NOT RECOMMENDED FOR PUBLICATION

No. 23-5284

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN F. CURRAN III, Plaintiff-Appellant, v. WEPFER MARINE SERVICES, INC.; OKIE MOORE DIVING AND MARINE SALVAGE, LLC, Defendants-Appellees, and WESTERN RIVERS BOAT MANAGEMENT, INC., Defendant.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE

O R D E R

Before: GRIFFIN, KETHLEDGE, and NALBANDIAN, Circuit Judges.

John F. Curran III, a pro se Tennessee resident, appeals the district court's judgment disposing of his civil lawsuit. Curran moves to remand the case to the district court for an evidentiary hearing. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a). For the reasons set forth below, we deny the motion to remand and affirm the district court's judgment.

In January 2019, Curran was hired as a deckhand by Okie Moore Diving and Marine Salvage, LLC ("Okie Moore"), a subsidiary of Wepfer Marine Services, Inc. ("Wepfer") that raises sunken vessels from navigable waterways. As his first assignment, Curran was part of a crew

tasked with raising a sunken barge from the Mississippi River. Curran alleged that his duties included serving as a "salvor, diver, equipment operator, welder[,] and laborer" aboard the M.V. Stephen Foster, the towboat upon which he and the other crewmembers lived during the assignment. After the sunken barge was successfully raised, a vessel owned and operated by Western Rivers Boat Management, Inc. ("Western Rivers") transported Okie Moore's equipment upriver to a staging area, during which time an Okie Moore employee, Mitch Revette, sustained an on-the-job head injury. Curran immediately administered first aid to Revette and notified the vessel master that Revette needed to be transported to a medical facility, which he was.

Curran alleged that, following this incident, his superiors made him a safety officer for Okie Moore and instructed him to prepare a medical-equipment list for the M.V. Stephen Foster, but that these additional duties did not come with an increase in pay. He further alleged that he was responsible for keeping his own timesheets and reporting the number of hours worked to Okie Moore's operations manager. According to Curran, the operations manager accepted his reported work hours without question, yet he was not compensated for 143.5 hours of overtime worked over the course of pay periods ranging from January 13, 2019, through April 21, 2019.

Curran filed this federal lawsuit in October 2020, seeking compensation from Wepfer and Okie Moore[1] for maritime salvage services pursuant to 46 U.S.C. § 80107. With leave of court, Curran later amended his complaint to add a claim for unpaid overtime under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 207. On a magistrate judge's recommendations, and over Curran's objections, the district court dismissed the salvage claim under Federal Rule of Civil Procedure 12(b)(6) and granted summary judgment in the defendants' favor on the FLSA claim. The district court denied Curran's motion to alter or amend the judgment.[2] *See* Fed. R. Civ. P. 59(e).

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[1] Curran also sued Western Rivers, which is not a party to this appeal because Curran's claims against it were settled and dismissed with prejudice.

[2] The district court treated Curran's post-judgment motion as seeking relief from judgment under Federal Rule of Civil Procedure 60(b). But because Curran filed that motion within 28 days after

On appeal, Curran challenges the district court's dismissal of his salvage claim under Rule 12(b)(6), as well as the district court's adverse summary judgment ruling with respect to his FLSA claim.

We review de novo a district court's dismissal of a complaint under Rule 12(b)(6) for failure to state a claim. *Lumbard v. City of Ann Arbor*, 913 F.3d 585, 588-89 (6th Cir. 2019). "We construe the complaint in the light most favorable to the plaintiff, accept all well-pleaded factual allegations as true, and examine whether the complaint contains 'sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" *Nolan v. Detroit Edison Co.*, 991 F.3d 697, 707 (6th Cir. 2021) (quoting *Hill v. Snyder*, 878 F.3d 193, 203 (6th Cir. 2017)). Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Nevertheless, "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). To avoid dismissal for failure to state a claim, a plaintiff must plead sufficient "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). We may affirm on any basis supported by the record. *Angel v. Kentucky*, 314 F.3d 262, 264 (6th Cir. 2002).

Curran sought a salvage award of over $4 million for rendering first aid to Revette. A traditional salvage award is "the compensation allowed to persons by whose voluntary assistance a ship at sea or her cargo or both have been saved in whole or in part from impending sea peril." *The Sabine*, 101 U.S. 384, 384 (1879). Thus, to recover a traditional salvage award, a plaintiff must prove three essential elements: (1) "[a] marine peril"; (2) "[s]ervice voluntarily rendered when not required as an existing duty or from a special contract"; and (3) "[s]uccess in whole or in part, or that the service rendered contributed to such success." *Id.*

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the entry of judgment, the district court should have instead construed it as a time-tolling motion to alter or amend the judgment under Federal Rule of Civil Procedure 59(e). *See In re Greektown Holdings, LLC*, 728 F.3d 567, 574 (6th Cir. 2013); Fed. R. App. P. 4(a)(4)(A). Curran's timely appeal from the denial of his Rule 59(e) motion brings up the underlying judgment for review. *See GenCorp, Inc. v. Am. Int'l Underwriters*, 178 F.3d 804, 833 (6th Cir. 1999).

Life salvage, unlike traditional property salvage, is a creature of statute. In 1912, Congress enacted the Life Salvage Act, 46 App. U.S.C. § 729 (now recodified at § 80107(a) and since amended), which provides that "[a] salvor of human life, who gave aid following an accident giving rise to salvage, is entitled to a fair share of the payment awarded to the salvor for salvaging the vessel or other property or preventing or minimizing damage to the environment." "In other words, life salvage is a derivative claim that exists only when a third party seeks a property salvage award, and is not an independent cause of action or the basis of a separate claim by the person involved in completing the services." *Sunglory Maritime Ltd. v. PHI, Inc.*, 212 F. Supp. 3d 618, 654-55 (E.D. La. 2016); *see St. Paul Marine Transp. Corp. v. Cerro Sales Corp.*, 313 F. Supp. 377, 379 (D. Haw. 1970); *In re Yamashita-Shinnihon Kisen*, 305 F. Supp. 796, 800 (D. Or. 1969). Since Curran failed to allege that a third party was seeking a property salvage award, he did not plead a claim to "a fair share of the compensation awarded to property salvors." *In re Yamashita-Shinnihon Kisen*, 305 F. Supp. at 800.

Moreover, Curran failed to allege facts showing that he administered first aid to Revette "following an accident giving rise to salvage." As just mentioned, to state a salvage claim, a plaintiff must demonstrate first and foremost the existence of a "marine peril," *Sabine*, 101 U.S. at 384, which "occurs when a vessel is exposed to any actual or apprehended danger which might result in her destruction," *Clifford v. M/V Islander*, 751 F.2d 1, 5 (1st Cir. 1984). To qualify, the danger need not be immediate; a "[r]easonable apprehension of peril . . . is enough." *Id.* at 6. Still, it must be shown that, at the time the assistance is rendered, the vessel "has encountered a[] damage or misfortune which might possibly expose her to destruction if the services were not rendered." *Id*. at 5 (quoting M. Norris, *The Law of Salvage* § 63, at 97 (1958)). Curran did not allege that, contemporaneous with his alleged act of life salvage, any vessel was damaged or exposed to danger that could lead to its destruction or further damage in the absence of the service provided. Nor does he cite any authority supporting his assertion that a salvage claim can be based on him saving the defendants' assets from "future peril," such as the greater liability they might have faced had

he not attended to Revette. Accordingly, the district court properly dismissed Curran's salvage claim.

Curran's counterarguments lack merit. He argues that, as a pro se litigant, he was entitled to a liberal construction of his pleadings. Curran is correct that pro se complaints should be liberally construed and held to less stringent standards than formal pleadings drafted by attorneys. *See Bridge v. Ocwen Fed. Bank, FSB*, 681 F.3d 355, 358 (6th Cir. 2012). But the district court acknowledged that it was required to construe Curran's complaint liberally, and nothing suggests that it failed to do so. Curran also contends that the district court erred in dismissing his salvage claim without allowing him to present evidence. But a district court's function under Rule 12(b)(6) is to assess whether the plaintiff's complaint, standing alone, is legally sufficient to state a claim for which relief may be granted. *Riverview Health Inst. LLC v. Med. Mut. of Ohio*, 601 F.3d 505, 512 (6th Cir. 2010). At the pleading stage, all well-pleaded facts in Curran's complaint were taken as true, *see Twombly*, 550 U.S. at 555, so there was no need for the district court to consider any evidence, *see New Albany Tractor, Inc. v. Louisville Tractor, Inc.*, 650 F.3d 1046, 1051 (6th Cir. 2011). In any event, the only evidence Curran faults the district court for not considering is an affidavit from Jason Strait, who is Western Rivers' Vice President of Operations. But Curran did not properly seek to amend his complaint to include the information contained in that affidavit. Moreover, nothing in the affidavit alters the conclusion that Curran failed to state a salvage claim.

Turning to Curran's FLSA overtime claim, we review a district court's grant of summary judgment de novo, viewing the facts in the light most favorable to the non-moving party. *Flagg v. City of Detroit*, 715 F.3d 165, 178 (6th Cir. 2013). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see Estate of Smithers ex rel. Norris v. City of Flint*, 602 F.3d 758, 761 (6th Cir. 2010). If the moving party satisfies this burden, the burden then shifts to the non-moving party to set forth "specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (emphasis omitted) (quoting Fed. R. Civ. P. 56(e)). A party opposing a motion for summary judgment may

not rest upon his pleadings but must set forth specific facts demonstrating that there are genuine issues of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The FLSA requires employers to pay overtime compensation to covered employees, 29 U.S.C. § 207(a)(1), but exempts from this requirement "any employee employed as a seaman," 29 U.S.C. § 213(b)(6). "Because the FLSA itself contains no definition of a 'seaman,' the Department of Labor regulations play a role." *McLaughlin v. Boston Harbor Cruise Lines, Inc.*, 419 F.3d 47, 50 (1st Cir. 2005); *see Coffin v. Blessey Marine Servs., Inc.*, 771 F.3d 276, 279 (5th Cir. 2014). Per Department of Labor regulations, an employee is a seaman if (1) he is "subject to the authority, direction, and control of the master aboard a vessel" and (2) his service "is rendered primarily as an aid in the operation of such vessel as a means of transportation, provided he performs no substantial amount of work of a different character." 29 C.F.R. § 783.31. "[S]uch differing work is 'substantial' if it occupies more than 20 percent of the time worked by the employee during the workweek." 29 C.F.R. § 783.37. Whether an employee is a seaman is based "upon the character of the work he actually performs and not on what it is called or the place where it is performed." 29 C.F.R. § 783.33. Because "what each employee actually does" determines how the FLSA applies to him, "application of the seaman exemption generally depends on the facts in each case." *Coffin*, 771 F.3d at 280; *see McLaughlin*, 419 F.3d at 51-52. The employer bears the burden of proving that an employee is exempt from FLSA protections. *Martin v. Ind. Mich. Power Co.*, 381 F.3d 574, 578 (6th Cir. 2004). In construing these exemptions, we give them a "fair," rather than a narrow, reading. *Encino Motorcars, LLC v. Navarro*, 584 U.S. 79, 89 (2018).

In moving for summary judgment, the defendants cited to a declaration from Okie Moore's president, Bruce Gibson, who stated that, on the dates relevant to this case, Curran worked aboard the M.V. Stephen Foster (the towboat on which he and the other crewmembers lived) and the M.V. Bruce Gibson (another river towboat owned by Okie Moore)—all the while subject to the control of the masters of those vessels. Gibson further declared that "[o]ver 80 percent of [Curran's] work duties aided the safe operation of the vessels in navigation." Curran's deposition testimony similarly showed that he worked aboard Okie Moore's vessels under the authority, direction, and

control of a master, and also that he spent most of his time performing quintessential seaman's duties—including checking engines and oil levels; repairing engines and pumps; fixing exterior navigation lights; conducting preventative maintenance; inspecting the cranes, anchor, and winches; inspecting the fire systems; serving as a lookout for sandbars and other vessels; and cleaning. *See, e.g.*, *Harkins v. Riverboat Servs.*, 385 F.3d 1099, 1104 (7th Cir. 2004) (explaining that "maritime work" includes responsibility for the "safe and efficient operation and maintenance" of a boat, including maintenance, cleaning, and fire prevention); *see also Coffin*, 771 F.3d at 285 ("The basic maintenance of a vessel is almost always seaman work for FLSA purposes."); *McMahan v. Adept Process Servs.*, 786 F. Supp. 2d 1128, 1136-37 (E.D. Va. 2011) (describing as "seamen duties" tasks such as vessel operation and maintenance and "connecting floating objects to the vessels for purposes of towing them," which are "services rendered primarily as an aid to the operation of a vessel as a means of transportation"). The defendants thus satisfied their initial burden of proving a lack of genuine dispute of material fact with respect to Curran's FLSA overtime claim.

The burden then shifted to Curran, as the non-moving party, to present specific facts creating a genuine issue for trial. *See Matsushita Elec. Indus. Co.*, 475 U.S. at 587. But Curran submitted no evidence that he was not employed as a seaman and, at the summary-judgment stage, could not merely rely on the allegations in his unverified amended complaint. *See Anderson*, 477 U.S. at 248-49; *cf. El Bey v. Roop*, 530 F.3d 407, 414 (6th Cir. 2008) (holding that a "verified complaint"—one that has been submitted under penalty of perjury—"carries the same weight as would an affidavit for the purposes of summary judgment"). We have made it clear that a party's "status as a pro se litigant does not alter his duty on a summary judgment motion" to present evidence demonstrating a material issue for trial. *Viergutz v. Lucent Techs., Inc.*, 375 F. App'x 482, 485 (6th Cir. 2010); *see United States v. Ninety Three Firearms*, 330 F.3d 414, 427-28 (6th Cir. 2003). Although Curran now attaches photographs of his alleged timesheets to his brief and asserts that they conclusively show that he did "very little" to aid in the vessel's operation, Curran could have provided his timesheets (or any other admissible evidence) to the district court but

failed to do so. We generally do not consider new evidence presented for the first time on appeal. *See Good v. Ohio Edison Co.*, 149 F.3d 413, 421 n.16 (6th Cir. 1998) ("In general, an appellate court reviewing a grant of summary judgment cannot consider evidence that was not before the district court at the time of its ruling."); 16A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3956.1 (5th ed. 2022) ("[A] party opposing a motion for summary judgment must bear in mind that if [evidence] is not filed with the district court and thus not considered by the court when it grants the motion, that [evidence] will not be part of the record on which the court of appeals reviews the grant of summary judgment."). In any event, the district court considered Curran's own deposition testimony, which was the primary basis for the defendants' uncontested statement of material facts. In short, viewing all admissible evidence in the light most favorable to Curran, *see Flagg*, 715 F.3d at 178, no reasonable jury could conclude that Curran was not employed as a seaman within the meaning of the FLSA's overtime provision. The district court therefore properly granted summary judgment in favor of the defendants.

Finally, Curran challenges the district court's denial of his post-judgment motion. By way of context, on January 9, 2023, the magistrate judge recommended granting the defendants' summary judgment motion. The report and recommendation stated that Curran would waive his appellate rights if he did not object within 14 days. Without receiving any objections, on February 6, 2023, the district court adopted the magistrate judge's report and recommendation and entered final judgment. Curran thereafter filed objections and moved to "set aside" the district court's judgment, explaining in both filings that he did not receive the magistrate judge's report and recommendation until February 2, 2023—well after the 14-day period for filing objections had expired. The district court denied Curran's post-judgment motion, finding that he had failed to show that his failure to file timely objections was the result of excusable neglect and, in any event, that his objections lacked merit and did not alter its decision to grant the defendants' summary judgment motion. Curran argues that the district court erred by not considering his objections timely, but we need not consider this argument given our conclusion that the district court's

substantive determination—that the defendants were entitled to summary judgment on the merits of his FLSA claim—is correct.

For these reasons, we **DENY** Curran's motion to remand for an evidentiary hearing and **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens, Clerk