UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

WENDELL HINKLEY,	)	
	)	
Plaintiff	)	
v.	)	Civ. No. 97-146-B
	)	
RALPH L. SMITH, ET AL.,	)	
	)	
Defendants	)	

ORDER AND MEMORANDUM OF DECISION

BRODY, District Judge

Plaintiff, William Hinkley, brings this admiralty suit against Defendants, Matthew Beal ("Beal"), Ralph L. Smith ("Smith"), and the F/V *Midnight Star* II. Plaintiff asserts claims of unseaworthiness (Count I), negligence under the Jones Act (Count II), and maintenance and cure (Count III), arising out of an accident at sea during which he suffered injuries. Plaintiff also brings an action *in rem* against the F/V *Midnight Star* II (Count IV). Presently before the Court are cross-motions for partial summary judgment. Plaintiff seeks summary judgment on his unseaworthiness claim and a determination of the legal ownership of the *Midnight Star* II. Defendants seek summary judgment on Plaintiff's maintenance and cure claim. For the following reasons, Plaintiff's motion is GRANTED and Defendants' motion is DENIED.

BACKGROUND

The relevant facts of this case are for the most part undisputed. The F/V *Midnight Star* II is a thirty-one foot fishing vessel rigged for mussel dragging, captained by Defendant Matthew Beal, and registered to Beal's father-in-law, Defendant Ralph Smith. The mussel dragging procedure is as follows: Mussels are collected from the sea using a drag. When the drag is hauled up, the mussels are dumped into a metal mussel tumbler which hangs in the water over

the stern in order to wash the mussels. When the mussels are clean, the tumbler is hoisted over the vessel, the tumbler door is opened by the crewmen, and the mussels are dumped onto a worktable. The tumbler is operated by a hydraulic control in the pilot house.

On August 22, 1996, Plaintiff was working as a crewmember on the *Midnight Star* II. While at sea, Beal, who was operating the hydraulic control, raised the tumbler over the work table where Plaintiff was standing, and attempted to rotate it one-quarter of a full rotation as required to empty its contents onto the work table. The hydraulic control, however, malfunctioned "by falling right down into the console" causing it to "be stuck on," and the mussel tumbler turned a full rotation at full speed, striking Plaintiff on the head and breaking his neck.[1] Beal Depo. at 27-28. It is undisputed that the hydraulic control malfunction was caused by a loose pin in the hydraulic control system. Smith Depo. at 44.

SUMMARY JUDGMENT

Summary judgment is appropriate in the absence of a genuine issue as to any material fact and when the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). An issue is genuine for these purposes if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A material fact is one that has "the potential to affect the outcome of the suit under applicable law." Nereida-Gonzalez v. Tirado-Delgado, 990 F.2d 701, 703 (1st Cir. 1993). For the purposes of summary judgment the Court views the record in the light most favorable to the nonmoving party. See McCarthy v. Northwest Airlines, Inc., 56 F.3d 313, 315 (1st Cir. 1995).

DISCUSSION

[1] Another crewmember, not a party to this action, was also struck by the rotating tumbler.

I. Plaintiff's Motion For Summary Judgment

A. Ownership of the *Midnight Star* II

Plaintiff seeks a determination of the ownership of the *Midnight Star* II. A determination of ownership is necessary because "[a] plaintiff normally can bring a unseaworthiness claim only against the owner of the vessel." Cerqueira v. Cerqueira, 828 F.2d 863, 865 (1st Cir. 1987). It is undisputed that the *Midnight Star* II is registered in Defendant Smith's name, that the bill of sale is in his name, and that Smith holds legal title to the vessel. Defs.' Answer to Am. Compl. ¶ 2; Smith Depo. at 9. Smith, however, denies that he is the "owner" of the vessel. Rather, both Defendants Smith and Beal contend that Beal is the "owner" of the *Midnight Star* II. Beal Depo. at 16, 20-21. Defendants' attorney, in an apparent attempt to create a dispute of fact, does not argue one way or the other, but, noting the "convoluted nature of the relationship between the defendants," urges the Court to let the jury decide who owns the vessel and in what capacity.[2] The Court, however, taking into consideration the memoranda filed by the parties and oral argument presented on the record at the final pretrial conference on December 22, 1997, is persuaded that Smith, as the holder of legal title, is the owner of the *Midnight Star* II for the

[2] Defendants' attorney does not offer a theory of ownership. Rather, he simply draws the Court's attention to Defendant Smith's deposition, which is far from clear on this issue. Smith states that he purchased the boat with his own money and let his son-in-law use it with the understanding that after Beal "got on his feet," Beal would pay Smith back. Smith Depo. at 11. In the meantime, Smith apparently kept the boat in his name "for protection," id. at 32, in case Beal divorced his daughter. Id. at 11. Smith suggests that Beal borrowed funds from a bank and used that money to repay Smith, but his testimony is vague as to the amounts involved or the nature of the arrangement. Id. at 11-14. However, Smith admits that the bank loan secured to pay off Beal's debt is in Smith's name, as well as the names of Beal and Smith's daughter, and that Smith would be liable for the loan should Beal default. Id. at 14-15. Smith states that Beal pays all maintenance and insurance expenses of the *Midnight Star* II, but he concedes that there is nothing in writing memorializing the "arrangement" between himself and Beal. Id. at 12.

purposes of this suit. "Shipowners may not delegate their duty to provide a seaworthy ship." McAleer v. Smith, 57 F.3d 109, 112 (1st Cir. 1995). Defendants do not argue, nor do the facts suggest, that Beal is an "owner pro hac vice," either as a demise charterer or as a fishing-lay captain. See id. at 112-13. The Court therefore finds that Smith is the owner of the vessel for the purposes of unseaworthiness liability.

B. Unseaworthiness

Plaintiff also moves for summary judgment on his unseaworthiness claim. A recent First Circuit case explained the contours and requirements of the unseaworthiness cause of action:

> A claim based on unseaworthiness enforces the shipowner's "absolute duty to provide to every member of his crew a vessel and appurtenances reasonably fit for their intended use." The duty includes maintaining the ship and her equipment in a proper operating condition, and can be breached either by transitory or by permanent defects in the equipment. A "temporary and unforeseeable malfunction or failure of a piece of equipment under proper and expected use is sufficient to establish a claim of damages for unseaworthiness." Finally, the injured seaman must prove that the unseaworthy condition was the sole or proximate cause of the injury sustained. Although the duty is absolute, "the standard is not perfection, but reasonable fitness; not a ship that will weather every imaginable peril of the sea, but a vessel reasonably suitable for her intended service." Most important to this discussion is that a claim of unseaworthiness is not dependent upon a finding of negligence. "The reason, of course, is that unseaworthiness is a condition, and how that condition came into being--whether by negligence or otherwise--is quite irrelevant to the owner's liability for personal injuries resulting from it."

Ferrara v. A.&V. Fishing, Inc., 99 F.3d 449, 453 (1st Cir. 1996) (citations omitted).

Viewing the evidence in a light most favorable to Defendants, the Court is persuaded that the hydraulic control on the *Midnight Star* II was not reasonably fit for its intended use and that its malfunction was the proximate and legal cause of Plaintiff's injury. Smith admits that the hydraulic control was in an unsafe condition and that its failure "never should have happened."

Smith Depo. at 51-52. Beal did not "dare to go fishing" again after the accident without taking steps to repair the malfunctioning hydraulic control, which Beal suggests was poorly designed. Smith Depo. at 44; Beal Depo. at 38-39. The control malfunction caused the tumbler to unexpectedly rotate at a high speed, striking Plaintiff and another crewmember, and thereby causing Plaintiff's injury.

Defendants put forth several arguments in an effort to survive summary judgment. First, they argue that the failure of the hydraulic control was unforeseeable and that "events which are foreseeable and unpreventable cannot be the basis for a finding of unseaworthiness." Defs.' Resp. at 5. This statement is not supported by the law. It is well settled, as the First Circuit noted in Ferrara, that a "'temporary and unforeseeable malfunction or failure of a piece of equipment under proper and expected use is sufficient to establish a claim of damages for unseaworthiness.'" 99 F.3d at 453 (quoting Usner v. Luckenbach Overseas Corp., 400 U.S. 494, 499 (1971)). The sudden and unforeseeable nature of an event does not prevent recovery for unseaworthiness.

Next, Defendants claim that they are excused from liability for unseaworthiness because the loosening of the pin in the hydraulic control was a "peril of the sea." The perils of the sea doctrine does not apply to this case. "[T]he perils of the sea doctrine excuses the owner/operator from liability when 'those perils which are particular to the sea, and which are of an extraordinary nature or arise from irresistible force or overwhelming power, and which cannot be guarded against by the ordinary exertions of human skill and prudence' intervene to cause the damage or injury." Ferrara, 99 F.3d at 454 (quoting R.T. Jones Lumber Co. v. Roen S.S. Co., 270 F.2d 456, 458 (2d Cir. 1959)). The malfunction of the hydraulic control is not a "peril

particular to the sea," nor did it arise from irresistible force or overwhelming power. The perils of the sea doctrine is more appropriately applied to situations where an exterior force, such as a submerged object or a particularly fierce storm wreaks havoc on an otherwise seaworthy vessel. See, e.g., Ferrara 99 F.3d at 454; R.T. Jones Lumber Co. v. Roen S.S. Co., 213 F.2d 370, 373 (7th Cir. 1954) ("A peril of the sea is that danger that comes when wind and wave in their fury work their will with ship and cargo after the owner has used all reasonable effort to make the ship seaworthy and well qualified to withstand those hazards and perils that the owner knows or has reason to believe must be encountered.") Such is not the case here.[3]

Defendants also argue that there is a genuine issue of material fact as to the proximate cause of Plaintiff's injury. Specifically, Defendants claim that Plaintiff's negligence contributed to his injury and that, therefore, any unseaworthy condition could not have been the injury's sole or proximate cause. The Court notes that a plaintiff injured by unseaworthiness is not barred from recovery by his own negligence, even if that negligence might reduce the recovery in the proportion that it contributed to the injury. Jordan v. United States Lines, Inc., 738 F.2d 48, 49 (1st Cir. 1984). Therefore, Defendants cannot raise an issue of material fact regarding proximate cause in an unseaworthiness action by simply alleging contributory negligence. Defendants may, however, raise their affirmative defense of comparative negligence at trial, and Smith's liability may be offset proportionately to the extent, if at all, the jury determines Plaintiff's own

[3] Defendants also suggest, without conceding, that the accident could have been the result of a "single negligent act," presumably by either Smith or Beal, thereby precluding recovery for unseaworthiness. Although the hydraulic control may have been negligently installed or maintained, the record indicates that it was the unseaworthy condition of the control, not an act of negligence at the time of the accident, that caused Plaintiff's injury.

negligence contributed to his injury.[4] See Hubbard v. Faros Fisheries, Inc., 626 F.2d 196, 200 n.1 (1st Cir. 1980).

Finally, Defendants argue that Smith, as owner of the *Midnight Star* II, is entitled to relief under the Limitation of Liability Act, 46 U.S.C. § 183(a), which provides that in the event of an accident "done, occasioned, or incurred, without the privity or knowledge of the vessel owner, the liability of the owner shall not exceed the value of the vessel." The Court cannot, on the record before it, resolve the issue of whether Smith had "privity or knowledge" of the unseaworthy condition of the *Midnight Star* II, and reserves judgment on this issue until trial.

II. Defendants' Motion for Summary Judgment

A. Maintenance and Cure

Defendants argue in their Motion for Partial Summary Judgment that Plaintiff is not

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[4] The Court notes that Defendants have, to date, offered no evidence to support the allegation that Plaintiff was negligent. Defendants claim that "contributory negligence on the part of the plaintiff is established by his testimony." Defs.' Resp. to Pl.'s Mot. Summ. J. at 9. Defendants offer no further explanation but point to a portion of Plaintiff's deposition that reads as follows:

> Q: Okay. Was there anything unusual about the situation as it existed on the *Midnight Star* II just prior to the time you were injured?
> A: No.
> Q: Were you -- you were aware then of the position -- were you aware of where the door was when you went to use the line?
> A: Yeah. It was where it was supposed to be.
> Q: And you were aware that the door was open?
> A: Yes.

Hinkley Depo. at 24-25. How these statements establish Plaintiff's negligence is unclear. Contrary to Defendants' contention, the deposition testimony of Matthew Beal strongly suggests that Plaintiff was not negligent. Beal noted that Plaintiff did nothing out of the ordinary and was standing in the place where he normally did when the tumbler was emptied. Beal Depo. at 22-23. The Court, however, does not conclude at this point in the proceedings that Defendants cannot prove negligence as a matter of law.

entitled to maintenance and cure because he lived at home with his parents free of charge during his recuperation. The Court once again looks to Ferrara, which provides a thorough discussion of the maintenance and cure cause of action:

> From time immemorial, the law of the sea has required shipowners to ensure the maintenance and cure of seamen who fall ill or become injured while in service of the ship. The term refers to "the provision of, or payment for, food and lodging ('maintenance') as well as any necessary health-care expenses ('cure') incurred during the period of recovery from an injury or malady." The right attaches "largely without regard to fault; a seaman may forfeit his entitlement only by engaging in gross misconduct." The entitlement attaches until the seaman is "so far cured as possible." And finally, the right is available only to a "seaman" who is "in service of the ship" at the time of the injury or onset of illness.

99 F.3d at 454 (citations omitted).

Generally, a seaman may not recover maintenance if parents or relatives support him during the recovery period. Flower v. Nordsee, Inc., 657 F. Supp. 235, 236 (D. Me. 1987). However, if a seaman actually incurs expenses while living at home he may recover those expenses. Id. It is uncontroverted that Plaintiff, who is 21 years old, lived with his parents prior to his accident and continued to live there while he recovered from his injury. Plaintiff's parents took care of him, providing him with food during his period of convalescence. However, according to Plaintiff, he was paying his mother $50.00 per week for "board" before his accident and, although those payments ceased upon his injury, Plaintiff promised to make up the payments he missed when he was once again financially able to do so. If Plaintiff can prove that he is actually indebted to his parents he may recover maintenance.[5] Regardless, Plaintiff has raised a

[5] Even if Plaintiff is not entitled to maintenance, the fact that he lived at home during his convalescence has no bearing on whether he is entitled to cure. See Nichols v. Barwick, 792 F.2d 1520, 1523-24 (11th Cir. 1986) (affirming denial of maintenance and grant of cure to seaman living at home).

genuine issue of material fact on this issue sufficient to survive summary judgment.

CONCLUSION

For the reasons stated above, Plaintiff's Motion for Partial Summary Judgment is GRANTED and Defendants' Motion for Partial Summary Judgment is DENIED.

SO ORDERED.

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MORTON A. BRODY
United States District Judge

Dated this 29th day of December, 1997.