UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 23-62315-CIV-DIMITROULEAS

In the Matter of the Complaint of:
Port Everglades Launch Service, Inc.
d/b/a Cape Ann Towing, as owner of the
M/V TUG 1 Bearing Hull Identification
No. LZ09699D603 and
M/V TUG 2 Bearing Hull Identification
No. DUS600141276
for Exoneration from or Limitation of Liability,

_____/

ORDER GRANTING BRADFORD MARINE'S MOTION FOR PARTIAL SUMMARY JUDGMENT

THIS CAUSE is before the Court upon FLYHop Co d/b/a Bradford Marine ("Bradford Marine")'s Motion for Partial Summary Judgment (the "Motion"), filed on April 15, 2025 [DE 69]. The Court has carefully considered the Motion, Accelerant Specialty Insurance ("Accelerant")'s Response, filed April 29, 2025 [DE 72], DWB Asset Management LLC ("DWB")'s Response, filed April 29, 2025 [DE 74] and Bradford Marine's Reply, filed May 6, 2025 [DE 79], along with Bradford Marine's Statements of Facts [DE 68], Accelerant's Response to Bradford Marine's Statement of Facts [DE 73], and DWB's Response to Bradford Marine's Statement of Facts [DE 75]. The Court is otherwise fully advised in the premises.

I. BACKGROUND

Selah ("Vessel" or "Selah") is a 2005 116' Azimut Motor-yacht owned by DWB Asset Management, LLC and insured by Accelerant. Selah was docked at Bradford Marine. On March 10, 2023, DWB and Bradford Marine duly executed a "Dockage and Repair Contract." *See* DE 68-1, 2 p. 60. On March 20, 2023, Bradford Marine hired Cape Ann Towing to tow Selah from its

berth on one side of the marina to a travel lift on the other. While *en route* the Vessel began to take on water and was damaged.

On December 3, 2023, Port Everglades Launch Service (d/b/a Cape Ann Towing) ("Petitioner") filed this action for exoneration from or limitation of liability pursuant to 46 U.S.C. § 30511. [DE 1]. Claimants DWB Asset Management, LLC and Accelerant Specialty Insurance Co. as subrogee of DWB Asset Management, LLC ("Claimants") appeared in the action and brought claims for negligence and breach of warranty and workmanlike service against Petitioner. *See* [DEs 8, 21]. Claimants also brought those same two claims along with a third count, vicarious liability, against Third-Party Defendant Bradford Marine [DEs 8, 21]. By the instant motion, Bradford Marine moves for partial summary judgment, arguing Bradford Marine's liability is capped at $500,000 in accordance with the applicable Dockage and Repair Contract. The Court agrees that Bradford Marine is entitled to a grant of partial summary judgment and accordingly grants the instant motion.

II. STANDARD OF LAW

"The court shall grant summary judgment 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). The movant bears "the stringent burden of establishing the absence of a genuine issue of material fact." *Suave v. Lamberti*, 597 F. Supp. 2d 1312, 1315 (S.D. Fla. 2008) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)).

"A fact is material for the purposes of summary judgment only if it might affect the outcome of the suit under the governing law." *Kerr v. McDonald's Corp.*, 427 F.3d 947, 951 (11th Cir. 2005) (internal quotations omitted). Furthermore, "[a]n issue [of material fact] is not 'genuine'

if it is unsupported by the evidence or is created by evidence that is 'merely colorable' or 'not significantly probative.'" *Flamingo S. Beach I Condo. Ass'n, Inc. v. Selective Ins. Co. of Southeast*, 492 F. App'x 16, 26 (11th Cir. 2013) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249–50 (1986)). "A mere scintilla of evidence in support of the nonmoving party's position is insufficient to defeat a motion for summary judgment; there must be evidence from which a jury could reasonably find for the non-moving party." *Id.* at 26-27 (citing *Anderson*, 477 U.S. at 252). Accordingly, if the moving party shows "that, on all the essential elements of its case on which it bears the burden of proof at trial, no reasonable jury could find for the nonmoving party" then "it is entitled to summary judgment unless the nonmoving party, in response, comes forward with significant, probative evidence demonstrating the existence of a triable issue of fact." *Rich v. Sec'y, Fla. Dept. of Corr.*, 716 F.3d 525, 530 (11th Cir. 2013) (citation omitted).

In deciding a summary judgment motion, the Court must view the facts in the light most favorable to the nonmoving party. *Davis v. Williams*, 451 F.3d 759, 763 (11th Cir. 2006). The Court also must resolve all ambiguities and draw all justifiable inferences in favor of the nonmoving party. *Anderson*, 477 U.S. at 255.

However, "at the summary judgment stage the judge's function is not [] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 255. The Court's role is limited to deciding whether there is sufficient evidence upon which a reasonable juror could find for the nonmoving party. *Morrison v. Amway Corp.*, 323 F. 3d 920, 924. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of

the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson*, 477 U.S. at 255.

III. DISCUSSION

Bradford Marine asks this Court to grant partial summary judgment in its favor as to the damages question of any potential liability.[1] It argues the exculpatory clause of its Dockage and Repair Contract with DWB caps damages at $500,000. DWB and Accelerant, in turn, argue that the exculpatory clause is ambiguous and therefore inapplicable. DWB also argues that the damages cap applies only to liability arising "under this agreement."

As an initial matter, we note that federal maritime law applies. *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 15 (2004) ("When a contract is a maritime one, and the dispute is not inherently local, federal law controls the contract interpretation."); *see also Internaves de Mexico s.a. de C.V. v. Andromeda Steamship Corp.*, 898 F.3d 1087, 1093 (11th Cir. 2018).

A. Whether the agreement is ambiguous

The Eleventh Circuit established a three-step test to determine whether a limitation on liability clause in a maritime contract is enforceable. First, the clause must clearly and unequivocally indicate the parties' intentions. Second, the clause may not absolve the ship repairer of all liability and must still provide a deterrent to negligence. Third, the parties must have equal bargaining power in negotiating the agreement. *Diesel Repower v. Islander Investments, Ltd.*, 271 F.3d 1318, 1324 (11th Cir. 2001).

[1] "A party may move for summary judgment, identifying each claim or defense — *or the part of each claim or defense* — on which summary judgment is sought." Fed. R. Civ. P. 56(a) (emphasis added).

In this case, Paragraph 4 to the Dockage and Repair Contract states:

> The Owner warrants that the Vessel is fully insured for all liabilities and its hull and machinery, and the Owner agrees to keep such insurances in full force and effect during all times when the Vessel is located in the Company's facility**. It is expressly understood and agreed to by the Owner and the Vessel that the Company's liability under this agreement shall be limited to a maximum total liability, under any theory of recovery, of one hundred thousand U.S. dollars, unless the Vessel exceeds a length threshold as follows**: less than 90 feet, the maximum total loss is $100,00f0; between 91 feet and 115 feet, the maximum total loss is $250,000; **between 116 feet and 140 feet, the maximum total loss is $500,000;** if greater than 141 feet, the maximum total loss is $1,000,000.

[DE 68-1] ¶ 4 (emphasis added). Movant Bradford Marine asserts the damages cap is clear on its face. In turn, Accelerant and DWB argue that Paragraph 4, quoted above, is ambiguous in light of Paragraph 5 of the agreement, which in turn states:

> "In no event shall the Company be liable to the Owner or the Vessel for any economic losses or consequential damages, including, but not limited to, loss of use of the Vessel or any charter, irrespective of its foreseeability, cause or resulting damages."

[DE 68-1] ¶ 5. DWB and Accelerant suggest these two provisions directly conflict: if Bradford disclaims all consequential and economic damages, they argue, there is little or nothing left to apply toward the purported $500,000 limit, rendering the cap illusory. Bradford Marine replies the two paragraphs are reconcilable, stating, "[t]he contract clearly differentiates between direct damages and consequential damages. Paragraph 4 caps direct damages (e.g., repair costs) at $500,000, while Paragraph 5 excludes consequential damages (e.g., lost profits, loss of use) entirely."

"[A] contractual provision should not be construed as being in conflict with another unless no other reasonable interpretation is possible." *Maccaferri Gabions, Inc. v. Dynateria Inc.,* 91 F.3d 1431, 1440 (11th Cir. 1996) (quotation omitted). "If two clauses of a contract appear to be in conflict, the preferred interpretation is the one that gives a 'harmonious interpretation' to the

clauses." *Merrill Stevens Dry Dock Co. v. M/V YEOCOMICO II*, 329 F.3d 809, 814 (11th Cir. 2003) (quotation omitted).

To find an ambiguity here, DWB and Accelerant would have this Court read Paragraph 4 out of the contract entirely and find the cap is "illusory" in light of the total limitation on economic and consequential damages in Paragraph 5. To do so flies in the face of ordinary contract interpretation principles. The Court therefore finds that these provisions are distinct and relate to different types of damages. While Paragraph 4 discusses direct damages, Paragraph 5 relates to consequential damages. Courts in this Circuit routinely distinguish direct and consequential damages in interpreting exculpatory clauses. *See, e.g.*, *Pearson v. Deutsche Bank AG*, No. 21-CV-22437, 2023 WL 3043406, at *11 (S.D. Fla. Apr. 22, 2023), *appeal dismissed* (Mar. 22, 2024) (finding a "contractual provision disclaiming liability in contract in tort for '*any consequential, special, indirect or speculative loss or damage* . . . which arises out of or in connection with this Agreement' . . . does not prevent Plaintiffs from recovering damages which are *not* consequential, special, indirect or speculative."); *see also Am. Bd. of Cardiovascular Medicine v. John Wiley & Sons, Inc.*, 2016 WL 9383326, at *2 (M.D. Fla. June 15, 2016) (holding that provision limiting liability for "any incidental, consequential, special, or indirect loss or damage" does not limit "actual or direct damages.").

To find an ambiguity, "there must be a genuine inconsistency or uncertainty in meaning that remains after resort to the ordinary rules of construction." *See Dahl-Eimers v. Mutual of Omaha Life Ins. Co.*, 986 F.2d 1379, 1381 (11th Cir. 1993). After applying the ordinary rules, no ambiguity remains.

B. Whether there is sufficient deterrent to negligence and equal bargaining power

Bradford Marine asserts it meets the second and third steps of the *Diesel* test: namely, that the exculpatory clause contains sufficient deterrent of negligence and that the parties had equal bargaining power. DWB and Accelerant do not respond Bradford Marine's arguments. Accordingly, the arguments are deemed conceded.[2] *Ramsey v. Bd. of Regents of Univ. Sys. of Georgia*, No. 1:11-CV-3862-JOF-JSA, 2013 WL 1222492, at *29 (N.D. Ga. Jan. 30, 2013), *aff'd*, 543 Fed. Appx. 966 (11th Cir. 2013) ("When a party fails to address a specific claim, or fails to respond to an argument made by the opposing party, the Court deems such claim or argument abandoned."). The Court therefore finds these last two prongs are met here.

C. Whether the limitation clause applies only to "liability under this agreement"

DWB further argues in its Response that the liability limitation applies only to Bradford Marine's "liability under this agreement." DWB asserts that Bradford Marine's motion is flawed because "it seeks blanket application of the $500,000 limitation without addressing whether each claim falls within the scope of "liability under this agreement." While Bradford Marine does not expressly respond to this argument, the Court finds it is without merit. Paragraph 4 of the Agreement reads:

> It is expressly understood and agreed to by the Owner and the Vessel that the Company's liability under this agreement shall be limited to a maximum total liability, under any theory of recovery, of . . .

[2] DWB and Accelerant are right not to challenge Bradford Marine's argument on point two, as the Eleventh Circuit has found that "risk of liability for as little as $300,000 is a sufficient deterrent of negligence." *Merrill Stevens.*, 329 F.3d at 813.

[DE 68-1] ¶ 4. There appears no genuine dispute that this provision provides that, "under this agreement," or in other words, *based upon* this agreement, liability shall be capped "*under any theory"* of recovery. The agreement therefore expressly encompasses a liability cap for all three causes of action—negligence, breach of warranty of workmanlike services, and vicarious liability. Moreover, in the context of the other provisions in the same Paragraph, which disclaims liability for any "personal injury," and/or "property damage" arising from *DWB's* potential "negligent act," the Court finds this is the precise type of action that the damages cap was intended to cover.

Accordingly, it is hereby **ORDERED AND ADJUGED** as follows:

1. The Motion [DE 69] is **GRANTED** as follows:
    a. Bradford Marine's liability in this action shall be capped at $500,000.

DONE AND ORDERED in Chambers at Fort Lauderdale, Florida this 22nd day of May, 2025.

WILLIAM P. DIMITROULEAS
United States District Judge

Copies to:

Counsel of record