UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 10-20296-CIV-UNGARO

SIVKUMAR SIVANANDI,

Plaintiff,

v.

NCL (BAHAMAS) LTD., d/b/a NCL,

Defendant.
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OMNIBUS ORDER

THIS CAUSE is before the Court upon Defendant's Motion to Dismiss the Complaint for Improper Venue and to Compel Arbitration, filed February 5, 2010 (D.E. 5 (the "Motion to Dismiss")). Plaintiff responded in opposition to the Motion to Dismiss on March 3, 2010 (D.E. 12), to which Defendant replied on March 15, 2010 (D.E. 16). Also before the Court is Plaintiff's Motion to Remand and Attorney's Fees and Costs, filed February 26, 2010 (D.E. 11 (the "Motion to Remand")). Defendant responded in opposition on March 15, 2010 (D.E. 17), to which Plaintiff replied on March 25, 2010 (D.E. 22). Accordingly, both Motions are ripe for disposition.

THE COURT has considered the Motions and pertinent portions of the record, and is otherwise fully advised of the premises.

BACKGROUND

This action arises out of injuries Plaintiff sustained while employed on Defendant's vessel. Plaintiff was working as an assistant line cook when he slipped and fell down stairs on two separate occasions: the first incident occurred in December 2006, and the second incident occurred in January 2009. (Complaint ¶¶ 2, 9, 17.) Both incidents resulted in knee pain, and, after the second incident, Plaintiff underwent left knee surgery on February 25, 2009.

(Complaint ¶¶ 11-16, 18-23.) Today, Plaintiff walks with a limp and a cane as he still experiences left knee pain. (Complaint ¶ 23.)

Plaintiff, a citizen of India, filed suit against Defendant in the Eleventh Judicial Circuit in and for Miami-Dade County, Florida, asserting claims for Jones Act Negligence (Count I), Unseaworthiness (Count II) and Failure to Provide Maintenance and Cure and Unearned Wages (Count III). Plaintiff served Defendant with his state court complaint on December 3, 2009. (Notice of Removal ¶ 4.) On January 29, 2010, Defendant filed a Notice of and Petition for Removal to Federal Court based upon the United States Convention on Recognition and Enforcement of Arbitral Awards (New York, June 10, 1958) (the "Convention"), and its enabling legislation, 9 U.S.C. § 201, *et seq.*

Immediately following its Petition for Removal, Defendant moved to dismiss and compel arbitration under the Convention pursuant to arbitration provision contained in an employment contract entered into by Plaintiff and Defendant on November 29, 2008 [1] (the "Employment Agreement").[2] (Notice of Removal ¶ 3.) Paragraph12 of the Employment Agreement states in relevant part:

> ARBITRATION - Seaman agrees, on his own behalf . . . that any and all claims, grievances, and disputes of any kind whatsoever relating to or in any way connected with the Seaman's shipboard employment with the Company including, but not limited to, claims such as personal injuries, Jones Act claims, actions for maintenance and cure, unseaworthiness, wages, or otherwise, no matter how described, pleaded or styled . . . shall be referred to and exclusively by binding arbitration pursuant to the United Nations Convention and Recognition and

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[1] The Court notes here that the Employment Agreement, which contains the mandatory arbitration provision, was entered into *after* Plaintiff's first slip and fall incident.

[2] A copy of the Employment Agreement can be found as Exhibit C to Defendant's Notice of Removal.

> Enforcement of Foreign Arbitral Awards . . . The place of arbitration shall be the Seaman's country of citizenship, unless arbitration is unavailable under The Convention in that country, in which case, and only in that case, said arbitration shall take place in Nassau, Bahamas.

Incorporated by reference into the Employment Agreement are the terms of the Collective Bargaining Agreement ("CBA"),[3] negotiated by the Norwegian Seafarer's Union on behalf of the Plaintiff. Article 20 of the CBA further provides that:

> The parties to the Agreement recognize that Bahamian law will apply to all disputes notwithstanding and without regard to any provision of Bahamian law that might be construed to preclude the application of Bahamian law to non-Bahamian Seafarers.

Accordingly, reading Paragraph 12 of the Employment Agreement together with Article 20 of the CBA, Plaintiff must submit his claims to arbitration proceedings in India or the Bahamas and Bahamian law will apply.

Plaintiff opposes arbitration, arguing that the arbitration provision is unenforceable because it is against public policy where it mandates that Bahamian law apply and, therefore, precludes Plaintiff from pursuing his Jones Act claim pursuant to U.S. law. Plaintiff also moves to remand, arguing that (i) his Jones Act claim is not removable as a matter of law, (ii) the arbitration provision is an impermissible forum selection clause, and (iii) the arbitration provision constitutes an impermissible prospective waiver of his statutory right to pursue a Jones Act Claim, relying on the recent Eleventh Circuit decision *Thomas v. Carnival Corp.*, 573 F.3d 1113 (11th Cir. 2009).

For the reasons described fully below, the Court finds that this case does fall within the

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[3] A copy of the CBA may be found as Exhibit F to Plaintiff's Reply brief to Defendant's Motion to Dismiss (D.E. 16).

Eleventh Circuit's holding in *Thomas*, and, therefore, the arbitration provisions is unenforceable.

DISCUSSION

I. Removal of the Case was Proper

As an initial matter, the Court must determine whether it has jurisdiction to determine the enforceability of the arbitration provision in this case. Section 205 of the Convention states that "[w]here the subject matter of an action or proceeding in State court relates to an arbitration agreement or award falling under the Convention, the defendant . . . may, at any time, before trial thereof, remove such action . . . ." 9 U.S.C. § 205. Once removed, "the Court should compel parties to arbitrate, providing [that the] following jurisdictional prerequisites are met: (1) there is agreement in writing to arbitrate dispute; (2) the agreement provides for arbitration in territory of signatory of Convention; (3) the agreement arises out of legal relationship, whether contractual or not, that is considered commercial; and (4) one party to agreement is not United States citizen, *or* the commercial relationship at issue has some reasonable relation with foreign state." *Thomas v. Carnival,* 573 F.3d 1113, 1117 (11th Cir. 2009) (citing *Bautista v. Star Cruises,* 396 F.3d 1289, 1294 (11th Cir. 2005)).

There is no dispute that the four jurisdictional prerequisites have been satisfied in this case, at least as to Plaintiff's claims arising from his second slip and fall incident.[4] Instead, Plaintiff asserts that his Jones Act claim cannot be removed as a matter of law, relying on the 2006 and 2008 amendments to the Jones Act. As this Court has held several times since the

[4] It is unclear whether there was an agreement to arbitrate when the first slip and fall incident occurred in December 2006 because the parties did not enter into an Employment Agreement until November 29, 2008. However, the issue of whether Plaintiff's claims arising from this first incident are arbitrable need not be addressed because the Court finds the arbitration provision unenforceable.

recent amendments of the Jones Act, removal of the Jones Act negligence claims to enforce arbitration agreements is proper pursuant to the Convention. *See, e.g., Allen v. Royal Carribean Cruise, Ltd.,* 2008 WL 5095412 (S.D. Fla. Sept. 30, 2008), *aff'd* 353 Fed. Appx. 360 (11th Cir. Nov. 23, 2009). Accordingly, the Court find that removal was proper under the Convention and that it has jurisdiction to determine the enforceability of the arbitration provision.

II. The Arbitration Provision is Unenforceable and Remand is Proper

Article V of the Convention provides specific affirmative defenses to a suit seeking to compel arbitration. One of these affirmative defenses is that the arbitration provision is in violation of public policy and should not be enforced. Convention, Article V(2)(b). Plaintiff argues that the arbitration provision in this case is void as against public policy because it requires that Bahamian law apply, thereby precluding Plaintiff from pursuing his statutory remedy under the Jones Act. (Motion to Remand at 8.) For support, Plaintiff relies on the Eleventh Circuit's recent decision *Thomas v. Carnival,* 573 F.3d 1113 (11th Cir. 2009).

In *Thomas*, the Eleventh Circuit held that an arbitration clause that required a seaman to arbitrate his Seaman's Wage Act claim in the Philippines under Panamanian law was void as against public policy because the choice-of-law and choice-of-forum clauses worked in tandem to operate as a prospective waiver of the seaman's right to pursue his statutory remedies under U.S. law. 573 F.3d at 1123-24. In so holding, the Eleventh Circuit stated that arbitration clauses should be upheld only if it evident that (1) U.S. law will definitely be applied, or (2) there is a possibility that U.S. law will be applied *and* there will be a subsequent opportunity for review. *Id.* at 1123 (relying on *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), and *Vimar Seguros y Reaseguros v. M/V Sky Reefer*, 515 U.S. 528 (1995)).

Here, there is no uncertainty as to the governing law in the proposed arbitral proceedings – only Bahamian law will be applied. In this respect, the present case is identical to *Thomas*. *Id.* at 1122-23 (noting that Panamanian law was the only possible governing law to be applied and choice of law is the important question). And therefore the question of whether there would even be a subsequent opportunity for review of the arbitrator's decision is irrelevant.[5] *See id.* at 1123 (phrasing the second part of the consideration – possibility of application of U.S. law and subsequent review – in the conjunctive). Accordingly, the Court finds that the arbitration provision in this case falls very much within the holding in *Thomas*. *Accord Kovacs v. Carnival Corp.*, 2009 WL 4980277, Case No. 09-22630-CV-HUCK (S.D. Fla. Dec. 21, 2009) (remanding case because, *inter alia*, it would be against public policy to compel arbitration of seaman's Jones Act claim where Panamanian law would apply at arbitration); *Pavon v. Carnival Corp.,* Case No. 09-22935-CV-LENARD (S.D. Fla. Jan. 20, 2010) (remanding seaman's Jones Act claims in part because to arbitrate such claims would contravene public policy where the Jones Act imposes strict liability on employers for the negligence of its employees); *see also Sorica v. Princess Cruise Lines, Ltd.*, Case No. 09-20917-HUCK (S.D. Fla. Aug. 4, 2009) (recognizing that a provision providing for arbitration under Bermuda law in a Bermuda forum of a Jones Act claim is void under the *Thomas* analysis)

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[5] For this reason, the Court does not find Defendant's authority, *Bulgakova v. Carnival Corp.,* 09-20023-CV-SEITZ (S.D. Fla. 26, 2010), persuasive. *Accord Cardoso v. Carnival Corp*., 2010 WL 996528, *3, Case No. 09-23442-CV-GOLD (S.D. Fla. Mar. 16, 2010) (finding that there is a distinct possibility that if the choice-of-law and choice-of-forum clauses are left intact, there would be no meaningful review subsequent to arbitration because the seaman would not likely obtain an award). Nor does the Court find *Allen v. Royal Carribean Cruise, Ltd.,* Case No. 08-22014-CV-UNGARO (S.D. Fla. Sept. 19, 2008) persuasive as it was decided prior to the Eleventh Circuit's *Thomas* decision.

The Court is not persuaded by the argument that *Thomas* is inapplicable here because Jones Act claims were not subject to arbitration in that case, but rather only the plaintiff's Seaman Wage Act claim was arbitrable. The Defendant has not offered any reason why the right to bring a Seaman Wage Act claim should be afforded any more protection than the right to bring a Jones Act claim.[6] Indeed, as this Court has held, "[A] holistic reading of *Thomas* indicates that the Eleventh Circuit's reasoning applies with equal force to claims brought pursuant to the Jones Act. Specifically, . . . the Eleventh Circuit did not focus on the unique nature of the Seaman's Wage Act in reaching its conclusion that foreign choice-of-law and arbitration clauses – if enforced in tandem – constitute a prospective waiver of statutory rights in violation of public policy." *Cardoso v. Carnival Corp.*, 2010 WL 996528, *3, Case No. 09-23442-CV-GOLD (S.D. Fla. Mar. 16, 2010) (finding that the choice-of-law and choice-of-forum provision, if applied in tandem, renders the arbitration agreement void as against public policy because the provisions operated as a prospective waiver of the seaman's Jones Act claim).[7]

Because the Court finds that the arbitration provision is unenforceable, the Court remands this case. Defendant removed this case solely on the grounds that the Court has jurisdiction

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[6] The Jones Act is remedial legislation, "for the benefit and protection of seaman who are peculiarly the wards of admiralty." *Arizona v. Anelich*, 298 U.S. 110, 123 (1936).

[7] The Court notes that it considered the remedy afforded in *Cardoso*, but finds that it inadequate. In *Cardoso*, the court severed the choice-of-law provision in order to effectuate the strong public policy in favor of arbitration. 2010 WL 996528 at *4. This of course, however, does not guarantee that U.S. law will be applied, and if even there were a possibility of that it did, that there would be an opportunity for review. Indeed, as the *Cardoso* court itself recognized, there is a distinct possibility that there would be no reward in favor of the plaintiff to enforce (and, therefore, no meaningful review) if the arbitrator chose to apply Panamanian law. *Id.* at *3.

pursuant to the Convention to enforce the arbitration agreement.[8] (Response to Motion to Remand at 4.) As Defendant recognizes, Jones Act claims are not otherwise generally removable. *See also Lewis v. Lewis & Clark Marine, Inc.,* 531 U.S. 438, 455 (2001) ("Moreover, in this case respondent raised a Jones Act claim, which is not subject to removal to federal court even in the event of diversity of the parties."). Having concluded that the arbitration agreement should not be enforced, the Court finds remand is proper. *Beiser v. Weyler*, 284 F.3d 665, 675 (5th Cir. 2002) ("If the district court decides that the arbitration clause does not provide a defense, and no other grounds for federal jurisdiction exist, the court must ordinarily remand the case back to state court."); *Kovacs v. Carnival Corp.*, 2009 WL 4980277, Case No. 09-22630-CV-HUCK (S.D. Fla. Dec. 21, 2009) (remanding case after finding arbitration of Jones Act claim void against public policy); *Pavon v. Carnival Corp.,* Case No. 09-22935-CV-LENARD (S.D. Fla. Jan. 20, 2010) (same).

II. Attorneys' Fees and Costs are Not Appropriate.

Plaintiff argues that he is entitled to attorneys' fees and costs for improper removal of this matter pursuant to 28 U.S.C. § 1447(c) because Defendant refused to agree to remand, notwithstanding the fact that there are decisions from this Court that have held that remand of Jones Act claims is proper. The Court disagrees. The Supreme Court has held that "[a]bsent unusual circumstances, courts may award attorneys fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal." *Martin v. Franklin*

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[8] Although Defendant also listed 28 U.S.C. § 1331 and 1333 as grounds for subject matter jurisdiction in its Notice of Removal, removal pursuant to these sections was not timely. *See* 28 U.S.C. § 1446(b) (removal must occur within thirty days after receipt of the initial pleading); *cf.* 9 U.S.C. § 205 (removal under the Convention is timely if made prior to trial).

Capital Corp., 546 U.S. 132, 141 (2005). As stated above, there are decisions from this Court that have denied motions to remand, even post-*Thomas.* Given the various ways in which this Court has applied *Thomas* to Jones Act claims, the undersigned cannot conclude that Defendant lacked an objective reasonable basis for seeking removal. Thus, the Court denies Plaintiff's request for fees and costs.

CONCLUSION

For the forgoing reasons, it is hereby

ORDERED AND ADJUDGED that Defendant's Motion to Dismiss is DENIED. It is further

ORDERED AND ADJUDGED that Plaintiff's Motion to Remand is GRANTED to the extent that this case is hereby REMANDED to the Eleventh Judicial Circuit in and for Miami-Dade County, Florida. The Clerk of the Court is hereby directed to take all necessary steps and procedures to effect remand of the above-style action. It is further

ORDERED AND ADJUDGED that Plaintiff's Motion to Remand is DISMISSED to the extent that it seeks attorneys' fees and costs.

DONE AND ORDERED this 14th day of April, 2010.

URSULA UNGARO
UNITED STATES DISTRICT JUDGE

copies provided:
counsel of record