IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BREEN DE BREE,	§	
	§	
Plaintiff,	§	
	§	
V.	§	CIVIL ACTION NO. H-18-4711
	§	
PACIFIC DRILLING SERVICES, INC., et al.,	§	
	§	
Defendants.	§	

MEMORANDUM AND RECOMMENDATION

Pending in this case that has been referred to the Magistrate Judge for all pretrial proceedings are two Rule 12(b)(6) Motions to Dismiss, filed by Defendants Pacific Drilling Services, Inc. and Pacific Drilling, Inc. (Document No. 11) and Defendant Rex Covens (Document No. 10), in which those Defendants maintain that the claims alleged by Plaintiff against them in his First Amended Complaint (Document No. 9) are not plausible and should be dismissed.

Having considered the motion, the response, the additional briefing, the claims and allegations in the pleadings, the applicable law, and the materials that can be considered in connection with a Rule 12(b)(6) Motions to Dismiss, the Magistrate Judge RECOMMENDS, for the reasons set forth below, that Defendants' Motions to Dismiss (Document Nos. 10 and 11) both be DENIED.

I. Background

This is a personal injury/Jones Act seaman case, which was filed by Plaintiff Breen De Bree ("De Bree") in state court and removed by Defendants Pacific Drilling Services, Inc., Pacific Drilling, Inc. and Rex Covens to this Court on the basis of diversity. Defendants, all of which/whom are or can be considered Texas residents, alleged in their Notice of Removal that

they had been fraudulently joined as defendants in order to prevent removal under 28 U.S.C. § 1441(a)(2). Within thirty days of removal, De Bree filed a Motion to Remand (Document No. 8), and a First Amended Complaint (Document No. 9). That First Amended Complaint added two Defendants -- Pacific Drilling Manpower, Ltd. and Pacific Santa Ana Sarl -- and added an allegation of intentional conduct on the part of Defendant Rex Covens. Defendants Covens, Pacific Drilling Services, Inc. and Pacific Drilling, Inc. all seek dismissal of DeBree's claims pursuant to Fed. R. Civ. P. 12(b)(6). It is these two Motions to Dismiss (Document Nos. 10 & 11) that will be considered herein.[1]

II. Motion to Dismiss Standard of Review

Rule 12(b)(6) provides for dismissal of an action for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is said to be plausible if the complaint contains "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S. Ct. at 1949. Plausibility will not be found where the claim alleged in the complaint is based solely on legal conclusions, or a "formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S. at 555. Nor will plausibility be found where

[1] On June 18, 2019, a Memorandum and Recommendation was entered, recommending that Plaintiff's Motion to Remand be DENIED. While the issues in the Motion to Remand and the pending Motions to Dismiss are nearly identical, the standard of review is decidedly different. As set forth herein, on a Rule 12(b)(6) Motion to Dismiss it is the Plaintiff's "allegations" that are to be reviewed to determine whether a plausible claim has been stated. In connection with the Motion to Remand, which raised jurisdictional and quasi-jurisdictional issues, summary-judgment like evidence could be considered. That is why, for purposes of Plaintiff's Motion to Remand, a determination could be made about the identity of Plaintiff's employer and the identity of the owner and/or operator of the vessel at the time of Plaintiff's injury. As set forth more fully below, such a determination cannot be made herein in connection with Defendants' Rule 12(b)(6) Motions to Dismiss because such a determination is dependent upon the evidence Defendants submitted.

the complaint "pleads facts that are merely consistent with a defendant's liability" or where the complaint is made up of "'naked assertions devoid of further factual enhancement.'" *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 557)). Plausibility, not sheer possibility or even conceivability, is required to survive a Rule 12(b)(6) Motion to Dismiss. *Twombly*, 550 U.S. at 556-557; *Iqbal*, 129 S. Ct. at 1950-1951.

In considering a Rule 12(b)(6) Motion to Dismiss, all well-pleaded facts are to be taken as true, and viewed in the light most favorable to the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). But, as it is only facts that must be taken as true, the court may "begin by identifying the pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Iqbal*, at 1950. It is only then that the court can view the well pleaded facts, "assume their veracity and determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, at 1950. If there are "matters outside of the pleadings considered," the motion to dismiss "must be treated as a motion for summary judgment." *Tuley v. Heyd*, 482 F.2d 590, 592 (5th Cir. 1973). However, documents outside of the pleadings attached to the defendant's motion to dismiss can be considered if the documents "are referred to in the plaintiff's complaint and are central to [the plaintiff's] claim." *Causey v. Sewell Cadillac-Chevrolet, Inc.*, 394 F.3d 285, 288 (5th Cir. 2004)

III. Discussion

Defendants Pacific Drilling Services, Inc., Pacific Drilling, Inc., and Rex Covens all seek dismissal of De Bree's claims under Rule 12(b)(6) – Pacific Drilling Services, Inc. and Pacific Drilling, Inc. arguing that they did not employ De Bree nor were either the owner or operator of the Pacific Santa Ana, on which De Bree's injuries were sustained, and Rex Covens arguing that De Bree cannot maintain a negligence claim against him under the "borrowed servant doctrine," and that De Bree has not stated against him a plausible intentional tort claim.

A. Pacific Drilling Services, Inc. and Pacific Drilling, Inc.

1. De Bree's negligence claims under the Jones Act

Under the Jones Act, a seaman injured in the course of employment may elect to bring a civil action at law against their employer. 46 U.S.C.S. § 883 (LEXIS through PL 116-17). This section of the Jones Act has been interpreted to "give rights to employees against employers and against no other." *Roth v. Cox*, 210 F.2d 76, 78 (5th Cir. 1954). Therefore, the Jones Act is only "applicable if the employment relationship exists." *Baker v. Raymond Int'l, Inc.*, 656 F.2d at 173, 176 (5th Cir. Sept. 1981).

Here, De Bree alleges in his First Amended Complaint that he "was employed by Pacific," including, as is relevant to the allegations about the identity of his employer, Pacific Drilling Services, Inc. and Pacific Drilling, Inc.[2] *See* Plaintiff's First Amended Complaint (Document No. 9) at 3. De Bree's allegation, in this Rule 12(b)(6) context, will be taken as true, and the evidence to the contrary in the record about the entity that actually employed Plaintiff will be disregarded because the evidence used was not referred to in De Bree's complaint. *See Paloma Res., LLC v. Axis Ins.*, 2019 U.S. Dist. LEXIS 18710, at *4 (S.D. Tex. Feb, 2016) (stating that the court could consider the document attached to the defendant's Rule 12(b)(6) Motion to Dismiss because it was referred to in the plaintiff's complaint and central to the plaintiff's claim). By alleging that Pacific Drilling Services, Inc. and Pacific Drilling, Inc. were De Bree's employers at the time of his alleged injury (Document No. 9 at 3), De Bree has stated plausible negligence and/or gross negligence claims against them under the Jones Act.

[2] Plaintiff's First Amended Complaint states that Pacific Drilling Services, Inc., Pacific Drilling, Inc., Pacific Santa Ana Sarl, and Pacific Drilling Manpower, Ltd will be jointly referred to as "Pacific Defendants." (Document No. 9 at 3).

2. De Bree's unseaworthiness claim

Under general maritime law, to be liable for a claim of unseaworthiness, the defendant "must be in the relationship of an owner or operator of the vessel." *Baker*, 656 F.2d at 181. De Bree alleges in the First Amended Complaint that he was "assigned to the Pacific Santa Ana, which was owned, operated, and/or managed by Pacific Drilling Services, Inc., Defendant Pacific Drilling, Inc., Defendant Pacific Santa Ana Sarl, and Defendant Pacific Drilling Manpower, Ltd." Plaintiff's First Amended Complaint (Document No. 9) at 3. Here, again, De Bree's allegation in this Rule 12(b)(6) context must be taken as true, and the contrary "evidence" in the record in the form of the Declarations of Lisa Buchanan and Johannes Boots, must be disregarded.[3] By alleging that Pacific Drilling Services, Inc. and Pacific Drilling, Inc. were the owners or operators of the Pacific Santa Ana at the time of his alleged injury, De Bree has stated a plausible unseaworthiness claim against Pacific Drilling Services, Inc. and Pacific Drilling, Inc.

B. Covens

1. De Bree's negligence claims under general maritime law

Under general maritime law, "[a] seaman may not recover against a co-employee for negligence." *Hussaini v. Marine Transp., Inc.*, 1998 U.S. App. LEXIS 39662 at *3 (5th Cir. Sept. 8, 1998); *see also Roth v. Cox*, 210 F.2d 76, 78 (5th Cir. 1954) ("[T]here is nothing in the Jones Act which grants to seaman a right to bring an action against anyone except his employer"). But,

[3] The declaration by Lisa Buchanan states that "[a]t the time of the alleged incident, on or about May 26, 2018, neither Pacific Drilling Services, Inc. nor Pacific Drilling, Inc. owned, operated, and/or managed the vessel named the Pacific Santa Ana." (Document No. 11-2 at 1). The declaration by Johannes Boots states that "[a]t the time of the Plaintiff's alleged injury, on or about May 26, 2018, Pacific Santa Ana Sarl owned and operated the vessel named the Pacific Santa Ana." (Document No. 11-3 at 1). These declarations cannot be considered in the determination whether or not to grant Defendants' Rule 12(b)(6) Motion to Dismiss because the declarations are not referred to within the Plaintiff's complaint. *See Causey*, 394 F.3d 285 at 288.

a seaman plaintiff can bring an intentional tort claim against a co-worker. *Pearson v. Rowan Co.*, 674 F. Supp. 558, 560 (E.D. La. 1987).

Here, De Bree alleges in the First Amended Complaint that he "was struck in the face with a scaffolding pole by Rex Covens," and that "the acts of Defendant Covens described herein were intentional." Plaintiff's First Amended Complaint (Document no. 9) at 3,4. These allegations, taken as true, are sufficient to state a plausible intentional tort claim against Covens. Covens argues that the newly added intentional tort claim should be disregarded because De Bree added it to his First Amended Complaint in order to manipulate jurisdiction. However, De Bree's First Amended Complaint should not be disregarded because he filed it pursuant to Rule 15(a).[4] *Accord LC Farms, Inc. v. McGuffee*, 2012 U.S. Dist. LEXIS 166343, at *9 (N.D. Miss. Nov. 21, 2012) (refusing to follow *Cavallini* or allow § 1447(e) to foreclose the plaintiff's use of Rule(15)(a) "absent clear judicial or legislative guidance"). As such, De Bree has stated a plausible intentional tort claim against Covens.

IV. Conclusion and Recommendation

Based on the foregoing, and the conclusion that De Bree has, with the allegations in his First Amended Complaint, stated plausible claims against Defendants Pacific Drilling Services, Inc., Pacific Drilling, Inc., and Covens, the Magistrate Judge RECOMMENDS that Defendants' Motions to Dismiss (Document Nos. 10 & 11) be DENIED.[5]

[4] Under Federal Rule of Civil Procedure 15(a), "[a] party may amend its pleading once as a matter of course within 21 days after serving it, or if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier." Fed. R. Civ. P. 15(a)(1)(A)-(B).

[5] Given the dichotomy presented by the recommended dispositions of Plaintiff's Motion to Remand and Defendants Rule 12(b)(6) Motions to Dismiss, as well as the uncontroverted evidence in the record as to the entity that employed De Bree and the entity that owned/operated the Pacific Santa Ana at the time of De Bree's alleged injury, the parties should consider whether there should be an additional amendment of the pleadings, or an additional dispositive motion.

The Clerk shall file this instrument and provide a copy to all counsel and unrepresented parties of record. Within fourteen (14) days after being served with a copy, any party may file written objections pursuant to 28 U.S.C. § 636(b)(1)(C), Fed. R. Civ. P. 72(b). Failure to file objections within such period shall bar an aggrieved party from attacking factual findings on appeal. *Thomas v. Arn*, 474 U.S. 140 (1985); *Ware v. King*, 694 F.2d 89 (5th Cir. 1982), cert. denied, 461 U.S. 930 (1983); *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. 1982) (en banc). Moreover, absent plain error, failure to file objections within the fourteen-day period bars an aggrieved party from attacking conclusions of law on appeal. *Douglass v. United Services Automobile Association*, 79 F.3d 1415, 1429 (5th Cir. 1996). The original of any written objections shall be filed with the United States District Clerk, P.O. Box 61010, Houston, Texas 77208.

Signed at Houston, this 1st day of ~~June~~ July, 2019.

FRANCES H. STACY
UNITED STATES MAGISTRATE JUDGE