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United States Court of Appeals,
Second Circuit.
John **PADILLA**, Plaintiff–Appellee,
Christopher B. Cupan, Plaintiff,
v.
MAERSK LINE, LIMITED, Defendant–Appellant.

Docket No. 12–834–cv.
Argued: April 4, 2013.
Decided: June 25, 2013.

Background: Injured seaman sued his employer on behalf of himself and a proposed class of similarly-situated seamen under general maritime law, claiming unearned wages. Following grant of summary judgment in favor of seaman, 603 F.Supp.2d 616, denial of employer's motion for reconsideration, 636 F.Supp.2d 256, award of damages to class in amount of $836,819.40, 2012 WL 315641, the United States District Court for the Southern District of New York, Berman, J., 2012 WL 4009555, denied employer's motion to amend judgment. Employer appealed.

Holdings: The Court of Appeals, Barrington D. Parker, Circuit Judge, held that:
(1) class of seamen who had become ill or injured while in ship's service was entitled to overtime pay as component of unearned wages, and
(2) employer failed to establish excusable neglect warranting relief from order denying its motion to amend judgment.

Affirmed.

West Headnotes

[1] Seamen 348 ⚿11(1)

348 Seamen
348k11 Medical Treatment and Maintenance of Disabled Seamen
348k11(1) k. In General. Most Cited Cases
Under maritime law, "maintenance" is the cost of lodging and food and "cure" is medical treatment.

[2] Seamen 348 ⚿11(1)

348 Seamen
348k11 Medical Treatment and Maintenance of Disabled Seamen
348k11(1) k. In General. Most Cited Cases

Seamen 348 ⚿16

348 Seamen
348k15 Wages
348k16 k. Right in General. Most Cited Cases
Under general maritime law, seamen who have become ill or injured while in a ship's service have the right to receive maintenance and cure from the owner of the vessel; in addition, a seaman is entitled to recover unearned wages, the wages he would have earned if not for the injury or illness.

[3] Seamen 348 ⚿11(9)

348 Seamen
348k11 Medical Treatment and Maintenance of Disabled Seamen
348k11(9) k. Actions. Most Cited Cases
While a seaman bears the burden of proving his right to maintenance and cure, claims for these are construed expansively and doubts regarding a shipowner's liability for maintenance and cure should be resolved in favor of the seamen.

[4] Labor and Employment 231H ⚿1279

231H Labor and Employment
231HXII Labor Relations
231HXII(E) Labor Contracts
231Hk1268 Construction
231Hk1279 k. Wages and Hours. Most Cited Cases

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Seamen 348 ⚿17

348 Seamen
348k15 Wages
348k17 k. Amount. Most Cited Cases

While the entitlement to unearned wages, on the part of a seaman who has become ill or injured while in a ship's service, arises under general maritime law, rates for unearned wages may be defined and modified in collective bargaining agreements (CBA).

[5] Labor and Employment 231H ⚿1279

231H Labor and Employment
231HXII Labor Relations
231HXII(E) Labor Contracts
231Hk1268 Construction
231Hk1279 k. Wages and Hours. Most Cited Cases

Seamen 348 ⚿18

348 Seamen
348k15 Wages
348k18 k. Extra Wages. Most Cited Cases

Issue whether seaman, who had become injured while in ship's service, was entitled to overtime pay as component of his unearned wages, was controlled by general maritime law, not by collective bargaining agreement (CBA), where CBA did not limit availability of unearned wages.

[6] Labor and Employment 231H ⚿1109

231H Labor and Employment
231HXII Labor Relations
231HXII(C) Collective Bargaining
231Hk1108 Right to Bargain Collectively
231Hk1109 k. In General. Most Cited Cases

Seamen 348 ⚿17

348 Seamen
348k15 Wages
348k17 k. Amount. Most Cited Cases

When the collective bargaining agreement (CBA) at issue is between large parties well-equipped to represent and protect their respective interests, the appropriate accommodation between federal maritime law and federal common law for the enforcement of CBAs is to allow unionized seamen to bargain for the rights and privileges they prefer in exchange for limitations on various components of compensation so long as the negotiations are legitimate and the seamen's interests are adequately protected.

[7] Labor and Employment 231H ⚿1269

231H Labor and Employment
231HXII Labor Relations
231HXII(E) Labor Contracts
231Hk1268 Construction
231Hk1269 k. In General. Most Cited Cases

With respect to unionized seamen, when the collective bargaining agreement (CBA) at issue is between large parties well-equipped to represent and protect their respective interests, the responsibility of the Court of Appeals is to determine the actual terms agreed to by the parties to the CBA and not to impose a limitation where none was intended or agreed to.

[8] Labor and Employment 231H ⚿1279

231H Labor and Employment
231HXII Labor Relations
231HXII(E) Labor Contracts
231Hk1268 Construction
231Hk1279 k. Wages and Hours. Most Cited Cases

Seamen 348 ⚿11(1)

348 Seamen
348k11 Medical Treatment and Maintenance of Disabled Seamen
348k11(1) k. In General. Most Cited Cases

With respect to a seaman who has become ill or injured while in a ship's service, only if the collect-

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ive bargaining agreement (CBA) expressly provides for a different computation of the seafarers' remedies does it modify the general maritime law.

[9] Seamen 348 ⚷18

348 Seamen
348k15 Wages
348k18 k. Extra Wages. Most Cited Cases

Class of seamen who had become ill or injured while in ship's service was entitled to overtime pay as component of unearned wages, since seamen would have earned overtime compensation "but for" injury or illness, given that it was the custom and practice for seafarers working for employer to derive substantial income from overtime compensation, seafarers working for employer regularly earned 100% or more of their base pay in overtime wages, and calculations of overtime pay due to class were essentially undisputed.

[10] Federal Courts 170B ⚷829

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk829 k. Amendment, Vacation, or Relief from Judgment. Most Cited Cases

The Court of Appeals reviews the denial of a motion to amend a judgment for abuse of discretion. Fed.Rules Civ.Proc.Rule 59(e), 28 U.S.C.A.

[11] Federal Courts 170B ⚷812

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk812 k. Abuse of Discretion. Most Cited Cases

A court abuses its discretion when: (1) its decision rests on an error of law or a clearly erroneous factual finding, or (2) cannot be found within a range of permissible decisions.

[12] Federal Civil Procedure 170A ⚷2656

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(G) Relief from Judgment
170Ak2651 Grounds
170Ak2656 k. Mistake; Inadvertence; Surprise; Excusable Neglect. Most Cited Cases

Federal Civil Procedure 170A ⚷2659

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(G) Relief from Judgment
170Ak2657 Procedure
170Ak2659 k. Motion, Complaint or Bill. Most Cited Cases

Because employer did not meet 28-day time limitation for filing motion to alter or amend judgment in seamen's action seeking overtime pay, employer's motion would be considered under rule governing relief from final order, and employer would be required to demonstrate excusable neglect. Fed.Rules Civ.Proc.Rule 59(e), 28 U.S.C.A.; Fed.Rules Civ.Proc.Rule 60(b), 28 U.S.C.A.

[13] Federal Courts 170B ⚷829

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk829 k. Amendment, Vacation, or Relief from Judgment. Most Cited Cases

When assessing, under abuse of discretion standard of review, claims of excusable neglect on a motion for relief from a final order, the Court of Appeals looks to the following factors: (1) the danger of prejudice to the non-movant; (2) the length of the delay and its potential impact on judicial proceedings; (3) the reason for the delay, including whether it was within the reasonable control of the movant; and (4) whether the movant acted in good faith. Fed.Rules Civ.Proc.Rule 60(b), 28 U.S.C.A.

[14] Federal Courts 170B ⚷829

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170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk829 k. Amendment, Vacation, or Relief from Judgment. Most Cited Cases

When assessing, under abuse of discretion standard of review, claims of excusable neglect on a motion for relief from a final order, the Court of Appeals focuses closely on the third factor, i.e., the reason for the delay, including whether it was within the reasonable control of the movant. Fed.Rules Civ.Proc.Rule 60(b), 28 U.S.C.A.

[15] Federal Civil Procedure 170A ⚷2656

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(G) Relief from Judgment
170Ak2651 Grounds
170Ak2656 k. Mistake; Inadvertence; Surprise; Excusable Neglect. Most Cited Cases

Employer failed to establish excusable neglect warranting relief from district court order denying employer's motion to amend amended judgment so as to remove officers from class action in which overtime pay was sought, where employer merely stated that officers had been overlooked during two-year period following class certification. Fed.Rules Civ.Proc.Rule 60(b), 28 U.S.C.A.

[16] Federal Civil Procedure 170A ⚷2656

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(G) Relief from Judgment
170Ak2651 Grounds
170Ak2656 k. Mistake; Inadvertence; Surprise; Excusable Neglect. Most Cited Cases

A delay attributable solely to a defendant's failure to act with diligence cannot be characterized as excusable neglect warranting relief from a final order. Fed.Rules Civ.Proc.Rule 60(b), 28 U.S.C.A.

Appeal from a judgment of the United States District Court for the Southern District of New York (Leisure, J.) in favor of a class of seafarers, discharged from service on **Maersk** ships due to illness or injury. Plaintiffs sought, as part of unearned wages, overtime pay that they would have earned from the time of their discharge until the end of their respective voyages. The district court ruled that the seafarers were entitled to such pay. We affirm.John J. Walsh, Freehill, Hogan & Mahar, LLP, New York, NY, for Defendant–Appellant.

Dennis M. O'Bryan, O'Bryan Baun Karamanian, Birmingham, MI, for Plaintiff–Appellee.

Before B.D. PARKER, LOHIER, and CARNEY, Circuit Judges.

BARRINGTON D. PARKER, Circuit Judge:

*1 Defendant–Appellant **Maersk** Line, Limited (" **Maersk** ") appeals from a judgment of the United States District Court for the Southern District of New York (Berman, *J.*) granting summary judgment in favor of a class of seafarers, discharged from service on **Maersk** ships due to illness or injury. These seafarers sought, and the district court granted, as part of unearned wages, overtime pay that they would have earned from the time of their discharge until the end of their respective voyages. It is not disputed that seafarers on **Maersk** voyages regularly received substantial overtime payments. Indeed, by **Maersk's** own calculations, overtime payments regularly exceeded each class member's base wages. The principal issue on this appeal is whether unearned wages recoverable by ill or disabled seafarers under general maritime law include overtime pay that they would have earned had they completed their voyages.

On October 30, 2006, John **Padilla** began his contract as Chief Cook aboard a **Maersk** vessel, the **MAERSK** ARKANSAS. His voyage was scheduled to end on February 26, 2007. However, on Nov. 6, 2006, **Padilla** sustained an abdominal injury, was relieved of service at the Port of Salalah

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in Oman and discharged as unfit for duty. The Particulars of Engagement and Discharge indicated that, at the time of his discharge, **Padilla** was entitled to the balance of his earned wages, which included six days of regular pay plus thirty-four hours of overtime pay.

[1] **Maersk** voluntarily paid **Padilla** unearned wages at his base pay rate, along with "maintenance and cure," [FN1] for the duration of his contract, but declined to pay him overtime wages. In May 2007, **Padilla** sued on behalf of himself and a proposed class of similarly situated seafarers seeking the overtime pay he would have earned on his voyage had he not been injured. As noted above, it is uncontested that prior to his injury, **Padilla**, like other class members, routinely earned substantial overtime in excess of 100% of base income.

The district court addressed the merits of **Padilla's** individual claim prior to considering class certification. **Padilla** moved for summary judgment, which the court granted in March 2009. **Padilla** contended that his entitlement to unearned wages was governed by general maritime law. **Maersk** did not seriously contest this proposition but argued that the collective bargaining agreement between **Padilla's** union and **Maersk** limited his recovery to unearned wages excluding overtime. The district court correctly concluded that the application of general maritime law could be limited, but not abrogated, in collective bargaining agreements. Turning to the Standard Freightship Agreement ("CBA"), the collective bargaining agreement between **Padilla's** union, Seafarers International Union, and **Maersk**, the district court concluded that the CBA did not address the inclusion of overtime pay in the calculation of **Padilla's** unearned wages. The court then held that unearned wages include overtime pay where the seafarer reasonably expected to earn overtime pay on a regular basis throughout his service in an amount that was not speculative and would have earned it "but for" an illness or injury. The district court found that **Padilla** satisfied this test and awarded him $13,478.40 in overtime pay.

***2** The case was reassigned from Hon. Peter K. Leisure to Hon. Richard M. Berman, who, in October 2010, certified a class of seamen who suffered illness or injury while in service aboard **Maersk** ships and who, after discharge, were paid unearned wages, maintenance and cure until the end of their voyage, but were not paid overtime wages as part of unearned wages. After further proceedings, in January 2012, the court awarded damages to the class in the amount of $836,819.40. Following this award and after **Maersk** filed an appeal in this court, **Maersk** sought to amend the judgment on two separate occasions. In July 2012, the court granted **Maersk's** first motion to amend to remove from the class two seamen who had filed separate suits. Shortly thereafter, but well after the end of the period allowed for filing a motion under Fed.R.Civ.P. 59(e), **Maersk** moved to amend the judgment again, this time to remove fifteen officers from the class. **Maersk** argued that the employment benefits of these officers were governed by a separate collective bargaining agreement, the American Maritime Officers Union Collective Bargaining Agreement ("AMOU CBA"), which expressly limited unearned pay to "benefits/wages only." The district court denied the motion finding that it was untimely, concerned with "wholly independent grounds" from those that led to the amended judgment and that **Maersk** failed to show "excusable neglect" for its delay in seeking the additional amendment.

On appeal, **Maersk** argues principally that the class is not entitled to overtime pay because overtime is not encompassed within the definition of "unearned wages" under general maritime law. **Padilla** argues that, given that overtime was a substantial and routine component of the seafarers' compensation, they were entitled to overtime payments because, under general maritime law, they must be placed in the same position they would have been in had they not been injured or disabled. We agree with **Padilla**.

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We review *de novo* a district court's grant of summary judgment, construing the evidence in the light most favorable to the non-movant, asking whether there is a genuine dispute as to any material fact and whether the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a); *Miller v. Wolpoff & Abramson, LLP,* 321 F.3d 292, 300 (2d Cir.2003).

DISCUSSION

[2][3] Under general maritime law, seamen who have become ill or injured while in a ship's service have the right to receive maintenance and cure from the owner of the vessel. *Ammar v. United States,* 342 F.3d 133, 142 (2d Cir.2003). In addition, a seaman is entitled to recover unearned wages, the wages he would have earned if not for the injury or illness. *Rodriguez Alvarez v. Bahama Cruise Line, Inc.,* 898 F.2d 312, 315 (2d Cir.1990) ("When a seaman is injured during his employment on a ship, the ship operator is liable not only for the seaman's maintenance and cure, but also for lost wages.") (citing *The Osceola,* 189 U.S. 158, 175, 23 S.Ct. 483, 47 L.Ed. 760 (1903)); *see also Griffin v. Oceanic Contractors, Inc.,* 664 F.2d 36, 39 (5th Cir.1981) ("The right of an injured seaman to recover unearned maintenance-wages-cure (M–W–C) under the general maritime law of the United States until either (1) the end of the voyage or (2) the end of the contractual period of employment is well established.") (citing *The Osceola,* 189 U.S. at 175, 23 S.Ct. 483), *rev'd on other grounds,* 458 U.S. 564, 102 S.Ct. 3245, 73 L.Ed.2d 973 (1982). While **Padilla** bears the burden of proving his right to maintenance and cure, claims for these are construed expansively and doubts regarding a shipowner's liability for maintenance and cure should be resolved in favor of the seamen. *Vaughan v. Atkinson,* 369 U.S. 527, 532, 82 S.Ct. 997, 8 L.Ed.2d 88 (1962); *Breese v. AWI, Inc.,* 823 F.2d 100, 104 (5th Cir.1987).

***3** [4][5][6][7][8] As the district court correctly recognized, while the entitlement to unearned wages arises under general maritime law, rates for unearned wages may be defined and modified in collective bargaining agreements, *see Ammar,* 342 F.3d at 146–47, and **Maersk** contends that the CBA should control our interpretation of the unearned wages issue. The CBA at issue here was between large parties well-equipped to represent and protect their respective interests. Under these circumstances, the appropriate accommodation between federal maritime law and federal common law for the enforcement of collective bargaining agreements is to allow unionized seamen to bargain for the rights and privileges they prefer in exchange for limitations on various components of compensation so long as the negotiations are legitimate and the seamen's interests are adequately protected. *Id.* In light of these considerations, our responsibility is to determine the actual terms agreed to by the parties to the CBA and not to impose a limitation where none was intended or agreed to. *Marcic v. Reinauer Transp. Cos.,* 397 F.3d 120, 131 (2d Cir.2005). Consequently, as the Ninth Circuit held in *Lipscomb v. Foss Mar. Co.,* 83 F.3d 1106, 1109 (9th Cir.1996), only if the CBA expressly provides for a different computation of the seafarers' remedies does it modify the general maritime law. Here, however, the CBA does not limit the availability of unearned wages and so we must apply general maritime law.

[9] Because much of **Padilla's** income was derived from overtime compensation, the district court awarded him overtime pay as part of his unearned wages, reasoning that **Padilla** was entitled to recover in full the compensation that he would have earned "but for" his injury. We agree with this approach. The record reflects that it was the custom and practice for seafarers working for **Maersk** to derive substantial income from overtime compensation and that, consequently, such compensation was a common expectation of both the seamen and of **Maersk**. As noted, **Padilla** and other **Maersk** seafarers regularly earned 100% or more of their base pay in overtime wages. Significantly, the district court concluded that the calculation of the overtime **Padilla** would have worked was not speculative.

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Cf. Griffin, 664 F.2d at 40 (upholding the district court's decision to deny overtime because "[t]he actual amount of overtime was uncertain, and hence any inclusion of such would have been purely speculative"). In fact, the calculations of the overtime pay due to the class were essentially undisputed: a **Maersk** manager easily calculated each seaman's expectation of his overtime from records of past work for **Maersk**. Thus we agree that the district court correctly applied the "but for" test.[FN2]

In reaching this conclusion, we align ourselves with the other circuits who apply the same test. *See Flores v. Carnival Cruise Lines,* 47 F.3d 1120, 1122–24 (11th Cir.1995) (holding that tips should be included in the measure of unearned wages because a seaman would have earned them but for his injury); *Lipscomb,* 83 F.3d at 1109 (concluding that accumulated time off is part of seaman's unearned wages under general maritime law); *Aksoy v. Apollo Ship Chandlers, Inc.,* 137 F.3d 1304, 1306 (11th Cir.1998) (calculating unearned wages as average tip income plus guaranteed minimum wage); *Morel v. Sabine Towing & Transp. Co.,* 669 F.2d 345, 346 (5th Cir.1982) (holding that accumulated leave time is part of total wages and payable in addition to maintenance); *Shaw v. Ohio River Co.,* 526 F.2d 193, 199 (3d Cir.1975) (same).

II.

*4 **Maersk** also appeals the district court's decision denying its motion to amend the amended judgment under Rule 59(e) by removing the fifteen officers whose employment was governed by the AMOU CBA. The district court denied the motion because it was six months late, because it concerned "wholly independent grounds" from those that gave rise to a previously amended judgment and because **Maersk's** explanation that it "overlooked" the AMOU CBA did not constitute excusable neglect. On appeal, **Maersk** argues that the decision to amend the judgment on this substantive issue could have been made conveniently and without waste of judicial resources. **Maersk** also argues that "class actions by their nature should be treated differently under Rule 59 ... [because] subclasses may emerge unexpectedly" and "may have to be decertified in light of the proceedings." Appellant's Brief at 38.

[10][11][12][13] **Maersk's** arguments are unavailing. We review the denial of a motion to amend the judgment under Rule 59(e) for abuse of discretion. *See Schwartz v. Liberty Mut. Ins. Co.,* 539 F.3d 135, 150 (2d Cir.2008). "A court abuses its discretion when (1) its decision rests on an error of law or a clearly erroneous factual finding; or (2) cannot be found within a range of permissible decisions." *Johnson ex rel. United States v. Univ. of Rochester Med. Ctr.,* 642 F.3d 121, 125 (2d Cir.2011). A motion to alter or amend a judgment under this rule must be filed no later than 28 days after the entry of judgment. Fed.R.Civ.P. 59(e). Because **Maersk** did not meet this time limitation, its motion is considered under Rule 60(b) and **Maersk** must demonstrate "excusable neglect." *See Stevens v. Miller,* 676 F.3d 62, 67–68 (2d Cir.2012); *Lora v. O'Heaney,* 602 F.3d 106, 111 (2d Cir.2010). When assessing claims of "excusable neglect" we look to the following so-called *Pioneer* factors: "(1) the danger of prejudice to the [non-movant], (2) the length of the delay and its potential impact on judicial proceedings, (3) the reason for the delay, including whether it was within the reasonable control of the movant, and (4) whether the movant acted in good faith." *Silivanch v. Celebrity Cruises, Inc.,* 333 F.3d 355, 366 (2d Cir.2003) (quoting *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship,* 507 U.S. 380, 395, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993)) (quotation marks and brackets in original omitted).

[14][15][16] Our Circuit focuses closely on the third *Pioneer* factor: the reason for the delay, including whether it was within the reasonable control of the movant. *Id.* The district court concluded that **Maersk** did not offer a valid reason for its delay since **Maersk** stated only that its argument pertaining to the officers had been "overlooked" during the two-year period following class certific-

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ation. **Maersk** offered no explanation as to why it did not raise the point that the officers were not entitled to overtime two months earlier when it made its first motion to amend the judgment to remove other plaintiffs. Because a delay attributable solely to a defendant's failure to act with diligence cannot "be characterized as 'excusable neglect'," we see no abuse of discretion by the district court in denying the motion. *Dominguez v. United States,* 583 F.2d 615, 617 (2d Cir.1978).

CONCLUSION

*5 For the foregoing reasons, we **affirm** the judgment of the district court.

FN1. "Maintenance" is the cost of lodging and food and "cure" is medical treatment.

FN2. **Maersk** also argues that by including overtime pay in "unearned wages" the district court expanded maritime remedies beyond those in the Jones Act, 46 U.S.C. § 30104, which permits the recovery of overtime only upon proof of negligence and a causal connection between the negligence and unseaworthiness and injury. According to **Maersk**, "a cause of action that existed before the Jones Act (unearned wages) survived the Jones Act, but damages permitted by the Jones Act (overtime wages) must be limited by the conditions in the Act." Appellant's Brief at 29. These arguments were not raised before the district court, and we decline to consider them here. *Greene v. United States,* 13 F.3d 577, 586 (2d Cir.1994) ("Entertaining issues raised for the first time on appeal is discretionary with the panel hearing the ap- peal.").

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