UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 18-23321-CIV-ALTONAGA/Goodman

NCL (BAHAMAS) LTD.,

Plaintiff,

v.

KRZYSTOF KACZKOWSKI,

Defendant.
______________________________/

ORDER

THIS CAUSE came before the Court on Plaintiff, NCL (Bahamas) Ltd.'s ("Norwegian['s]") Motion for Summary Judgment [ECF No. 23] ("Motion"). Defendant, Krzystof Kaczkowski, filed a Memorandum in Opposition [ECF No. 27] ("Opposition"), to which Plaintiff filed a Reply [ECF No. 28].[1] The Court has carefully considered the parties' written submissions, the record, and applicable law. For the following reasons, the Motion is granted.

I. BACKGROUND

This action arises out of injuries Defendant sustained while working aboard the *Norwegian Sky*, a passenger vessel operated by Plaintiff. (*See generally* Mot. 2). From 2006 to 2017, Kaczkowski was employed by Intec Maritime Offshore Services Corporation ("Intec") as a welder. (*See* Pl.'s Facts ¶ 1). Intec serves as an independent contractor for various shipowners, and its workers perform "certain discrete and specific tasks aboard its customers' ships." (*Id.* ¶ 3). Intec

[1] The parties' factual submissions include: Plaintiff's Statement of Undisputed Material Facts [ECF No. 23] 4–6 ("Pl.'s Facts"); Defendant's Objections to Plaintiff's Statement of Facts [ECF No. 27-4] 1–3 ("Def.'s Facts"); Defendant's Statement of Uncontested Material Facts [ECF No. 27-4] 3–7 ("Def.'s Supp. Facts"); and Plaintiff's Response to Defendant's Statement of Material Facts [ECF No. 28] 1–2 ("Pl.'s Reply Facts").

"provides the labor force to different shipowners" and is wholly responsible for hiring workers and selecting them for each project. (*Id.* ¶ 4 (internal quotation marks and citation omitted)). Intec pays its workers directly. (*See id.* ¶ 5).

Over the course of his employment with Intec, Kaczkowski periodically worked as a borrowed laborer on projects involving approximately 41 different vessels for 15 different shipowners. (*See* Pl.'s Facts ¶ 9(b); Def.'s Supp. Facts ¶ 4). Kaczkowski worked on vessels owned and/or operated by Norwegian or Norwegian's parent company's fleet of vessels for approximately 201 days. (*See* Pl.'s Facts ¶ 9(e)). A substantial portion of Kaczkowski's work took place in shipyards and on ships that were in dry-dock and/or removed from navigation. (*See* Pl.'s Reply Facts ¶ 4).

On March 31, 2017, Intec assigned Kaczkowski to perform work aboard the *Norwegian Sky* (the "Vessel"). (*See* Pl.'s Facts ¶ 6). This was not a permanent "reassignment" to work for Norwegian aboard the Vessel; rather, "it was another in a long line of individual, ship-based jobs that Kaczkowski performed for a series of borrowing employers over the years." (Def.'s Supp. Facts ¶ 7). Kaczkowski was scheduled to board the Vessel on March 31, 2017, perform work on the ship, and disembark by April 28, 2017. (*See* Pl.'s Facts ¶ 7). The project included welding work in the engine room, as well as the fabrication and installation of metal drains and trim in the Vessel's bakery. (*See id.* ¶¶ 6–7; Def.'s Supp. Facts ¶ 7).

Kaczkowski worked, took his meals, and slept on the Vessel. (*See* Def.'s Supp. Facts ¶ 10). On April 5, 2017, Kaczkowski suffered injuries to his legs while working on the Vessel. (*See id.* ¶ 11). Because of his injuries, Kaczkowski was unable to perform his duties and was evacuated from the ship. (*See id.*).

Kaczkowski filed a lawsuit for injuries suffered in the incident in *Kaczkowski v. NCL (Bahamas) Ltd., et al.*, No. 17-24090-Civ-Altonaga (the "Underlying Action").[2] In the Underlying Action, Kaczkowski raises a negligence claim; maritime claims for unseaworthiness and maintenance and cure; and a claim under the Jones Act, 46 U.S.C. section 30104. (*See generally id.*).

On August 15, 2018, Norwegian filed this declaratory judgment action to determine whether Kaczkowski is a "seaman" as defined under the Jones Act. (*See generally* Mot.). This determination is crucial to the viability of Kaczkowski's claims in the Underlying Action,[3] because only "seamen" are entitled to assert claims under the Jones Act, claims for maintenance and cure, and claims for unseaworthiness of a vessel.[4]

II. LEGAL STANDARD

Summary judgment is rendered if the pleadings, discovery and disclosure materials on file, and any affidavits show there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a), (c). An issue of fact is "material" if it might affect the outcome of the case under the governing law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). It is "genuine" if the evidence could lead a reasonable jury to find

---

[2] The Underlying Action has been administratively closed because Kaczkowski "has not yet achieved maximum medical improvement" following his injuries. (Mot. 2 n.1 (citation omitted)).

[3] Kaczkowski's general negligence claim against Norwegian is not contingent on Kaczkowski's seaman status.

[4] *See O'Boyle v. United States*, 993 F.2d 211, 213 (11th Cir. 1993) ("[I]n order to recover damages under the Jones Act, [a plaintiff] must have the status of a seaman." (alterations added)); *Hall v. Diamond M Co.*, 732 F.2d 1246, 1248 (5th Cir. 1984) ("Only seamen are entitled to the benefits of maintenance and cure."); *Bonefont v. Valdez Tankships*, No. 95-21021, 1998 WL 30028, at *4 (5th Cir. Jan. 9, 1998) ("[G]eneral maritime law places upon a vessel owner an absolute non-delegable duty to provide a seaman with . . . a seaworthy vessel. . . . This duty furnishes seamen, and only seamen, with a separate and independent cause of action against a shipowner for unseaworthiness . . . ." (alterations added; internal citations omitted)).

for the non-moving party. *See id.*; *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

At summary judgment, the moving party has the burden of proving the absence of a genuine issue of material fact, and all factual inferences are drawn in favor of the non-moving party. *See Allen v. Tyson Foods Inc.*, 121 F.3d 642, 646 (11th Cir. 1997). The movant's initial burden on a motion for summary judgment "consists of a responsibility to inform the court of the basis for its motion and to identify those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115 (11th Cir. 1993) (alterations and internal quotation marks omitted) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). Once the moving party has shouldered its initial burden, the burden shifts to the non-moving party to "'set forth specific facts showing that there is a genuine issue for trial,' not just to 'rest upon the mere allegations or denials of the adverse party's pleading.'" *United States v. Lawrence*, 276 F.3d 193, 197 (5th Cir. 2001) (quoting *Resolution Tr. Corp. v. Camp*, 965 F.2d 25, 29 (5th Cir. 1992)).

Courts must consider the entire record and not just the evidence singled out by the parties. *See Clinkscales v. Chevron U.S.A., Inc.*, 831 F.2d 1565, 1570 (11th Cir. 1987). The non-moving party's presentation of a "mere existence of a scintilla of evidence" in support of its position is insufficient to overcome summary judgment. *Anderson*, 477 U.S. at 252.

Because the issue of whether an injured worker qualifies as a seaman is a mixed question of law and fact, "it often will be inappropriate to take the question from the jury." *Clark v. Am. Marine & Salvage, LLC*, 494 F. App'x 32, 34 (11th Cir. 2012) (quoting *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 554 (1997)). "Nevertheless, summary judgment or a directed verdict is

mandated where the facts and the law will reasonably support only one conclusion." *Id.*

III. ANALYSIS

Plaintiff asserts Kaczkowski is not a seaman under the Jones Act because he lacks a substantial connection to a vessel in navigation. (*See generally* Mot.). The Court first sets out the applicable Jones Act framework, and then considers whether Kaczkowski has sufficiently established he is entitled to seaman status as a matter of law.

A. Jones Act Framework

The Jones Act provides a cause of action in negligence for "a seaman injured in the course of employment." 46 U.S.C. § 30104. "The Jones Act, however, does not define the term 'seaman' and therefore leaves to the courts the determination of exactly which maritime workers are entitled to admiralty's special protection." *Chandris, Inc. v. Latsis*, 515 U.S. 347, 355 (1995). The Supreme Court considered the seaman inquiry at length in *Chandris*,[5] noting that a "seaman" under general maritime law is essentially "a mariner of any degree, one who lives his life upon the sea." *Id.* (internal quotation marks and citation omitted). To bring clarity to the "labyrinth" of judicial decisions concerning seaman status, *id.* at 356, the Supreme Court articulated a two-part test to determine whether a maritime worker is a seaman: 1) "an employee's duties must contribute to the function of the vessel or to the accomplishment of its mission," and 2) "a seaman must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature" *id.* at 368 (alterations, internal quotation marks, and citations omitted). The "substantial connection" criterion does not mechanically require the worker have a connection to one single vessel — an identifiable fleet or a finite group of vessels

[5] The Supreme Court has addressed the seaman question in three major decisions: *McDermott International v. Wilander*, 498 U.S. 337 (1991); *Chandris*; and *Harbor Tug*, all which guide the Court's analysis here.

subject to common ownership or control will qualify. *See Hufnagel v. Omega Serv. Indus., Inc.*, 182 F.3d 340, 348 (5th Cir. 1999) (citing *Harbor Tug*, 520 U.S. at 1540–41).

At issue in this declaratory action is the second and "more demanding" factor. *Bendlis v. NCL (Bahamas) Ltd.*, No. 14-24731-Civ, 2015 WL 1124690, at *3 (S.D. Fla. Mar. 11, 2015). As the Supreme Court explained in *Chandris*,

> The fundamental purpose of th[e] substantial connection requirement is to give full effect to the remedial scheme created by Congress and to separate the sea-based maritime employees who are entitled to Jones Act protection from those land-based workers who have only a transitory or sporadic connection to a vessel in navigation, and therefore whose employment does not regularly expose them to the perils of the sea.

515 U.S. at 368 (alteration added; citations omitted).

"The duration of a worker's connection to a vessel and the nature of the worker's activities, taken together, determine whether a maritime employee is a seaman . . . ." *Id.* at 370 (alteration added). As a general rule, "a worker who spends less than about 30 percent of his time in the service of a vessel in navigation should not qualify as a seaman under the Jones Act." *Id.* at 371. "[T]he inquiry into the nature of the employee's connection to the vessel must concentrate on whether the employee's duties take him to sea." *Harbor Tug*, 520 U.S. at 555 (alteration added).

B. Seaman Status: The Substantial Connection Test

The principal issue before the Court is whether Kaczkowski satisfies the temporal prong of the substantial connection test. The parties' primary disagreement arises from conflicting applications of the "30 percent" rule.

Kaczkowski emphatically argues Norwegian's invocation of the 30 percent rule "is irrelevant because that rule is meant to analyze the status of a maritime worker who splits his time between vessels and shore – a dichotomy not present here." (Opp. 13). This argument is not well-taken. Certainly, the 30 percent rule aims to distinguish sea-based maritime employees entitled to

Jones Act protection from land-based workers who have only a transitory or sporadic connection to a vessel in navigation. *See Chandris*, 515 U.S. at 368–71. However, Kaczkowski's statement "there is no suggestion that Kaczkowski ever split his time between a vessel and land either for Norwegian or any other employer, or that he ever did so over the course of his career" is wholly inaccurate. (Opp. 14).

Norwegian submits evidence, contained largely in the Motion's exhibits, showing Kaczkowski performed a substantial amount of work on shore. (*See* Tervo Deposition [ECF No. 23-2] 52:3-25 (noting Kaczkowski worked at shipyards where vessels were dry-docked and out of navigation); Intec Payroll Vendor Ledgers [ECF No. 23-7] (tracking how many days Kaczkowski spent working on vessels not in navigation); and Intec Payroll Vendor Ledgers with NCL Notations [ECF No. 23-9] (Norwegian's worksheet accounting for the number of days Kaczkowski worked on and offshore)). Kaczkowski has not presented any evidence contrary to Norwegian's submissions, which the Court accepts as true. The Court thus finds the 30 percent rule relevant in this case and turns to the parties' diverging interpretations of how the rule is to be applied.

i. Kaczkowski's Proposed Application of the 30 Percent Rule

Kaczkowski argues "the only possibly relevant time period" for determining his seaman status is "the period of his employment for his employer at the time he was injured – Norwegian." (Opp. 8). He contends he became Norwegian's borrowed employee in 2017 and worked exclusively aboard the *Norwegian Sky* until he was injured. (*See id.* 16). Kaczkowski claims he did not divide his time between employers, but rather spent 100 percent of his time working under each individual employer's control at any given time. (*See id.* 12). According to Kaczkowski, because each borrowed employee project was stand-alone in nature, Norwegian's method of calculating percentages between each of his employers is flawed. (*See id.*).

Yet, "[i]n evaluating the employment-related connection of a maritime worker to a vessel in navigation, courts should not employ a 'snapshot' test for seaman status, inspecting only the situation as it exists at the instant of the injury; a more enduring relationship is contemplated in the jurisprudence." *Chandris*, 515 U.S. 363 (alteration added; internal quotation marks and citation omitted). To be sure, the Supreme Court saw "no reason to limit the seaman status inquiry . . . exclusively to an examination of the overall course of a worker's service with a particular employer." *Id.* at 371–72 (alteration added).

Kaczkowski does not offer "any legal authority whatsoever" for his argument or proposed methodology. (Reply 6 n.8). Indeed, the Fifth Circuit rejected a similar argument in *Wilcox v. Wild Well Control, Inc.*, 794 F.3d 531, 538 (5th Cir. 2015). The employee in *Wilcox* argued he satisfied the substantial connection prong because he spent more than 30 percent of his time with the borrowing employer aboard a vessel. *See id.* The employee conceded there was no direct support for his argument, noting instead that certain pre-*Chandris* cases recognized a borrowed employee could become a seaman with regard to his borrowing employer. *See id.* The Fifth Circuit expressly declined to adopt such a rule. *See id.*

Kaczkowski urges the Court to view the "employment-related connection" too narrowly — apparently suggesting the Court focus solely on his involvement in the 2017 project on the *Norwegian Sky*. (*See* Opp. 8–9). Kaczkowski essentially proposes the Court use the "snapshot" test rejected by the Supreme Court and current maritime jurisprudence. This, the Court will not do.[6]

---

[6] *See, e.g.*, *Lebrun v. Baker Hughes, Inc.*, 192 F. Supp. 3d 696, 701–02 (E.D. La. 2016) (declining to consider solely plaintiff's 28-day assignment to the vessel in question to determine seaman status and instead looking to broader employment history); *see also Brown v. Trinity Catering, Inc.*, No. 06-5756, 2007 WL 4365384, at *6 (E.D. La. Dec. 11, 2007) (looking beyond "snapshot" of plaintiff's employment on the vessel).

ii. Norwegian's Proposed Application of the 30 Percent Rule

For its part, Norwegian insists the Court use a significantly broader lens and evaluate Kaczkowski's connection to Norwegian's vessels vis-à-vis his entire employment history with Intec. (*See generally* Mot.). Norwegian contends Kaczkowski is *not* a seaman because he only spent 12.4 percent of his time working aboard vessels owned or operated by Norwegian or its parent company. (*See id.* 14–15). Norwegian calculates that over the course of his 1,621 days of employment with Intec, Kaczkowski spent only 201 days aboard Norwegian's vessels. (*See id.*). Norwegian argues Kaczkowski's "status as a seaman turn[s] on an examination of his entire work history with his nominal employer – not his limited work history with the borrowing employer."[7] (*Id.* 12 (alteration added; citation omitted)).

Norwegian relies heavily on *Wilcox*, which is factually similar to the current action. In *Wilcox*, the plaintiff, Joseph Wilcox, was a welder employed by Max Welders, an offshore marine construction company providing construction, fabrication, and repair services to customers. *See Wilcox*, 794 F.3d at 534. While employed by Max Welders, Wilcox worked for 34 different customers on 191 different jobs, both onshore and offshore. *See id.* at 538. Max Welders then assigned Wilcox to work on a project for one of its customers, Wild Well. *See id.* at 534. Wild

[7] One of Kaczkowski's principal arguments concerns his status as Norwegian's "borrowed servant." Under the borrowed servant theory, an employee may recover from an entity which, although not his technical employer, exercises *de facto* control over him. *See Eckert v. United States*, 232 F. Supp. 2d 1312, 1317 n.5 (S.D. Fla. 2002). Borrowed servant status alone does not confer seaman status. *See O'Boyle v. United States*, 993 F.2d 211, 213 (11th Cir. 1993). In *O'Boyle*, the court declined to "tarry long with [the] argument," stating that even if the worker "was an employee . . . under the borrowed servant doctrine . . . , it is clear that in order to recover damages under the Jones Act, he must have the status of a seaman." *Id.* (alterations added).

The Court agrees with Norwegian that whether Kaczkowski qualifies as a borrowed servant is not material to this declaratory judgment action, and as such the Court does not reach the issue here. For the sake of clarity, the Court will refer to Norwegian as Kaczkowski's "borrowing employer" and Intec as his "nominal employer."

Well became Wilcox's borrowing employer, and Wilcox was to live aboard Wild Well's vessel during the two-month project. *See id.* at 535. He was injured while working on the project. *See id*.

The issue presented was whether Wilcox had established a substantial connection to his borrowing employer's vessel (or group of vessels) sufficient to classify him as a seaman. The Fifth Circuit addressed the scope of the employment-related connection analysis and considered whether courts should look to a worker's entire employment with his nominal employer, or instead focus only on the time he worked for the borrowing employer.[8] *See generally id.* at 536–39. The Fifth Circuit explained:

> We do not here adopt a bright-line rule that courts performing the seaman-status inquiry must always look to an employee's entire employment with his nominal employer rather than his borrowing employer. Nevertheless, we also decline to adopt a rule that borrowed-employee status automatically requires courts look only to his period of employment with the borrowing employer.

Id. at 538 (footnote call numbers omitted).

Rather than apply these bright-line rules, "the specific facts of each case, especially one where the allegations involve a borrowing employer, must guide courts to determine whether an employee's entire employment is relevant or not." *Goode v. Celebrity Cruises, Inc.*, No. 16-24131-Civ, 2017 WL 3425345, at *6 (S.D. Fla. Aug. 9, 2017). In light of these principles, the Court will consider both Kaczkowski's employment with Norwegian and his employment with Norwegian in relation to Intec to determine seaman status.

---

[8] The Fifth Circuit conducted this analysis in the context of a case where the *Barrett* reassignment exception does not apply. Under *Barrett v. Chevron, U.S.A., Inc.*, 781 F.2d 1067 (5th Cir. 1986), and *Chandris*, courts may look outside the worker's time with the borrowing employer if he has been "reassigned" to a new position such that his essential duties or work location is permanently changed, rather than simply serving on a boat sporadically. *See generally id.*; *see also Wilcox*, 794 F.3d at 536. As in *Wilcox*, the *Barrett* exception does not apply here because Kaczkowski was not permanently "reassigned" to work for Norwegian aboard the Vessel. (*See* Def.'s Facts ¶ 7).

As to Kaczkowski's connection to Norwegian's vessels relative to his entire employment with Intec, Kaczkowski worked a total of 201 days out of 1,621 days on Norwegian vessels — 12.4 percent of his time, which falls significantly below the 30 percent threshold. (*See* Mot. 14–15). This figure includes *all* of the time Kaczkowski spent working for Norwegian and its affiliates, both aboard ships and on land. (*See* Norwegian's Chart [ECF No. 23-8] n.1). The amount of time Kaczkowski spent aboard Norwegian vessels strictly *in navigation* thus appears to be far less: Norwegian states Kaczkowski spent only 22 of the 201 days working for Norwegian on vessels in navigation. (*See* Reply 8 (citing Intec Payroll Vendor Ledgers)). At any rate, it is clear the percentage of time he spent working on Norwegian vessels in navigation compared to his entire employment history with Intec falls short of the required 30 percent.

An analysis limited to Kaczkowski's employment history with Norwegian, his purported borrowing employer, yields similar results. Kaczkowski spent 201 total days working on Norwegian or Norwegian related projects, 179 of which were spent on vessels removed from navigation. (*See id.* (citing Intec Payroll Vendor Ledgers)). Ultimately, Kaczkowski spent only about 11 percent of his time working for Norwegian and its affiliates aboard vessels *in navigation*.

Thus, under either analysis, Kaczkowski fails to establish a substantial connection to a vessel in navigation. The Court is mindful the 30 percent figure serves as a guideline and departure from it may be justified in appropriate cases. *See Chandris*, 515 U.S. at 371. But departure does not appear warranted here. *See Roberts v. Cardinal Servs., Inc.*, 266 F.3d 368, 376 (5th Cir. 2001) (noting the plaintiff came "quite close (27.7 percent) to meeting the 30 percent requirement," but the court still did not "perceive the instant case to be one that justifies an exceptional departure from the 30 percent test.").

Courts have routinely declined to find seaman status in analogous cases. (*See* Mot. 13 (collecting cases)). Particularly instructive is *Brown v. Trinity Catering, Inc.*, where the plaintiff was a galley hand for his nominal employer, Trinity, a company supplying a sea-based catering crew for various customers. *See* 2007 WL 4365384, at *1. The plaintiff, Gwenn Brown, was assigned to work 18 days on a vessel in navigation owned and operated by one of Trinity's customers. *See id.* at *6. Like Kaczkowski, Brown spent 100 percent of his time working on the vessel, where he ate and slept while assigned to work the project. *See id.* The court entered summary judgment, finding that "[g]iven his brief and limited employment tenure by Trinity and aboard the [vessel] . . . Brown ha[d] not shown the necessary connection of substantial duration to a vessel or an identifiable fleet of vessels sufficient to establish Jones Act seaman status . . . ." *Id.* (alterations added). The Court finds a similar result appropriate here.

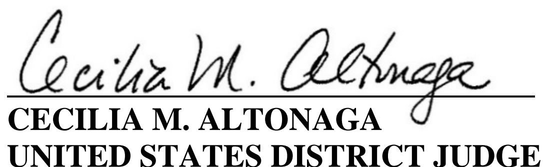
Kaczkowski has "failed to introduce any evidence that his work was substantially connected to a vessel in navigation." *Clark*, 494 F. App'x at 35. Even giving Kaczkowski "the benefit of every doubt and viewing the evidence in the light most favorable to him as required for the non-movant at the summary judgment stage" (Norwegian's Chart n.1), Kaczkowski has failed to establish he spent 30 percent of his time in the service of a vessel (or identifiable fleet of vessels) in navigation. The undisputed facts show he spent, at best, roughly 12 percent of his work hours at sea working on a vessel in navigation owned or operated by Norwegian or its parent company. "Where undisputed facts reveal that a maritime worker has a clearly inadequate temporal connection to vessels in navigation," the Court may grant summary judgment. *Chandris*, 515 U.S. at 371 (citation omitted); *see also Wilcox*, 794 F.3d at 539 (affirming district court's grant of summary judgment where worker failed to demonstrate a genuine issue of material fact from which

a reasonable jury could conclude he qualified for seaman status under the Jones Act); *Clark*, 494 F. App'x at 35 (same).

IV. CONCLUSION

For the foregoing reasons, it is **ORDERED AND ADJUDGED** that Plaintiff, NCL (Bahamas) Ltd.'s Motion for Summary Judgment **[ECF No. 23]** is **GRANTED**. Final judgment will be entered by separate order. The Clerk of Court is instructed to **CLOSE** the case, and any pending motions are **DENIED** as moot.

DONE AND ORDERED in Miami, Florida, this 14th day of June, 2019.



CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: counsel of record