

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 2nd day of November, two thousand twenty.

PRESENT: AMALYA L. KEARSE,
GERARDE E. LYNCH,
WILLIAM J. NARDINI,
Circuit Judges.

D'ONOFIO GENERAL CONTRACTOR CORP., as Owner of
THE M/V LUCIE JO for Exoneration from and Limitation of
Liability,

Petitioner-Appellee,

AVITUS GROUP, AVITUS INC., AND
BETTER BUSINESS SYSTEMS, INC.,

Claimants-Appellees,

v.

No. 19-4029

EDWARD SAFER, JR.,

Respondent-Appellant.

FOR PETITIONER-APPELLEE:

Guerric S.D.L. Russell, Nicoletti Hornig &
Sweeney, New York, NY.

FOR CLAIMANTS-APPELLEES: John Sandercock, Lester Schwab Katz & Dwyer, LLP, New York, NY.

FOR RESPONDENT-APPELLANT: Nicholas P. Giuliano, Matthew M. Gorden, and Stanton J. Terranova, Giuliano McDonnell & Perrone, LLP, Mineola, NY.

On appeal from the United States District Court for the Eastern District of New York (Cheryl L. Pollak, *M.J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the order of the district court is **AFFIRMED**.

Respondent-Appellant Edward Safer, Jr., appeals from an order of the district court, entered on November 5, 2019, denying his motion for reconsideration of the court’s March 26, 2019, order denying his motion to vacate the stay of his state court action and stay the federal action pending the conclusion of his state court action. We assume the parties’ familiarity with the record.

Safer was captain of the *Lucie Jo*, a tugboat owned by D’Onofrio General Contractor Corp. (“D’Onofrio”).¹ On September 10, 2015, Safer slipped on the deck of the *Lucie Jo* and injured his left knee. He sued D’Onofrio and Avitus,² a professional employer organization that provides D’Onofrio with payroll services and appears on Safer’s W-2 form, in state court. He alleged negligence under the Jones Act, 46 U.S.C. § 30104, and unseaworthiness and maintenance and cure under general maritime law.

¹ It appears from the record that the correct spelling of the petitioner-appellee’s name is “D’Onofrio,” which we will use throughout the body of this order.

² “Avitus” refers to a group of related companies: Avitus, Inc., Avitus Group, and Better Business Systems, Inc.

Pursuant to the Limitation of Liability Act of 1851, 46 U.S.C. § 30501 *et seq.*, D’Onofrio petitioned the district court for exoneration from and limitation of liability for these claims. The district court enjoined the further prosecution of all suits arising from Safer’s injury and required all claimants to present their claims in the limitation proceeding. Safer answered with his personal injury claims, and Avitus answered by filing a claim against D’Onofrio for full indemnification together with attorneys’ fees, costs, and disbursements. Safer also moved to lift the stay on other proceedings so that he could pursue his action in state court. The district court denied his motion and a subsequent motion for reconsideration.

On appeal, Safer argues that the district court erred in declining to lift the stay on his state court proceedings. He argues that he is a “lone claimant” entitled to pursue his seaman’s claims in state court because Avitus’s contract claims are not subject to the limitation proceeding. He also contends that his proposed stipulation, filed in the district court on April 5, 2019, adequately protects D’Onofrio’s right to limitation of liability because it prioritizes Avitus’s claims for attorneys’ fees over his own claims and commits not to enforce any state court judgment against D’Onofrio or any other liable party who may cross-claim or claim over against D’Onofrio in the limitation proceeding without first returning to the limitation proceeding.

We review the denial of the motion to lift the stay for abuse of discretion. *See D’Amico Dry Ltd. v. Primera Maritime (Hellas) Ltd.*, 756 F.3d 151, 155 n.2 (2d Cir. 2014); *see also Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 997 (2001) (“The question presented is whether the district court abused its discretion in dissolving the injunction.”).

“As long as there is a potential set of circumstances in which a shipowner could be held liable in excess of the limitation fund, the reasonable prospect of claims for indemnification should constitute a multiple claimant situation necessitating a *concurus*.” *Complaint of Dammers & Vanderheide & Scheepvaart Maats Christina B.V.*, 836 F.2d 750, 757 (2d Cir. 1988). A court may decline to lift a stay on state court proceedings if it “concludes that the vessel owner’s right to limitation will not be adequately protected—where for example a group of claimants cannot agree on appropriate stipulations or there is uncertainty concerning the adequacy of the fund or the number of claims.” *Lewis*, 531 U.S. at 454.

Under these circumstances, the district court did not abuse its discretion in denying Safer’s motion to lift a stay on his state court case. While claims arising from personal contracts are not subject to limitation under the Limitation of Liability Act, *see Mediterranean Shipping Co. S.A. Geneva v. POL-Atl.*, 229 F.3d 397, 403-04 (2d Cir. 2000), D’Onofrio and Avitus are currently litigating the nature and validity of D’Onofrio’s alleged indemnification obligation to Avitus. Accordingly, Avitus’s claims for common law indemnification and contribution, as well as its claim for legal fees and expenses, are still live, “leaving a potential set of circumstances in which [D’Onofrio] could be held liable in excess of the limitation fund.” *Dammers*, 836 F.2d 757. As to Safer’s proposed stipulation, Avitus explicitly objects to it. A stipulation executed by all potential claimants is not always necessary to protect a shipowner’s right to limitation, but explicit objection from a party who has actually filed a claim raises concerns as to whether “the admiralty court can effectively ensure that a shipowner will not face liability in excess of the limitation fund.” *Id.* at 759. In such a scenario, it is well within the district court’s discretion to

decline to lift a stay on Safer’s state court proceedings and “proceed to adjudicate the merits, deciding the issues of liability and limitation.” *Lewis*, 531 U.S. at 454 (collecting cases).

Safer also contends that the district court erred in denying his motion for summary judgment to dismiss Avitus’s claims against D’Onofrio. We lack jurisdiction to consider such a claim. The district court’s denial of summary judgment on this point—premised on a disputed issue of material fact about whether Avitus was Safer’s co-employer—is a nonfinal decision and therefore unappealable. *See, e.g., Blue Water Yacht Ass’n v. New Hampshire Ins. Co.*, 355 F.3d 139, 141 (2d Cir. 2004) (the provision allowing immediate appeal of “[i]nterlocutory decrees . . . determining the rights and liabilities of the parties to admiralty cases in which appeal from final decrees are allowed,” 28 U.S.C. § 1292(a)(3), refers to an “interlocutory decree [that has] decid[ed] the merits of the controversy between parties, but has left unsettled the question of damages or other details”; it does not encompass an “order [that] merely denied appellant’s motion to dismiss, holding the liability question open for adjudication.” (internal quotation marks omitted)).

We have considered Safer’s remaining arguments and conclude that they are without merit. For the foregoing reasons, the order of the district court is **AFFIRMED**.

FOR THE COURT:
Catherine O’Hagan Wolfe, Clerk of Court