UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
IN ADMIRALTY

Case No.: 0:22-61379-CIV-SINGHAL

IN RE:

PETITION OF BURTON S. LUCE, as titled owner of and for the M/V "CONCERT GRAND", a 1988 46' GRAND BANKS, hull identification number GNDF0045F888, her engines, tackle, and appurtenances, for Exoneration from or Limitation of Liability,

Petitioner.
_______________________________________/

ORDER

THIS CAUSE is before the Court on Respondent 760 Taylor Lane, LLC d/b/a Playboy Marine Center's Motion to Dismiss Petitioner's Amended Petition for Exoneration from or Limitation of Liability Based on Lack of Subject Matter Jurisdiction (the "Motion") (DE [29]), filed January 16, 2023. Following a brief stay to permit jurisdictional discovery, Petitioner Burton S. Luce, as titled owner of and for the M/V "CONCERT GRAND" filed a Response in Opposition ("Opp.") (DE [48]), on April 10, 2023, and Respondent submitted a Reply in support of its Motion ("Reply") (DE [56]) on April 24, 2023. The Motion is ripe for consideration and, for the reasons discussed below, granted.

I. BACKGROUND

This action arises from an incident on March 10, 2022, in which Rudy Mueller, a crewmember of M/V "CONCERT GRAND" (the "Vessel") fell from a forklift after retrieving personal items from the Vessel. That day, the Vessel arrived at Playboy Marine for a

bottom paint job. *See* (Deposition Tr. of S. Powell Peck (DE [48-1] at 49:3-6)); (Deposition Tr. of Rudy Mueller (DE [48-2] at 32:14–33:21)); (Deposition Tr. of Burton S. Luce (DE [48-3] at 70:16–71:5)). In his Response, Petitioner linked to a sixteen-minute surveillance video that captured the entire incident. *See* (DE [48-4]). The video shows that the M/V "CONCERT GRAND" was hauled out of the water and placed over land at Playboy Marine. *Id.* at 04:00–07:00. Soon thereafter, Mueller returned to the Vessel to retrieve personal items he left behind and used a forklift to board the Vessel. *Id.* at 11:40–12:00. Less than a minute later, Mueller successfully descended from the Vessel onto the same forklift. *Id.* at 12:30–12:36. Immediately thereafter, the forklift jolted as it lowered Mueller down from the stern and Mueller fell on the ground. *Id.* at 12:36–12:40.

On July 25, 2022, Petitioner, Burton S. Luce, as owner of M/V CONCERT GRAND, her engines, tackle, and appurtenances, filed the instant action, seeking exoneration from and limitation of its liability for any injuries, damages, or losses arising from the incident. *See* (DE [1]). Petitioner filed the operative Amended Petition on August 25, 2022 pursuant to § 30501 *et seq.* of Title 46 United States Code, Supplemental Rule F and Local Admiralty Rule F. Petitioner seeks exoneration from any claims arising from the March 10, 2022 incident and, in the alternative, asks this Court to limit its liability to the value of the Vessel, which Petitioner avers is $164,000.

On December 1, 2022, this Court docketed an Order Approving Petitioner's Amended Ad Interim Stipulation, Directing Issuance of Monition and Injunction, which stayed all actions of proceedings against Petitioner originating from the alleged March 10, 2022, incident until such time as this matter is resolved. *See* (DE [25]). On January 16, 2023, Respondent Playboy Marine filed its Rule F(5) Claim, asserting damages and

indemnity claims based on the "Contract of Agreement" entered into between the parties for the shoring services and workplace rental of the Vessel. *See* (DE [28]). That same day, Respondent filed the instant Motion (DE [29]). Respondent is the only Claimant to appear in the action, and Petitioner represented in its Motion for Entry of Final Default Judgment that Mueller's counsel "advised that Rudy Mueller does not intend to file a claim in this matter and instructed Petitioner to seek a default judgment against him." *See* (DE [55] at ¶ 12). Accordingly, on July 27, 2023, this Court entered an Order granting Petitioner's Motion for Final Default Judgment against all potential claimants except for Respondent. *See* (DE [58]).

Respondent seeks to dismiss this action for lack of subject matter jurisdiction for two reasons. First, according to Respondent, no admiralty jurisdiction exists over Petitioner's claims where the Vessel was not within navigable waters at the time of the alleged incident. *See* (Mot. (DE [29] at 7–11))[1]. Respondent directly contradicts the Amended Petition, in which Petitioner contends that the Vessel was "alleged to have been in navigable waters at the time of the Incident." *See* (Am. Pet. (DE [12] at ¶ 10)). Second, Respondent maintains that the "Contract of Agreement" entered into between the parties is a personal contract and, as such, Respondent's claims are not subject to the Limitation of Liability Act. *See* (Mot. (DE [29] at 11–15)).

Petitioner counters that the Vessel was within navigable waters at the time of the Incident and, as such, Petitioner's claims are within this Court's admiralty jurisdiction. (Opp. (DE [48] at 3–10)). Petitioner also argues that the personal contract at issue is irrelevant to the determination of subject matter jurisdiction and presents factual issues

[1] All page numbers reference the pagination generated by the electronic CM/ECF database, which appears in the headers of all court filings.

which should not be resolved on a Motion to Dismiss. *See Id.* at 11–20. The Court considers the parties arguments in turn below.

I. <u>LEGAL STANDARD</u>

A. Subject Matter Jurisdiction

Federal Rule of Civil Procedure ("Rule") 12(b)(1) applies to challenges of a court's subject matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1). "A case is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case." *Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998). Generally, the plaintiff must allege, with particularity, facts necessary to establish jurisdiction and must support his allegation if challenged to do so. *Morrison v. Allstate Indem. Co.*, 228 F.3d 1255, 1273 (11th Cir. 2000).

"A defendant can move to dismiss a complaint under Rule 12(b)(1) for lack of subject matter jurisdiction by either facial or factual attack." *Stalley ex rel. U.S. v. Orlando Reg'l Healthcare Sys., Inc.*, 524 F.3d 1229, 1232 (11th Cir. 2008). "A 'facial attack' on the complaint 'require[s] the court merely to look and see if [the] plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations in his complaint are taken as true for the purposes of the motion.'" *McElmurray v. Consol. Gov't of Augusta—Richmond Cnty.*, 501 F.3d 1244, 1251 (11th Cir. 2007) (quoting *Lawrence v. Dunbar*, 919 F.2d 1525 (11th Cir. 1990)). "Factual attacks," on the other hand, serve to "challenge 'the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits are considered.'" *Id.* In *McElmurray*, the Eleventh Circuit stated that a district court treated a motion to dismiss as a facial, rather than factual, attack because it "considered only the complaint and the

attached exhibits." 501 F.3d at 1251. Where, as here, the Court considers a factual challenge to subject matter jurisdiction, "the trial court may proceed as it never could under 12(b)(6) or Fed.R.Civ.P. 56. Because at issue in a factual 12(b)(1) motion is the trial court's jurisdiction—its very power to hear the case—there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Dunbar*, 919 F.2d at 1529 (cleaned up). In short, "no presumptive truthfulness attaches to plaintiff's allegations." *Id.*

II. ANALYSIS

A. Whether Admiralty Jurisdiction Governs This Action

Federal courts retain exclusive admiralty jurisdiction "to determine whether [a] vessel owner is entitled to limited liability." *Beiswenger Enterprises Corp. v. Carletta*, 86 F.3d 1032, 1036–37 (11th Cir. 1996) (citing *Ex Parte Green*, 286 U.S. 437, 439–40 (1932)). In tort cases, as here, a petition must satisfy two elements to invoke admiralty jurisdiction: "(1) there must be a significant relationship between the alleged wrong and traditional maritime activity (the nexus requirement) and (2) the tort must have occurred on navigable waters (the location requirement)." *Aqua Log, Inc. v. Lost & Abandoned Pre-Cut Logs & Rafts of Logs*, 709 F.3d 1055, 1059 (11th Cir. 2013). Under the location requirement, or locality test, a court must determine whether the alleged tort occurred on navigable waters or whether the injury, if suffered on land, was caused by a vessel on navigable waters. *See Executive Jet Aviation, Inc. v. City of Cleveland, Ohio*, 409 U.S. 249, 253 (1972); *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995). The nexus test requires that a petitioner establish (1) that the tort has a "potentially disruptive impact on maritime commerce;" and (2) that a "substantial

relationship" exists "between the activity giving rise to the incident and traditional maritime activity." *Sisson v. Ruby*, 497 U.S. 358, 364 (1990).

(1) The Locality Test

The Court first addresses whether the accident occurred on navigable waters or that an "injury suffered on land was caused by a vessel on navigable water." *Grubart*, 513 U.S. at 534. "Navigable water" under 28 U.S.C. § 1333 is generally defined as "a body of water which, in its present configuration, constitutes a highway of commerce, alone or together with another body of water, between the states or with foreign countries over which commerce in its current mode is capable of being conducted." *Alford v. Appalachian Power Co.*, 951 F.2d 30, 32 (4th Cir. 1991). Respondent argues the M/V "CONCERT GRAND" was not on navigable waters where, at the time of the incident, the Vessel was "already hauled out of the water and sitting in the slings of the hoist on land at Playboy Marine." (Mot. (DE [29] at 2)) (citing (DE [29-1], Declaration of S. Powell Peck, Vice President of Playboy Marine)). Petitioner responds that the Vessel satisfies the locality test because of its position–within Playboy Marine's travel lift and approximately ten to fifteen feet from the haul out slip–and its ability to be easily returned to navigation. *See* (Opp. (DE [48] at 9–12)).

Admiralty jurisdiction applies to a contract between a vessel owner and a repair facility for work on a vessel so long as the vessel is not withdrawn from navigation. *American Eastern Development Corp. v. Everglades Marina, Inc.*, 608 F.2d 123 (5th Cir. 1979).[2] In *American Eastern*, the Fifth Circuit held that a district court could exercise admiralty jurisdiction over claims arising from pleasure boats stored in dry storage racks

[2] In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981) (en banc), the Eleventh Circuit adopted as precedent all of the decisions of the former Fifth Circuit decided prior to October 1, 1981.

within a building owned and operated as a marina. *See id.* Because the boats were in and out of the water weekly and had only been placed into storage to avoid the damage and costs associated with salt-water storage, the court found that the boats were not "withdrawn from navigation," such that the court could exercise admiralty jurisdiction. *Id.* at 124. In *Lewis Charters, Inc. v. Huckins Yacht Corp.*, however, the Eleventh Circuit distinguished a vessel that was "inside [a] paint facility" with "work on the boat . . . in progress" as "certainly withdrawn from navigation." 871 F.2d 1046, 1053 (11th Cir. 1989). The circumstances at issue in this matter more closely resemble the vessel in *Lewis*, such that the Petitioner's Vessel was withdrawn from navigation at the time of the incident. Here, the Vessel arrived at Playboy Marine for a bottom paint job that typically involved multiple steps and would have spanned several days. *See* (Reply (DE [56] at 4)). In a typical bottom paint job, the vessel is taken to Playboy Marine, where it is lifted out of the water and placed on land with the use of a travel lift. *See id.* (citing Deposition Tr. of Rudy Mueller (DE [48-2] at 24:3–26:13)). On the following day, the next step is to sand the bottom of the vessel and paint it. (Deposition Tr. of Rudy Mueller (DE [48-2] at 26:10–27:3)). The entire process typically takes three to four days and the vessel is not placed back into the water until the task is complete. *Id.* at 27:4–28:5. Here, Petitioner brought the Vessel to Playboy Marine for a bottom paint job and understood that the Vessel would be inoperable for some time. *See* (Opp. (DE [48] at 12) ("The [bottom paint job] would have been performed some distance away from Playboy Marine's haul out slip, while the Vessel was on blocks with jack stands for support.")). Notwithstanding Petitioner's contention that the boat had just been lifted out of the water and could have returned to the water just as quickly, the parties here had no intention to return the boat to the water

until the paint job was complete. As in *Lewis*, the Vessel here had arrived for a paint job, "work on the boat was in progress[,] and the [Vessel] was certainly withdrawn from navigation." *Lewis*, 871 F.2d at 1053. Indeed, this Court previously concluded that vessels undergoing repairs at Playboy Marine were withdrawn from navigation. *In re Lavender*, No. 03-60757-CIV, 2004 WL 2935860, at *2 (S.D. Fla. Nov. 5, 2004). In *In re Lavender*, a fire started on the petitioner's vessel while it was on land undergoing repairs at Playboy Marine. *See id.* at *1. The fire damaged respondents' vessels, which were parked in the immediate vicinity. *See id.* Admiralty jurisdiction did not extend to respondents' vessels where they were on land "undergoing or awaiting to undergo repairs" and, as the Court concluded, withdrawn from navigation. *Id.* at 3.

Petitioner also fails to satisfy the locality test where the Vessel was not itself on navigable waters and where there is no argument that the injuries to Mueller were caused by a Vessel on navigable water. To begin, there is no dispute that the water from which the Vessel was hauled out, Dania Cut, is navigable. *See* (Opp. (DE [48] at 8 n.3)) (citing *In re Lavender*, 2004 WL 2935860, at *1 ("Playboy Marine is located on the Dania Cutoff, a waterway that connects to the Intracoastal waterway, which in turn connects to the Atlantic Ocean.")). While Petitioner correctly argues that a vessel need not be physically in the water to be considered in or on navigable waters, the location of this Vessel–hauled out of the water and stored above a concrete slab–is easily distinguishable from the cases upon which Petitioner relies. *See The Admiral Peoples*, 295 U.S. 648, 651–652 (1935) (applying admiralty jurisdiction over a fall from a gangplank that was attached to a vessel in water); *Sea Vessel, Inc. v. Reyes*, 23 F.3d 345 (11th Cir. 1994) (recognizing admiralty jurisdiction in an incident that occurred in a "shiplift type dry dock," where a vessel is lifted

and "stays in place over the water while repairs are made."); *Parker v. Darby*, 109 F. Supp. 3d 1347, 1348 (M.D. Fla. 2015) (applying admiralty jurisdiction over an incident that occurred while the vessel was suspended over navigable water in a dry dock). Accordingly, this Court finds that the Vessel was not located in or on navigable waters at the time of Mueller's fall. Finally, Petitioner makes no argument that the injuries arose from a vessel on navigable water. As is plain from Petitioner's video, the injuries to Mueller involved a forklift that was fully situated on land. *See* (DE [48-4] at 12:36–12:40).

Although Petitioner's failure to satisfy the locality test is sufficient to deny admiralty jurisdiction, this Court finds that Petitioner cannot establish the nexus requirement for the reasons discussed below.

(2) The Nexus Test

Under the nexus test, admiralty jurisdiction exists when a "potential hazard to maritime commerce arises out of activity that bears a substantial relationship to traditional maritime activity." *See Sisson*, 497 U.S. at 362 (citation omitted). Courts applying the nexus test first consider the "general features of the type of incident involved" to determine whether the incident might disrupt commercial activity. *Id.* at 363. Second, courts look to whether the "general character" of the "activity giving rise to the incident" shows a "substantial relationship to traditional maritime activity." *Grubart*, 513 U.S. at 534.

This Court first examines whether the incident itself was of the sort that might disrupt maritime commerce. Petitioner characterizes Mueller's fall as an "onboard injury which occurred during the . . . maintenance . . . of a vessel" which "potentially disrupts maritime commerce." (Opp. (DE [48] at 14)) (quoting *Parker*, 109 F. Supp. 3d at 1348). Respondent, however, describes the incident as a "fall from a forklift after disembarking

a vessel located on land," which caused no damage to other vessels. (Reply (DE [56] at 6–7)). In this case, Petitioner's Vessel posed minimal threat to maritime commerce where, as discussed above, the Vessel itself was withdrawn from navigation. Further, the type of accident at issue here would not have damaged any other Vessel engaged in navigation. *See Lewis*, 871 F.2d at 1051 (rejecting admiralty jurisdiction where fire damage to a vessel "did not occur where other vessels in navigation could have been affected."). Despite Petitioner's position that Playboy Marine shares space with other marine service companies, there is no indication that Mueller's injury would have affected nearby vessels. As Petitioner's own surveillance footage reveals, Playboy Marine maintains only one haul out slip with no other vessels in the immediate vicinity. *See* (DE [48-4]); (Deposition Tr. of S. Powell Peck (DE [48-1] at 17:18–18:13)).

Under the second nexus factor, this Court considers whether the general character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity. *Sisson*, 497 U.S. at 358. Petitioner analogizes the bottom paint job to the "routine repair of a vessel" which, Petitioner argues, is "a crucial maritime activity." (Opp. (DE [48] at 15)) (citing *Reyes*, 23 F.3d 350–51). Respondent, on the other hand, relies on the Eleventh Circuit's ruling in *Lewis* where the Court found no "discernible relationship" between the tort at issue there and traditional maritime activities. (Reply (DE [56] at 7)). In *Lewis*, the circuit court considered whether the owner of a vessel could litigate negligence claims in admiralty where its vessel caught fire in an enclosed, land-based facility. 871 F.2d at 1052. The circuit court analogized the petitioner's circumstances to that of a car owner who left his car at a repair facility only to discover that a fire, initiating in the car or elsewhere, destroyed the car and caused widespread

damage. *See id.* Ultimately, the *Lewis* court concluded that the land-based tort shared no discernible relationship with maritime activities and declined to exercise admiralty jurisdiction. *See id.* Here too, the tort originated on land. Mueller's accident involved a land-based forklift and ended with Mueller leaving the scene in an ambulance. *See* (Deposition Tr. of Burton S. Luce (DE [48-3] at 38:14–42:4)). The Court therefore agrees that *Lewis* is instructive and accordingly finds that Petitioner fails to meet the second nexus factor.

B. Whether the Limitation of Liability Act Applies

Respondents' second argument for dismissal is that the Limitation of Liability Act does not apply to this case where the parties entered into a personal contract. *See* (Mot. (DE [29] at 11–15)). Having determined that this Court lacks admiralty jurisdiction over the claims in this case, this Court need not determine whether the Limitation of Liability Act applies. The Eleventh Circuit has squarely held that the Limitation of Liability Act provides no independent basis for jurisdiction "in the absence of a significant relationship between its claim and traditional notions of maritime activity." *Lewis* 871 F.2d at 1054; *see also Reyes*, 23 F.3d at 348 n. 6.

Accordingly, it is hereby

ORDERED AND ADJUDGED as follows:

1. Respondent's Motion to Dismiss (DE [29]) is **GRANTED.** The Clerk is directed to **CLOSE** this case and any pending motions are **DENIED** as moot.
2. This Court's Order granting Petitioner's Motion for Default Judgment (DE [57]) and Final Default Judgment (DE [58]) are **VACATED** as improvidently granted.

DONE AND ORDERED in Chambers, Fort Lauderdale, Florida, this 8th day of January 2024.

RAAG SINGHAL
UNITED STATES DISTRICT JUDGE