UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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WILFREDO VARGAS and AMANDA COLUCCIO VARGAS,

Plaintiffs,

v.

APL LIMITED, AMERICAN PRESIDENT LINES, LTD., APL MARITIME LTD., APL MARINE SERVICES, LTD., OSPREY SHIPMANAGEMENT INC., NEPTUNE ORIENT LINES LTD., NOL LINER (PTE) LTD., WILMINGTON TRUST COMPANY, as Owner Trustee for the Benefit of NOL Liner (PTE) LTD., and the M/V APL PEARL, her engines, gear, tackle and cargo, *in rem*,

Defendants.

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APL LIMITED, AMERICAN PRESIDENT LINES, LTD., APL MARINE SERVICES, LTD., NEPTUNE ORIENT LINES LTD., NOL LINER (PTE) LTD., WILMINGTON TRUST COMPANY,

Third-Party Plaintiffs,

v.

MAHER TERMINALS LLC,

Third-Party Defendant.

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MEMORANDUM AND ORDER
15-CV-6981 (ILG) (RML)

**GLASSER**, Senior United States District Judge:

Plaintiffs, Wilfredo Vargas ("Wilfredo" or "Vargas") and his wife Amanda Coluccio Vargas, commenced this action pursuant to the Longshoreman's Harbor Workers Compensation Act, 33 U.S.C. § 905(b), for damages arising from an injury that Vargas sustained while

performing work as a lasher aboard the MV APL PEARL while the ship was berthed at a marine terminal in Elizabeth, New Jersey. *See* Compl. [ECF No. 1]. Defendants APL Limited, American President Lines, Ltd., APL Marine Services, Ltd., Neptune Orient Lines Ltd., NOL Liner (PTE) Ltd., and Wilmington Trust Company (collectively, "Defendants") filed a third-party complaint pursuant to Fed. R. Civ. P. 14(c) seeking contractual indemnification or contribution from Maher Terminals LLC ("Maher"), a marine terminal operator that was contracted to provide services to the APL PEARL while it was berthed. Third-Party Compl. [ECF No. 12], at 5.

The Court previously granted in part and denied in part a motion for summary judgment brought by certain of the named Defendants. *Vargas v. APL Ltd.*, 431 F. Supp. 3d 82 (E.D.N.Y. 2019). Third-party defendant Maher now moves for summary judgment on Defendants' indemnification and contribution claims. [ECF No. 46]. For the following reasons, the motion is **GRANTED**.

## BACKGROUND[1]

### I. Stevedoring and Terminal Services Agreement

Maher is a stevedoring company that provides stevedoring and terminal services to different shipping companies. On or about May 16, 2011, Maher entered into a Stevedoring and Terminal Services Agreement [ECF No. 46-11] (the "Agreement") with American President Lines, Ltd. and APL Co. Pte Ltd to provide stevedoring and terminal services to their vessels while the vessels were berthed at Maher's marine terminal. The Agreement requires Maher to provide "all necessary employees, labor, supervision, watchmen service, necessary electrical power supply system connected to public power source, normal cargo handling equipment, machinery and repair capabilities to perform terminal and vessel services" that were "contemplated under the

[1] Unless otherwise noted, the following is taken from the undisputed facts in the parties' Local Rule 56.1 Statements. [ECF Nos. 46-13, 49-2].

Agreement." Agreement § 2.A. The Agreement foresaw the possibility that Maher would use subcontractors to provide the services it was required to provide. *Id.* § 1.C.

Maher argues that, although the Agreement provides for indemnification obligations in certain circumstances, it does not require indemnification of the Defendants for the injury that Vargas has alleged. Mem. of Law in Supp. of Third-Party Def. Maher Terminals, LLC's Mot. for Summ. J. [ECF No. 46-14], at 3-4 (citing Agreement §§ 7.M, 8.E, 9.C, and Clause 9.5 of Schedule B). Defendants, on the other hand, argue that the Agreement does contain an indemnification provision that is applicable to this case, pointing to subparagraph H of Section 8. Mem. of Law in Opp'n to Mot. for Summ. J. [ECF No. 49], at 3. That provision provides as follows:

> CONTRACTOR and CARRIER agree to use reasonable efforts to give prompt notice to one another of any loss, damage, injury, death, delay or other incident that may give rise to a claim under this Agreement, as soon as it is reasonably practicable to do so under the circumstances. However, failure to give such notice shall in no way bar any subsequent claim of CONTRACTOR or CARRIER for damages, indemnity, contribution or otherwise. The Parties shall reasonably cooperate in exchanging information and evidence as may be required in the defense of cases filed by third party plaintiffs.

Agreement § 8.H.

## II. Normal Operating Procedures for Lashing Onboard a Vessel

The APL Pearl is a container vessel, meaning the only thing it carries is containers. Once containers are stored inside the hull of the ship, hatches on the top of the deck are closed and additional containers are stacked above the hatches, up to six high. Those containers are held in place with twist locks.[2] In addition to the twist locks, the bottom three layers of containers are held in place with metal rods which are tightened with turnbuckles called "lashings."

When a vessel comes into Maher Terminals' port, lashings must be taken off the containers so that they can be removed. Once the lashings are removed, Maher's cranes will remove the

[2] A twist lock is a locking device for securing large containers in place while they are transported.

containers from the vessel. The cranes then load new containers on board, requiring the lashers to come back and secure those containers. Maher and its employees, however, do not do any lashings. Rather, Maher subcontracts its lashing work to subcontractors, such as American Maritime Services ("AMS"), the company that employed Vargas. Maher has used AMS as a lashing subcontractor for many years.

Maher does not supervise the lashers. According to Maher's Director of Operations, Larry Monaco, AMS' lashers are not Maher's employees but are professionals who "know what to do" so "day-to-day supervision of AMS" by Maher is "not necessary." Dep. Tr. of Larry Monaco at 30:7-12. Rather, Mr. Monaco explained that Maher deals directly with the AMS lashing foreman, who in turn supervises the lashers. *Id.* at 30:1-2. Prior to starting work, the lashing foreman meets with the lashers and gives them their orders. The foreman assigns lashers to a particular location on the ship and instructs them as to the work that needs to be done. Maher does not monitor or control the number of hours the lashers work or monitor their work performance. If Maher is alerted to a problem, it will refer it to the foreman. *Id.* at 111:12-14. Vargas knows nothing about Maher. Vargas testified that he does not know any Maher employees, never reported his accident to Maher, and does not know if Maher was aware of his accident.

Maher does not provide lashers with any equipment. It is AMS' obligation to provide its employees with the equipment they need to do their job. Lashers were required to apply to their foreman for any equipment they might need and not to the ship's officers. Protocol discourages those officers from interacting or interfering with the lasher's work.

## III. Vargas' Alleged Injury

Prior to his injury, Vargas lashed an average of four to five ships a week, working on well-over over 200 ships over the course of two years. Vargas considered himself to be an experienced

lasher. Thomas Larkin, the chief mate on board the APL PEARL, stated that he had no evidence that AMS' lashers, including Vargas, were not competent. Dep. Tr. of Thomas Larkin at 131:13-132:4.

According to Vargas' testimony, on the date of his accident, a mate on the APL PEARL directed him to lash the most forward, outboard container that was located on top of a pedestal. Vargas replied that he could not reach that position, but the mate again directed him to get it done. When Vargas asked how he was to reach that container, the mate obtained a ladder and handed it to him. Although Vargas could have obtained assistance from another lasher or the foreman, he did not; he also did not inspect the ladder prior to using it. Vargas testified that he leaned the ladder against the steel wall and began climbing it. About three-quarters of the way up, the ladder slipped out from under him, causing him to fall and be injured.

Defendants' experts concluded that Vargas' injury was caused by his own negligence in failing to ensure the ladder was properly inspected and secured before using it, as well as by failing to request assistance and safety equipment. The experts also placed blame with AMS for failing to properly train Vargas and failing to provide him with the equipment he needed to complete his work safely. Plaintiff's expert, on the other hand, concluded that the fault lies with the APL PEARL for requiring Vargas to access a container located on top of a pedestal through a ladder without the supervision or assistance of the crew's mate, failing to make sure that the ladder was properly secured, and failing to provide safety equipment.

## ANALYSIS

### I. Summary Judgment Standard

Summary judgment should be granted "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). "A fact is material if it might affect the outcome of the case under governing law." *Fireman's Fund Ins. Co. v. Great Am. Ins. Co. of N.Y.*, 822 F.3d 620, 631 n. 12 (2d Cir. 2016) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). "A dispute is genuine 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Id.* (quoting *Anderson*, 477 U.S. at 248). "In making this determination, the Court 'must construe the facts in the light most favorable to the non-moving party and must resolve all ambiguities and draw all reasonable inferences against the movant.'" *Id.* (quoting *Beyer v. County of Nassau*, 524 F.3d 160, 163 (2d Cir. 2008)); *see also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Anderson*, 477 U.S. at 255. "'The evidence of the non-movant is to be believed' to the extent that a jury could reasonably believe it." *Grant v. City of New York*, 15-CV-3635 (ILG) (ST), 2019 WL 1099945, at *4 (E.D.N.Y. Mar. 8, 2019) (quoting *Anderson*, 477 U.S. at 255). "Conversely, 'the court . . . must disregard all evidence favorable to the moving party that the jury is not required to believe.'" *Id.* (quoting *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000)).

## II. Contractual Indemnification

Defendants first seek indemnification from Maher under the terms of the Agreement. Maher argues that the Agreement does not create an indemnification obligation for claims such as those alleged by Vargas. For the reasons explained below, the Court finds that Maher is correct.

It is well-established that a stevedoring contract such as this one is a maritime contract. *Jarka Corp. v. Hellenic Lines, Ltd.*, 182 F.2d 916, 919 (2d Cir. 1950) (citing *Atl. Transp. Co. of W. Va. v. Imbrovek*, 234 U.S. 52, 61 (1914)); *Neth. Am. Steam Nav. Co. v. Gallagher*, 282 F. 171, 175-76 (2d Cir. 1922); *Vieira v. Maher Terminals, Inc.*, 1998 WL 1085912, at *1 (E.D.N.Y. June

17, 1998). "When a contract is a maritime one, and the dispute is not inherently local, federal law controls the contract interpretation." *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 22-23 (2004). Under federal law, contracts are interpreted in accordance with general, common-law principles. *MassMutual Asset Fin. LLC v. ACBL River Operations, LLC*, 220 F. Supp. 3d 450, 454 (S.D.N.Y. 2016); *Flynn v. Am. Auto Carriers, Inc.*, 85 F. Supp. 2d 158, 166-67 (E.D.N.Y. 2000). These principles – and the Court's purpose – aims in the first instance "to give effect to the intent of the parties as revealed by the language of their agreement." *Compagnie Financiere de CIC et de L'Union Europeenne v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 232 F.3d 153, 157 (2d Cir. 2000); *see also In re M/V MSC FLAMINIA*, 339 F. Supp. 3d 185, 241 (S.D.N.Y. 2018) ("[M]aritime contracts are construed 'like any other contracts: by their terms and consistent with the intent of the parties.'") (quoting *Norfolk S. Ry. Co.*, 543 U.S. at 31).

"[T]he words and phrases [in a contract] should be given their plain meaning, and the contract should be construed so as to give full meaning and effect to all of its provisions." *Chesapeake Energy Corp. v. Bank of N.Y. Mellon Tr. Co.*, 773 F.3d 110, 114 (2d Cir. 2014) (quoting *Olin Corp. v. Am. Home Assur. Co.*, 704 F.3d 89, 99 (2d Cir. 2012)). With respect to contractual indemnification provisions, the Court "consider[s] 'the breadth of the language of the disputed provision; the existence of limiting definitions in the clause; whether a particular interpretation creates or avoids a redundancy; and the surrounding provisions of the entire agreement.'" *Compania Sud Americana de Vapores S.A. v. Glob. Terminal & Container Servs., Inc.*, 509 F. App'x 97, 99 (2d Cir. 2013) (quoting *Navieros Oceanikos, S.A., Liberian Vessel Trade Daring v. S.T. Mobil Trader*, 554 F.2d 43, 47 (2d Cir. 1977)).

Here, the Court finds that the Agreement does not contain an express indemnification clause that applies to Vargas' injury. The language of subparagraph H of Section 8, which is set

out above, is unambiguous and shows that it is not an indemnification provision but a notice and non-waiver provision. It does not provide that either party to the Agreement has an obligation to indemnify the other, as Defendants contend, but that the failure to provide notice of a claim will not result in a waiver of the right to indemnification *should such a right exist*. The conclusion that this clause should not be construed to operate as an indemnification provision is bolstered by the fact that the parties included other indemnification provisions in the Agreement, showing that they could have done so for this type of claim if they had so intended. Moreover, adopting Defendants' position would imbue subparagraph H with a universal application, rendering superfluous the more narrowly tailored indemnification clauses contained elsewhere in the Agreement. As Defendants themselves note, Mem. of Law in Opp'n to Mot. for Summ. J. [ECF No. 49], 13-14, this result should be avoided. *Noia v. Div. 1181 A.T.U.-N.Y. Welfare Fund*, No. 06-CV-353 (JG), 2007 WL 2713834, at *10 (E.D.N.Y. Sept. 14, 2007) ("[U]nder federal common law a contract should be interpreted [so] as to give meaning to all of its terms—presuming that every provision was intended to accomplish some purpose, and that none are deemed superfluous.") (quoting *Harris v. Epoch Grp., L.C.*, 357 F.3d 822, 825 (8th Cir. 2004)).

Defendants argue that even if the paragraph is not an express indemnification provision, an indemnification right can be inferred from the terms of the Agreement. They contend that the inclusion of certain kinds of claims in subparagraph H, such as injury, death, and delay, that are not otherwise provided for in express indemnification clauses shows the parties' intent that there should be indemnification for such claims. Mem. of Law in Opp'n to Mot. for Summ. J. [ECF No. 49], 12-13. "If APL has no right to seek indemnity from Maher in the event of personal injury or death," Defendants ask, "why does Section 8(H) say that APL retains the right to seek indemnity on that basis regardless of whether they give Maher prompt notice of any such incident?" *Id.* at

13. The answer to this question is: it does not. The clause does not provide either party with a right to bring a specific kind of claim in any specific kind of situation. It only says that the *failure to provide notice* will not cause a waiver of the right to bring a claim, whether that claim is "for damages, indemnity, contribution or otherwise." Agreement § 8.H. The inclusion of multiple types of claims in one sentence indicates the parties' intent regarding the impact of a failure to provide notice. It does not create any new rights, but simply prevents the waiver of those created elsewhere in the Agreement.

Similarly unpersuasive is Defendants' assertion that the express limitations on indemnification in certain circumstances show the parties' intent that, if the type of claim is not expressly excluded, an indemnification claim may be asserted. *Id.* at 15. The absence of a limitation is not equivalent to the existence of a right. To adopt Defendants' position would mean that the parties begin in a state where each must indemnify the other for any conceivable claim, with this universal obligation limited only by the select limitations included in the Agreement. Not only would this create a general right to indemnification that does not exist in the law, but it would render superfluous the provisions of the Agreement that expressly provide for indemnification in certain circumstances. Such a position cannot, as a matter of law, be correct.[3]

## III. Contribution

Defendants also seek contribution from Maher and, alternatively, claim that they have asserted a breach of contract claim against Maher. Third-Party Compl. [ECF No. 12], at ¶¶ 19-20; Mem. of Law in Opp'n to Mot. for Summ. J. [ECF No. 49], at 20-21. Both of these claims are asserted through Fed. R. Civ. P. 14(c). However, because Vargas' Complaint does not bring

[3] Maher also argues that Defendants are not entitled to indemnification for breach of an implied warranty of workmanlike performance or on a theory of vicarious liability. Mem. of Law in Supp. of Third-Party Def. Maher Terminals, LLC's Mot. for Summ. J. [ECF No. 46-14], at 13-17. Defendants offer no opposition on these points, so the Court considers them conceded.

admiralty claims pursuant to Fed. R. Civ. P. 9(h), Defendants are not able to utilize Rule 14(c) to seek contribution from, or assert a breach of contract against, a third-party.

Fed. R. Civ. P. 14(c)(1) provides that "[i]f a *plaintiff* asserts an admiralty or maritime claim under Rule 9(h), the *defendant* . . . may, as a *third-party plaintiff*, bring in a *third-party defendant* who may be wholly or partly liable . . . ." Fed. R. Civ. P. 14(c)(1) (emphasis added). By expressly distinguishing between the plaintiff and defendant/third-party plaintiff, the rule's language indicates that it is only applicable where the *original* plaintiff asserts an admiralty or maritime claim under Fed. R. Civ. P. 9(h). That the defendant/third-party plaintiff does so is not sufficient or even relevant. *Seemann v. Coastal Env't Grp.*, No. 15-CV-2065 (ADS) (AYS), 2016 WL 7388537, at *4 (E.D.N.Y. July 2, 2016) ("If the [original] plaintiff does not designate his claims as admiralty claims under Rule 9(h), then Rule 14(c) is not available to the defendant, and the defendant [must instead] seek to implead the third-party under general impleader practice pursuant to Rule 14(a) or institute a separate action."). Therefore, despite the fact that Defendants declared they were bringing their claims pursuant to Fed. R. Civ. P. 9(h) and 14(c) and that those claims concern a maritime contract, Fed. R. Civ. P. 14(c) is only available if *Vargas*' claims are admiralty or maritime claims.

The Supreme Court has established a two-part test to determine if a tort claim is an admiralty or maritime claim for jurisdictional purposes: first, the alleged tort must have "occurred on navigable water" or have been "caused by a vessel on navigable water"; and second, "'the general features of the type of incident involved'" (a) must be of a nature that "has 'a potentially disruptive impact on maritime commerce,'" and (b) must have a general character that "shows 'a substantial relationship to traditional maritime activity.'" *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995) (quoting *Sisson v. Ruby*, 497 U.S. 358, 363-65

(1990)). Courts have recognized that a claim under the Longshoreman's Harbor Workers Compensation Act – the claim that Vargas pled in his Complaint – may be an admiralty claim. *See, e.g.*, *Nelson v. United States by & through Nat'l Oceanic & Atmospheric Admin.*, No. 19-CV-01761 (HZ), 2022 WL 278784, at *4-5 (D. Or. Jan. 31, 2022); *LeBlanc v. Panther Helicopters, Inc.*, No. 14-1772, 2018 WL 5307335, at *5 (E.D. La. Oct. 26, 2018); *Marable v. United States*, No. 14-CV-1206 (WQH) (KSC), 2017 WL 6541021, at *3 (S.D. Cal. Dec. 21, 2017); *Holder v. Fraser Shipyards, Inc.*, No. 16-CV-343 (WMC), 2017 WL 11438557, at *3 (W.D. Wis. Sept. 12, 2017) (collecting cases that show *in personam* claims under the Longshoreman's Harbor Workers Compensation Act to be the type that can be brought within either the court's admiralty or diversity jurisdiction).

However, just because a claim may arise under admiralty jurisdiction does not mean that it's pleading necessarily invokes the Court's admiralty jurisdiction. Rather, where alternative bases for jurisdiction exist, a plaintiff may choose under which to proceed. This choice is important because, although the admiralty and civil systems were joined in 1966, there remain differences in procedure and remedies available between the two. *See Buccina v. Grimsby*, 889 F.3d 256, 260 (6th Cir. 2018) (identifying several provisions in the Federal Rules of Civil Procedure that spell out special admiralty procedures); *Foulk v. Donjon Marine Co.*, 144 F.3d 252, 255 (3d Cir. 1998) (identifying Fed. R. Civ. P. 14(c), 38(e), 82, the Supplemental Rules for Certain Admiralty and Maritime Claims, and 28 U.S.C. § 1292(a)(3)).

In order to ensure that the parties know which procedures and remedies the plaintiff intended to be applicable, the Federal Rules Advisory Committee added Fed. R. Civ. P. 9(h) to act as an identification mechanism, permitting the designation of a case as an admiralty proceeding if the plaintiff so intended. *Buccina*, 889 F.3d at 260-61; 5A Fed. Prac. & Proc. Civ. § 1313 (4th

ed.). Reference to the rule, though helpful in identifying the plaintiff's intent, is not required. *See* Fed. R. Civ. P. 9(h) (providing that a plaintiff "may" designate a claim as an admiralty or maritime claim). Where a plaintiff has not made a specific reference to Rule 9(h) but admiralty jurisdiction exists as an option, a court looks to the surrounding facts and circumstances to determine whether or not the plaintiff intended to invoke the court's admiralty jurisdiction. *See, e.g.*, *Foulk*, 144 F.3d at 256-57 (considering the parties' actions in litigation); *Bodden v. Osgood*, 879 F.2d 184, 186 (5th Cir. 1989) (considering "totality of the circumstances" to conclude plaintiff did not intend to invoke admiralty jurisdiction); *Price v. Atl. Ro-Ro Carriers*, 45 F. Supp. 3d 494, 512 (D. Md. 2014) (same).

In this case, Vargas' intention with respect to admiralty jurisdiction is not clear. He and his wife allege both diversity and admiralty jurisdiction in the Complaint. Compl. [ECF No. 1], at ¶ 1 ("Jurisdiction exists under 28 U.S.C. § 1332, Diversity of Citizenship . . . with respect to all *in person*[*a*]*m* defendants and pursuant to 28 U.S.C[.] § 1333[,] Maritime Admiralty Jurisdiction against the MV Pearl *in rem*."). Additionally, of the three causes of action in the Complaint, one is clearly an admiralty claim (an undefined in rem cause of action against the MV APL Pearl), one is clearly not an admiralty claim (Vargas' wife's common law claim for loss of consortium and services), and one may be an admiralty claim (Vargas' claim for relief under the Longshoreman's Harbor Workers Compensation Act). *See id.* at ¶¶ 30-44.

There are, however, two reasons why the Court concludes that Vargas and his wife did not intend to proceed under admiralty jurisdiction. First, none of the claims in the Complaint is designated as an admiralty claim under Fed. R. Civ. P. 9(h). Second, and more tellingly, Vargas and his wife seek a jury trial, something not typically available for admiralty claims. *See* Fed. R. Civ. P. 38(e); *Mayer v. Cornell Univ.*, 107 F.3d 3, at *4 (2d Cir. 1997); *Becker v. Tidewater, Inc.*,

405 F.3d 257, 259 (5th Cir. 2005) (noting "the historical exclusion of jury trials for admiralty suits"). In light of these circumstances, the Court concludes that Vargas' Complaint is not brought pursuant to Fed. R. Civ. P. 9(h). *See Seemann*, 2016 WL 7388537, at *4-6 (collecting cases holding that request for a jury trial shows a plaintiff's intent not to proceed under admiralty or maritime rules); *see also Buccina*, 889 F.3d at 261 (plaintiffs could not obtain benefits of admiralty rules after having obtained a jury trial).

Because the Court concludes that the Complaint does not raise an admiralty or maritime claim, it does not permit Defendants to assert a third-party claim pursuant to Fed. R. Civ. P. 14(c), entitling Maher to summary judgment.

## CONCLUSION

For the foregoing reasons, third-party defendant Maher's motion for summary judgment is **GRANTED**.

SO ORDERED.

Dated: Brooklyn, New York
March 10, 2022

/s/
I. Leo Glasser
Senior United States District Judge