UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

KAREN OCAMPO, as personal representative of SALOMON RODRIGUEZ,

Plaintiff,

v.

UNITED STATES OF AMERICA, et. al.

Defendant.

AND RELATED CROSS CLAIM.

Case No.: 15cv00180 JAH-WVG

ORDER DENYING DEFENDANT NASSCO'S MOTION FOR SUMMARY JUDGMENT [Doc. No. 79]

PROCEDURAL BACKGROUND

On January 27, 2015, Damaris Manzanero Vazquez, appearing as the personal representative of Salomon Rodriguez, filed a complaint against United States of America and National Steel and Shipbuilding Company ("NASSCO"). On November 23, 2015, Anakaren Lopez, appearing as the personal representative of Salomon Rodriguez, filed a First Amended Complaint and, filed a Second Amended Complaint on March 14, 2017. On November 6, 2017, Plaintiff filed a Third Amended Complaint which replaced Anakaren Lopez with Karen Ocampo as the personal representative for the Salomon Rodriguez. Plaintiff seeks damages for negligence and alleges Defendants' negligence caused Salomon Rodriguez to fall off the unguarded side of an elevator platform

approximately 98 feet down an elevator trunk while working aboard the USS Boxer in navigable waters at Pier 13, Naval Station, San Diego, California. TAC ¶¶ 11 - 21. Plaintiff asserts, as the decedent's personal representative, she is entitled to recover on behalf of Mr. Rodriguez's minor son. Id. ¶ 27.

Defendant United States filed an answer and cross claim against Defendant NASSCO asserting claims for negligence and contribution, and breach of express maritime contract. NASSCO filed an answer to the FAC and an answer to the crossclaim.

Defendant NASSCO filed a motion for summary judgment or, in the alternative, partial summary judgment. Both Plaintiff and Defendant United States filed oppositions to the motion, and Defendant NASSCO filed a reply. The parties appeared before this Court for a hearing on the motion, after which the Court took the matter under submission.

FACTUAL BACKGROUND

Defendant United States contracted with Defendant NASSCO to conduct repairs and maintenance on the USS Boxer and other vessels. Def. NASSCO Exh. 3 (Doc. No. 79-7). Included in the contract was the replacement of non-skid deck covering on the elevator platform inside Elevator #3 on the USS Boxer. Def. NASSCO Exh. 5 (Doc. No. 79-8). Defendant NASSCO subcontracted with South Bay Sand Blasting and Tank Cleaning, Inc. ("South Bay") to perform the non-skid deck covering work. Def. NASSCO Exh. 6 (Doc. No. 79-8). On July 31, 2014, while working as a laborer for South Bay on the elevator platform, Salomon Rodriguez fell through an unguarded opening at the aft end of the elevator platform to his death.

LEGAL STANDARD

Summary judgment is properly granted when "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). Entry of summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The party moving for summary judgment bears the

initial burden of establishing an absence of a genuine issue of material fact. Celotex, 477 U.S. at 323. Where the party moving for summary judgment does not bear the burden of proof at trial, as here, it may show that no genuine issue of material fact exists by demonstrating that "there is an absence of evidence to support the non-moving party's case." Id. at 325. The moving party is not required to produce evidence showing the absence of a genuine issue of material fact, nor is it required to offer evidence negating the non-moving party's claim. Lujan v. National Wildlife Fed'n, 497 U.S. 871, 885 (1990); United Steelworkers v. Phelps Dodge Corp., 865 F.2d 1539, 1542 (9th Cir. 1989). "Rather, the motion may, and should, be granted so long as whatever is before the District Court demonstrates that the standard for the entry of judgment, as set forth in Rule 56(c), is satisfied." Lujan, 497 U.S. at 885 (quoting Celotex , 477 U.S. at 323).

Once the moving party meets the requirements of Rule 56, the burden shifts to the party resisting the motion, who "must set forth specific facts showing that there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). Without specific facts to support the conclusion, a bald assertion of the "ultimate fact" is insufficient. See Schneider v. TRW, Inc., 938 F.2d 986, 990-91 (9th Cir. 1991). A material fact is one that is relevant to an element of a claim or defense and the existence of which might affect the outcome of the suit. The materiality of a fact is thus determined by the substantive law governing the claim or defense. Disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment. T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987) (citing Anderson, 477 U.S. at 248).

When making this determination, the court must view all inferences drawn from the underlying facts in the light most favorable to the nonmoving party. See Matsushita, 475 U.S. at 587. "Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, [when] ... ruling on a motion for summary judgment." Anderson, 477 U.S. at 255.

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DISCUSSION

Defendant NASSCO seeks summary judgment as to the negligence claim asserted by Plaintiff. Defendant argues it is not liable because it did not contribute to or aggravate the dangerous condition created by South Bay. In the alternative, Defendant argues it is entitled to partial summary judgment as to Plaintiff's claim for punitive damages.

I. Whether Defendant NASSCO is Liable

Defendant NASSCO contends, under general admiralty law, it is not liable for injuries to the decedent as a result of his performance of inherently and peculiarly dangerous work because he was the employee of a solvent independent contractor that was as well informed and competent as Defendant in the methods necessary to avoid accidental injuries to workers. Additionally, Defendant contends it had no significant involvement in the safety aspects of the job and did not aggravate any danger. Defendant maintains a line of California cases supplement admiralty law on the liability to an employee of an independent contractor and is known as the "Privette doctrine."[1]

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[1] In Privette v. Superior Court, the California Supreme Court discusses the exception to the common law rule that one who hires an independent contractor is not liable for injuries caused by the independent contractor, known as the "peculiar risk doctrine", and held that an employee of an independent contractor whose injuries are subject to workers' compensation may not recover under the peculiar risk doctrine. 5 Cal.4th 689 (1993). The parties agree general maritime law recognizes the peculiar risk doctrine. Defendant United States maintains California law is inapplicable to this admiralty action and suggests this Court should ignore all references to California law. Defendant NASSCO contends Privette "complement[s] the well settled precedent. . ." Reply at 4. Because admiralty law applies to this action, the Court will not address California law.

Defendant NASSCO cites to Nelson v. United States, to support its argument that it is not liable to Plaintiff. Nelson, involved an admiralty action seeking to hold the United States liable for negligence in the death of the employee of an independent contractor hired by the government to perform hazardous maritime work. 639 F.2d 469 (1980). The court held:

> that under general admiralty law the United States is not liable for injuries to the employees of its independent contractors arising out of the performance of inherently and particularly dangerous work in circumstances in which the contractor is solvent and is as well informed and competent as the Government in the methods necessary to avoid accidental injuries to works, absent significant Government involvement in safety aspects of the job or a Government act aggravating the job's danger.

Id. at 478. The court looked to the language of Restatement Torts section 413 in determining the nature of the duty owed which, along with section 416, is commonly referred to as the "peculiar risk doctrine." The peculiar risk doctrine allows a party injured by an independent contractor's inherently dangerous work to seek tort damages from the hirer of the independent contractor when the hirer fails to ensure that special precautions are taken to avoid danger. Restatement (Second) of Torts § 413. Furthermore, even if a hirer provides for precautions by contract or otherwise, the hirer may be vicariously liable for the contractor's negligence. Restatement (Second) of Torts § 416

In opposition, Plaintiff argues the doctrine is inapplicable to the case at bar because she has not sued Defendant NASSCO under theories of peculiar risk or vicarious liability. She contends a hirer is liable to an employee of a contractor when a hirer's exercise of retained control affirmatively contributes to the employee's injuries. Plaintiff contends NASSCO actively participated in how the job was done by refusing to put the elevator platform at the bottom, directing that the elevator be put at the flight deck level, and failing to simultaneously request the lowering of the aft ramp, a critical omission which was essential to the process of raising the platform.

Defendant United States contends the peculiar risk doctrine is irrelevant, because replacing nonskid decking on a sea going vessel is routine and not inherently dangerous.

Additionally, Defendant United States argues NASSCO cannot shield itself from liability under the peculiar risk doctrine because NASSCO significantly involved itself in the safety aspects of the job by contract and it was NASSCO's actions that created the alleged risk.

A. Applicability of the Peculiar Risk Doctrine

Plaintiff contends the peculiar risk doctrine is inapplicable because she is not asserting claims against Defendant NASSCO under theories of vicarious liability or the peculiar risk doctrine. She asserts Defendant is directly liable because its exercise of retained control affirmatively contributed to the decedent's death. Specifically, Plaintiff argues Defendant NASSCO violated three mandatory NAVSEA standards pertaining to safety, the rules of The Society for Protective Coatings, and Occupational Safety and Health Administration ("OSHA") Shipyard Industry Standards and its violations were negligence. Defendant United States contends the peculiar risk doctrine is irrelevant because this matter does not involve inherently dangerous work.

Defendant NASSCO argues it may bring its affirmative defense under the peculiar risk doctrine because it should not be liable to South Bay's employee when South Bay, affirmatively failed to protect its own, and NASCCO did not exercise control in any way to affirmatively contribute to the employee's injury. Additionally, Defendant argues South Bay's work was inherently dangerous because its workers were removing and replacing the surface from the elevator platform almost 98 feet above the elevator trunk and the platform was shrouded in opaque plastic.

The peculiar risk doctrine applies when the work "involve[s] some special hazard resulting from the nature of the work done, which calls for special precautions." Restatement (Second) of Torts § 416, comm. d.

> It is not essential that the peculiar risk be one which will necessarily and inevitably arise in the course of the work, no matter how it is done. It is sufficient that it is a risk which the employer should recognize as likely to arise in the course of the ordinary and usual method of doing the work, or the particular method which the employer knows that the contractor will adopt.

Restatement (Second) of Torts § 416, comm. e. Generally, the trier of fact determines the applicability of the doctrine. See United States v. Sierra Pacific Industries, 879 F.Supp.2d 1117, 1126-27 (E.D.Cal. 2012).

Defendant contends the peculiar risk arose from South Bay performing the work 98 feet above the elevator trunk. It is for the fact finder to determine whether Defendant NASSCO was aware that South Bay would perform the work as it did and, therefore, whether the peculiar risk doctrine applies. However, it is not necessary to reach the issue to resolve Defendant NASSCO's motion. Even assuming peculiar risk doctrine applies, as discussed below, there is a genuine issue of material fact as to whether Defendant NASSCO involved itself in the safety aspects of the work or aggravated the danger.

B. Defendant NASSCO's Liability under the Peculiar Risk Doctrine

Under admiralty law, the peculiar risk doctrine will not shield the hirer from liability if the hirer (1) significantly involves itself in the safety aspects of the job, or (2) aggravates the job's danger. See Nelson, 639 F.2d at 479.

NASSCO contends the subcontract between NASSCO and South Bay defines the relationship between the two as that of a hirer and independent contractor, required South Bay to provide all labor, work, and materials for the nonskid work item, and provided South Bay complete control over the performance of its work under the subcontract. Defendant maintains South Bay managed and trained all of its own employees and gave them work assignments, maintained and utilized their own equipment for the work and controlled the manner and means by which it performed the non-skid work. Additionally, Defendant maintains South Bay inspected the elevator platform inside Elevator #3 without any NASSCO employees and determined there was no unsafe condition when it installed the plastic around the platform.

Defendant NASSCO further contends it relied on South Bay's expertise, representations, and contractual obligations to accomplish the nonskid work consistent with the requirements of federal and state laws, OSHA, NAVSEA Standard Items, and NASSCO's policies and procedures. Defendant maintains South Bay was required to

regularly inspect work areas to ensure that no hazardous conditions existed, ensure all employees were compliant with OSHA and NAVSEA standards, and notify NASSCO of any unsafe conditions noted in their work areas that were beyond their control. Additionally, Defendant maintains South Bay required safety training for its employees including job safety and hazard analysis for nonskid work, and performed its own walk-throughs for safety and inspections before it started work. Specifically, Defendant maintains South Bay's manager Candido Parco inspected the elevator platform and determined it was safe for people to work on and South Bay supervisor David Burruel testified that he checked for fall hazards on the day of the accident, and neither were aware of safety concerns and did not advise NASSCO of any concerns.

Defendant NASSCO also contends it did not have significant involvement in the safety aspects of South Bay's work and could delegate any safety analysis and monitoring in compliance with NAVSEA Standard Items and OSHA to South Bay. Defendant contends, as the prime contractor, it did not exercise control over Elevator #3 nor direct South Bay to take any steps, including shrouding the elevator platform with opaque plastic and maintains it was South Bay's employees who controlled the details, directions, and instructions of how the nonskid work would be performed. Additionally, Defendant maintains it was South Bay that requested the elevator platform be raised to the flight deck and covered the elevator platform in plastic despite South Bay employees noticing the gap at the edge of the platform.

NASSCO maintains it delegated its duties for compliance with OSHA and NAVSEA Standard Items, including performing a job hazard analysis, and installing appropriate fall protection to South Bay, a qualified expert in the nonskid field. It further maintains there is no term in the contract between the United States and NASSCO that prohibits NASSCO from delegating the requirements under the NAVSEA Standard Items to any of its subcontractors. Defendant contends, South Bay was required to accomplish the requirements of NAVSEA Standard Item 009-32 for the removal and installation of the deck covering on the elevator platform inside Elevator #3 and it reasonably relied on South

Bay to comply with its General Terms and Conditions. NASSCO argues its delegation to South Bay of the duties to perform safety inspections and comply with statutory regulations like NAVSEA Standard Items and OSHA is not evidence of affirmative conduct that caused an unsafe condition.

Defendant NASSCO also maintains it did not aggravate the danger created by South Bay because South Bay requested the elevator platform be raised to the flight deck, the United States moved the elevator platform to the flight deck and only opened the inboard door, and South Bay installed the opaque plastic obscuring the gap at the edge of the elevator platform without telling anyone. Defendant further maintains South Bay was aware that there was a gap at the edge of the platform but did not raise this hazard to NASSCO. Defendant contends, although it could have inspected the job site for job hazards before South Bay started work, it did not affirmatively direct any of the conduct to create the unsafe condition.

Plaintiff argues the accident was caused by NASSCO's affirmative conduct. Plaintiff maintains Defendant NASSCO asked the crew to place the platform at flight deck level, and when LTJG Christopher Young suggested to David Conley, NASSCO area manager on the USS Boxer, that the platform be lowered to its bottom level, Conley refused. Plaintiff contends Conley testified that the nonskid job could be done with the platform at the bottom level and that there was a great risk of doing the work at the flight deck level and there was no "pre-planning" on how to minimize that risk. Plaintiff further contends Joe Pritchard, NASSCO general manager of repair, confirmed that the nonskid job could have been done at the bottom level, NASSCO had control over which level the job would be done and NASSCO never requested or recommended that the aft ramp in cargo weapons Elevator #3 be lowered before the accident. Plaintiff argues Defendant NASSCO created the hole through which the decedent fell by asking the ship's crew to raise the elevator platform to the flight deck level without asking them to lower the aft ramp in the elevator which covers the hole.

Plaintiff also argues NASSCO negligently violated its contractual obligations with regard to NAVSEA 009-74, NAVSEA 009-07 and NAVSEA 009-06 and its negligent contractual breaches which caused the decedent's death nullify any peculiar risk defense.

Plaintiff maintains the contract between the US and NASSCO required NASSCO to comply with NAVSEA Standard Item 009-74 which required NASSCO to "[e]stablish, document, implement, and maintain a written Safety Plan Appropriate for the work to be accomplished," and to "monitor, inspect, oversee and abate hazardous or deficient conditions related to the conduct and work of subcontractor(s)." Pla's Response at 3. Plaintiff maintains NASSCO failed to do either. Plaintiff points to the testimony of Barton Deem, NASSCO safety supervisor, who testified that no one from NASSCO's safety department ever inspected Elevator #3 before the accident and did not perform any periodic checks of South Bay's work. Additionally, David Conley, NASSCO area manager on the USS Boxer, testified he never went inside cargo weapons Elevator #3 before the accident. He asserts it was his policy to inspect spaces aboard ship before projects began, and asked for the elevator door to be opened so he could inspect it but did not do so. Conley also testified NASSCO did not prepare a specific safety plan for the work to be done in Elevator #3. Plaintiff argues this was a violation of NAVSEA standard Item 009-74. Plaintiff asserts Conley also testified NASSCO did not monitor, inspect, oversee or abate hazardous or deficient conditions related to the conduct and work practices of subcontractors with regard to Elevator #3 prior to the accident which was a violation of NAVSEA Standard Item 009-74. Additionally, Plaintiff maintains Rick Pankow, NASSCO ship manager for the USS Boxer, was involved in the preplanning meeting with the United States for the nonskid work to be done in the cargo weapons elevator on the USS Boxer, assigned the management of the nonskid work on the cargo weapons elevator to Conley, and he did not inspect the elevator because that was Conley's job. Pankow further testified that he knew the nonskid work would require the removal of the handrails on the aft edge of the platform and there was no specific bid item for South Bay to provide fall protection for the gap.

Plaintiff further maintains NASSCO violated NAVSEA Standard Item 009-07 and 009-06. She contends the contract required NASSCO to comply with 009-07, entitled "Confined Space Entry, Certification, Fire Prevention and Housekeeping; Accomplish." Plaintiff further contends David De Arman, NASSCO representative for the daily fire prevention and housekeeping inspections in July 2014, testified that inspections were contractually required and the purpose of the inspection team was to look for any safety discrepancies identified on an ESH Discrepancy and Corrective Action Log, which he maintained, and get them fixed. Plaintiff contends the inspection team was supposed to identify and correct fall hazards but missed the 98 foot fall hazard in Elevator #3.

Plaintiff maintains chipping up the nonskid on the elevator platform created contaminants and NAVSEA 009-06 requires inspections of contaminate producing areas on a daily basis whenever work is on progress. Plaintiff contends De Arman testified that 009-06 never came into play because he did not know that work was taking place in cargo weapons Elevator #3. According to Plaintiff, Conley went back to the elevator a couple days after he asked the ship to open the door, but he did not go in because the containment was up. Plaintiff contends if the containment was visible, then it was obvious people were working on the elevator and the inspection team should have been inspecting the elevator. She further contends the joint Navy/NASSCO fire prevention and housekeeping inspection team saw the outer plastic layer of the containment while conducting their inspections prior to the accident, but never inspected the elevator.

Plaintiff argues although NAVSEA 009-04 allows delegation of inspections to a qualified subcontractor subject to supervisor approval, NASSCO offers no evidence the Navy approved any delegations of containment inspection to South Bay. She further argues NAVSEA 009-74 and 009-07 do not have delegations clauses, so the duties are not delegable. Additionally, Plaintiff contends when NAVSEA items are delegated to a subcontractor the prime contractor is ultimately responsible.

Plaintiff also argues NASSCO violated the rules of the Society for Protective Coatings ("SSPC"). Plaintiff maintains Dean Delcamp, NASSCO manager of quality

assurance, testified NASSCO is required to be certified by the SSPC to do painting on Navy ships. She further maintains SSPC audited NASSCO following the accident and issued an audit deficiency report which stated NASCCO could not produce evidence they routinely conduct safety walk-throughs for subcontractors or NASSCO personnel on active projects and could not produce evidence that prior to July 31, 2014, it was ensuring employees or subcontractors working on or near sides/edges were protected by OSHA compliant guardrails, safety nets on other OSHA compliant practices. Plaintiff argues NASSCO's failure to comply is negligence.

Additionally, Plaintiff argues NASSCO violated OSHA Shipyard Industry Standards with which it was legally required to comply. Plaintiff maintains page 26 of the Guidelines for Workplace Safety and Health Programs in the Shipyard Industry in the Fed-OSHA Shipyard Industry Standards, requires host employers to inform the contract employers of any known safety and health hazards to which the contract employees may be exposed prior to their starting any work. Plaintiff contends NASSCO safety manager Barton Deem testified this never happened and Conley testified NASSCO never informed South Bay of any hazards they might be exposed to prior to starting work in cargo weapons Elevator #3. Additionally, Plaintiff contends Pankow testified that planking should have been installed over the opening but he is not aware of any discussion of this issue with South Bay before the accident. Plaintiff argues NASSCO's failure to exchange safety information with South Bay was negligence. Specifically, Plaintiff argues a shipyard exercising "reasonable care under the circumstances" would have followed Fed-OSHA Shipyard Industry Guidelines and exchanged safety information and safety responsibilities with its subcontractor.

Plaintiff also argues it was Defendant's responsibility to make sure the chain railing in cargo weapons Elevator #3 was safe and the gap next to the railing in cargo weapons Elevator #3 was properly guarded when the chain railing came down, and its failure to do so is negligence. Plaintiff maintains the loose chain railing in cargo weapons Elevator #3 on the USS Boxer were not OSHA compliant and would not have prevented the accident.

Defendant United States argues NASSCO significantly involved itself in the safety aspects of the job it subcontracted to South Bay by virtue of its contract with the Navy. The United States maintains the contract specifically incorporated all Federal OSHA regulations applicable to ship repair and related work, and explicitly stated that nothing in this contract relieved NASSCO from any obligation to comply with the regulations. Defendant United States contends whether or not NASSCO performed work under its contract with the Navy or subcontracted out specific work items, NASSCO remained responsible for insuring that all work performed under the contract complied with all Federal OSHA safety requirements applicable to civilian ship yards. Specifically, the United States contends NASSCO was contractually bound to "monitor, inspect, oversea, and abate hazardous or deficient conditions related to the conduct and work practices of subcontractor(s)," but failed to comply with this requirement. NAVSEA Standard Item 009-74, page 3 of 9, ¶ 3.6.1, Exhibit "E" to the Kaufman-Cohen Declaration. Defendant argues NASSCO failed to abide by the specific contractual provisions, and as a result was cited and fined by Federal OSHA for the death of decedent.

The United States further argues NASSCO's acts aggravated the nonskid work in Elevator #3. Defendant United States contends NASSCO admits that it asked ship's force to place Elevator #3 at the flight deck level before South Bay began its work in the elevator and when asked by LTJG Young whether he wanted the platform lowered to the bottom, Conley replied no, because they did not have enough equipment to reach the bottom.

In reply, Defendant NASSCO contends there is no language in the contract that prohibits NASSCO from delegating safety responsibilities to South Bay. Defendant concedes that there is a contract provision showing NASSCO was not relieved from any obligation to comply with the regulations, but argues there is no term preventing NASSCO from delegating those obligations. Defendant argues that it may delegate its compliance with statutory requirements, including safety practices to an independent contractor.

Defendant also argues evidence and argument of any alleged breach of the contract, improper delegation of the safety standards, and citations for violations of safety standards

have no bearing on the Court's analysis as to whether NASSCO affirmatively contributed to the safety aspects of the job or aggravated the job's dangerous condition to absolve liability to an employee of an independent contractor.

This Court disagrees. There is a dispute as to whether Defendant NASSCO's obligation to comply with safety regulations, which included implementing and maintaining safety plans, and inspecting and monitoring work of subcontractors, significantly involved Defendant in the safety aspects of the nonskid work. While Defendant NASSCO argues it can delegate its obligations to comply with regulations to a subcontractor, it provides no authority in support. The contract specifically required Defendant NASSCO to comply with safety regulations and explicitly stated nothing in the contract relieved NASSCO of its obligation of compliance. Furthermore, the NAVSEA standards with which it was contractually required to comply either did not permit delegation or allowed delegation under specific circumstances and NASSCO provides no factually evidence that those circumstances existed here. Accordingly, the peculiar risk doctrine does not shield Defendant NASSCO from liability, and its motion for summary judgment on that basis is DENIED.

II. Punitive Damages

Defendant argues Plaintiff cannot present clear and convincing evidence that NASSCO acted with the requisite malice, oppression, or fraud to justify an award of punitive damages. Defendant contends Plaintiff may not rely on NASSCO's alleged breaches of the contract with the United States because, in California, punitive damages are not available for simple breaches of contract. Additionally, Defendant contends there is no clear and convincing evidence that it consciously disregarded the safety of the jobsite, or intended to vex, annoy, or defraud the decedent, or that any of its managing agents had malice towards the decedent or blatantly disregarded the safety of his workplace.

Plaintiff argues NASSCO mistakenly based its motion regarding punitive damages on California state law which is inapplicable because this action is governed by maritime law. Plaintiff maintains maritime law permits punitive damages when the plaintiff states a

claim for gross negligence or recklessness, which she asserts she has done in this case. Plaintiff contends NASSCO never included fall protection in its contract with South Bay, and now blames South Bay for lack of fall protection. She further contends not making a contract specification for full protection enhances NASSCO's profit which represents an enhanced degree of punishable culpability.

In reply, Defendant contends punitive damages are generally unavailable under general maritime law for breach of contract claims. Defendant argues because her punitive damages claim is based solely on NASSCO's breach of contract with the United States, she is not entitled to punitive damages.

Punitive damages are available under general maritime law. See Atlantic Sounding Co., Inc. v. Townsend, 557 U.S. 404, 415 (2009). In an admiralty action, punitive damages may be imposed for "conduct that manifests reckless or callous disregard' for the rights of others ... or 'gross negligence or actual malice [or] criminal indifference.' " Batterton v. Dutra Grp., 880 F.3d 1089, 1091 (9th Cir. 2018) (citing Evich v. Morris, 819 F.2d 256, 258-59 (9th Cir. 1987). Plaintiff maintains Defendants failure to include fall protection in its contract with South Bay was gross negligence or recklessness. "[G]ross negligence is simply a point[] on a continuum of probability and its presence depends on the particular circumstance of each case." Royal Ins. Co. of America v. Southwest Marine, 194 F.3d 1009. 1015 (9th Cir. 1999) (internal quotations and citations omitted).

Defendant United States presents evidence that Defendant NASSCO's employee denied the request to lower the platform to the bottom for the nonskid work, because the equipment could not reach the bottom. Consequently, there is a question as to whether Defendant NASSCO knew the work would need to be performed at the flight deck level and failed to include fall protection despite this knowledge. The Court finds Plaintiff presents a trial issue as to whether Defendant NASSCO was grossly negligent when it failed to include fall protection in its contract with South Bay under the circumstances. Accordingly, Defendant NASSCO is not entitled to judgment as to the claim for punitive damages and its motion is DENIED.

CONCLUSION AND ORDER

Based on the foregoing, IT IS HEREBY ORDERED Defendant NASSCO's motion for summary judgment is **DENIED**.

DATED: September 21, 2018

JOHN A. HOUSTON
United States District Judge