release to suggest that the plaintiff understood the actual risks, and despite the fact that plaintiff was represented by counsel, the Third Circuit held that the release was void.

Neither party has addressed which Circuit's law should apply. Although the release provides that it is governed by the Jones Act and general maritime law, the release does not specify a particular Circuit. Plaintiff appears to apply the law in the Third Circuit, as opposed to the Sixth

---

[9]The Eleventh Circuit has adopted the approach of the Third Circuit (*see Sea-Land Serv., Inc. v Sellan*, 231 F3d 848 [11th Cir 2000]).

[10]Texaco's citation to *Langhorne v Achmen Products., Inc.* (23 AD3d 208 [1st Dept 2005]) is misplaced. While the case involved a release signed in federal court regarding an asbestos claim, the case did not involve the Jones Act or general maritime law. The plaintiff in that case was vice president and president of an insulation company, not a seaman (*see Consorti v Aerofin Corp.*, Index Number 101948/04 [decision of Judge Helen Freedman, dated August 27, 2004]).

Circuit, where the lawsuit was commenced (*see* footnote 2).

Under the standards of either the Third or Sixth Circuit, Texaco has failed to meet its burden of proof to demonstrate that Mason South understood that he was releasing a future claim for mesothelioma, which was a risk known to him.[11] If the Sixth Circuit applies, the release is void under *Babbitt*, 104 F3d 89, *supra* because a release must reflect "a bargained-for settlement of a known claim for a specific injury, as contrasted with an attempt to extinguish potential future claims the employee might have arising from the injuries known or unknown by him."

If the Third Circuit's standard controls, summary judgment is also properly denied under *Wicker*, 142 F3d 690, *supra.* The *Wicker* court found that the release was void and contained a "laundry list of diseases or hazards [which] the employee may attack as boiler plate" (*id.* at 701). The release in *Wicker* provided in relevant part:

> I, Edward Wicker . . . for the sole consideration of Twenty-one Thousand Dollars ($ 21,000) . . . hereby release and hereby discharge Consolidated Rail Corporation . . . from any and all losses, claims, liabilities, actions, causes of action . . . and demands of any kind whatsoever in nature . . . which I have or to which I claim to be entitled by reason of any injuries, known or unknown, foreseen or unforeseen . . . which now exist or which may arise in the future as a result of or in any way connected with my alleged exposure to any material, substance, product, and/or good(s) of any kind or nature (including but not limited to dust, fumes, vapors, mists, gases, agents, asbestos or toxic substances of any kind) supplied or permitted to exist by [Conrail], and/or arising out of any working condition, of any kind, during my employment by [Conrail] . . . .

---

[11] Even if Second Circuit law is applied, summary judgment is properly denied. The court in *Oliverio*, 14 Misc 3d 219, *supra* adopted the *Wicker* standard when dealing with FELA. Additionally, under general maritime law, the validity of a seaman's release which is "as extensive as human and legal ingenuity could make" is properly submitted to the jury where "meager consideration" is paid by the ship owner and plaintiff has no "lawyer nor other competent adviser representing him when he signed the release" (*Hume v Moore-McCormick Lines*, 121 F2d 336 [2d Cir 1941]).

> I hereby declare and represent that the injuries and illnesses which have been or may be sustained, including mental conditions resulting from asbestos exposure or exposure to any substance, condition or environment or a belief that I was exposed to asbestos, or any substance, condition or environment, are, or may be permanent, and that recovery therefrom is uncertain and indefinite, and that they may cause or lead to other deleterious conditions, including but not limited to cancer, and that in making this Release, it is understood and agreed that I rely wholly upon my own judgment, belief, and knowledge of the nature, extent, effect, duration, and other possible results of said injuries, illnesses, conditions, exposures, and liability therefore, and that the release is made without reliance upon any statement or representation by [Conrail] . . . and that possible future conditions, as yet undetected, including but not limited to cancers of any kind, are included.

Like the *Wicker* release, the South release refers to a release of future claims arising out of asbestos exposure, and like *Wicker* release the South release contemplates a second injury. However, unlike the *Wicker* release, the South release does not even mention cancer, and neither release mentions mesothelioma.[12] Further, although the language of the release is strong evidence of the parties' intent, it is not conclusive.[13] Texaco has offered no proof (other than the language of the release) to demonstrate that Mason South intended to release a future claim for mesothelioma. The meager consideration that Mason South received and the documented problems with the Maritime Asbestos Clinic strongly militates against any conclusion that Mason South intended to do so (*see Garrett v Moore-McCormack Co.*, 317 US at 248, *supra* ["[t]he adequacy of the consideration and

---

[12]While the complaint sought damages for the fear of developing "cancer and other asbestotic disease" Mason South did not sign the complaint, and there is no evidence that he read the complaint or knew of the contents.

[13]Texaco's citation to *Langhorne v Achmen Products., Inc.* (23 AD3d 208 [1st Dept 2005]) is misplaced. While the case involved a release signed in federal court regarding an asbestos claim, the case did not involve the Jones Act or general maritime law. The plaintiff in that case was vice president and president of an insulation company, not a seaman (*see Consorti v Aerofin Corp.*, Index Number 101948/04 [decision of Judge Helen Freedman, dated August 27, 2004]).

the nature of the medical and legal advice available to the seaman at the time of signing the release are relevant to an appraisal of this understanding"]).[14] While the case law may be antiquated and paternalistic, this country has a very a long history of protecting mariners, a class of people described as "easily overreached" "credulous and complying" "thoughtless and require indulgence" and, as most apropos here "almost ready to sign any instrument that may be proposed to them" (*see Hume v Moore-McCormick Lines*, 121 F2d 336, *supra*). And while Texaco may have intended that the release bar this action, a release may not be "merely an engine by which an employer can evade FELA liability" (*Wicker*, 142 F3d at 700, *supra*).

It is hereby

ORDERED that Texaco, Inc.'s motion for summary judgment and sanctions is denied; and it is further

ORDERED that the plaintiff serve a copy of this Decision and Order with notice of entry on defendant within 20 days from today; and it is further

ORDERED that plaintiff's counsel disclose the settlement amount paid to plaintiff within

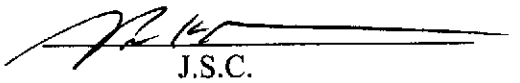
---

[14]The release recites that Mason South "DISCUSSED THE CONTENTS THEREOF WITH MY ATTORNEY." This law firm is the same firm discussed in two decisions by this court dated December 10, 2015 in the case *William E. Bartel, and David C. Peebles administrators of the Estate of Eugene Quinlan, deceased, and Julie Quinlan, individually v Marine Transport Lines, Inc., Waterman Steamship Corp. & John Crane Inc.*, Index Number 190360/14. In those decisions, the court noted that the Second Circuit cited numerous failures by the Maritime Asbestos Clinic in failing to produce evidence on behalf of clients in order to pursue a path of "sheer volume" to force settlement and referred to the firm's "dilatory volume strategy" (*see Asbestos Claimants v U.S. Lines Reorganization Trust*, 318 F3d 432, 434-435 [2d Cir 2003]). While an attorney is an agent of the client, the issue before the court revolves around the client's understanding of the release, not his attorney's. Therefore, a FELA release may be void even where plaintiff is represented by counsel (*see e.g.*, *Wicker*, 142 F3d 690, *supra*).

20 days from today through an affirmation of counsel uploaded to NYSCEF.[15]

This constitutes the Decision and Order of the court.

Dated: January 4, 2016



J.S.C.

HON. PETER H. MOULTON

[15]At the court's suggestion the settlement amount was initially disclosed in an email between the court and the parties. In this motion, Texaco did not object to plaintiff's offer to disclose the settlement amount if ordered by the court. The court now directs disclosure of the settlement amount as it was a basis for this court's Decision and Order.