UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

TIMOTHY G. O'BRIEN,	)	
	)	
Plaintiff	)	
	)	
v.	)	***Civil No. 07-64-P-H***
	)	
THUNDER BAY, INC.,	)	
	)	
Defendant, and	)	
	)	
DANIEL LIBBY, d/b/a D&E ENTERPRISES,	)	
	)	
Defendant and Third-Party Plaintiff	)	
	)	
v.	)	
	)	
LOPER-BRIGHT ENTERPRISES, INC.,	)	
	)	
Third-Party Defendant	)	

RECOMMENDED DECISION ON MOTIONS FOR SUMMARY JUDGMENT

The plaintiff, Timothy G. O'Brien, brings this action as a result of injuries he sustained while the captain of the fishing vessel F/V *Thunder Bay*, owned by the defendant Thunder Bay, Inc. ("Thunder Bay"). The plaintiff was injured while assisting the third-party defendant Loper-Bright Enterprises, Inc.'s ("Loper-Bright") vessel, F/V *Retriever*, in repairing its net. That net, in turn, was being serviced by defendant Daniel Libby's ("Libby") net reel, which broke and fell on the plaintiff.

The plaintiff moves for partial summary judgment against Thunder Bay on Count I of the amended complaint. Loper-Bright moves for summary judgment on all claims asserted against it

by defendant and third-party plaintiff Libby. Finally, Thunder Bay moves for summary judgment on all claims asserted against it in the amended complaint.

I recommend that the court deny the plaintiff's motion, deny Loper-Bright's motion, grant Thunder Bay's motion to dismiss Count II of the amended complaint, and deny Thunder Bay's motion for summary judgment on Counts I and III and on Libby's cross-claim against it.

I. Summary Judgment Standards

A. Federal Rule of Civil Procedure 56

Summary judgment is appropriate only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Santoni v. Potter*, 369 F.3d 594, 598 (1st Cir. 2004). "A dispute is genuine if the evidence about the fact is such that a reasonable jury could resolve the point in the favor of the non-moving party." *Rodríguez-Rivera v. Federico Trilla Reg'l Hosp. of Carolina*, 532 F.3d 28, 30 (1st Cir. 2008) (quoting *Thompson v. Coca-Cola Co.*, 522 F.3d 168, 175 (1st Cir. 2008)). "A fact is material if it has the potential of determining the outcome of the litigation." *Id.* (quoting *Maymi v. P.R. Ports Auth.*, 515 F.3d 20, 25 (1st Cir. 2008)).

The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Santoni*, 369 F.3d at 598. Once the moving party has made a preliminary showing that no genuine issue of material fact exists, the nonmovant must "produce specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue." *Triangle Trading Co. v. Robroy Indus., Inc.*, 200 F.3d 1, 2 (1st Cir. 1999) (citation and internal punctuation omitted);

Fed. R. Civ. P. 56(e). "As to any essential factual element of its claim on which the nonmovant would bear the burden of proof at trial, its failure to come forward with sufficient evidence to generate a trialworthy issue warrants summary judgment to the moving party." *In re Spigel*, 260 F.3d 27, 31 (1st Cir. 2001) (citation and internal punctuation omitted).

To the extent that this case involves cross-motions for summary judgment, "[t]his framework is not altered by the presence of cross-motions for summary judgment." *Cochran v. Quest Software, Inc.*, 328 F.3d 1, 6 (1st Cir. 2003). "[T]he court must mull each motion separately, drawing inferences against each movant in turn." *Id.* (citation omitted); *see also, e.g.*, *Wightman v. Springfield Terminal Ry. Co.*, 100 F.3d 228, 230 (1st Cir. 1996) ("Cross motions for summary judgment neither alter the basic Rule 56 standard, nor warrant the grant of summary judgment *per se.* Cross motions simply require us to determine whether either of the parties deserves judgment as a matter of law on facts that are not disputed. As always, we resolve all factual disputes and any competing, rational inferences in the light most favorable to the [nonmovant].") (citations omitted).

B. Local Rule 56

The evidence that the court may consider in deciding whether genuine issues of material fact exist for purposes of summary judgment is circumscribed by the Local Rules of this District. *See* Loc. R. 56. The moving party must first file a statement of material facts that it claims are not in dispute. *See* Loc. R. 56(b). Each fact must be set forth in a numbered paragraph and supported by a specific record citation. *See id.* The nonmoving party must then submit a responsive "separate, short, and concise" statement of material facts in which it must "admit, deny or qualify the facts by reference to each numbered paragraph of the moving party's statement of material facts[.]" Loc. R. 56(c). The nonmovant likewise must support each denial

or qualification with an appropriate record citation. *See id.* The nonmoving party may also submit its own additional statement of material facts that it contends are not in dispute, each supported by a specific record citation. *See id.* The movant then must respond to the nonmoving party's statement of additional facts, if any, by way of a reply statement of material facts in which it must "admit, deny or qualify such additional facts by reference to the numbered paragraphs" of the nonmovant's statement. *See* Loc. R. 56(d). Again, each denial or qualification must be supported by an appropriate record citation. *See id.*

Failure to comply with Local Rule 56 can result in serious consequences. "Facts contained in a supporting or opposing statement of material facts, if supported by record citations as required by this rule, shall be deemed admitted unless properly controverted." Loc. R. 56(e). In addition, "[t]he court may disregard any statement of fact not supported by a specific citation to record material properly considered on summary judgment" and has "no independent duty to search or consider any part of the record not specifically referenced in the parties' separate statement of fact." *Id.*; *see also, e.g.*, *Cosme-Rosado v. Serrano-Rodriguez*, 360 F.3d 42, 45 (1st Cir. 2004) ("We have consistently upheld the enforcement of [Puerto Rico's similar local] rule, noting repeatedly that parties ignore it at their peril and that failure to present a statement of disputed facts, embroidered with specific citations to the record, justifies the court's deeming the facts presented in the movant's statement of undisputed facts admitted.") (citations and internal punctuation omitted).

II. Factual Background

On October 12, 2005, the plaintiff was employed by Thunder Bay as the captain of the fishing vessel F/V *Thunder Bay*. Thunder Bay Inc.'s Statement of Undisputed Material Facts in Support of Its Motion for Summary Judgment ("Thunder Bay SMF") (attached to Docket No.

69) ¶ 1; Plaintiff's Opposing Statement of Material Facts ("Plaintiff's Responsive SMF") (Docket No. 74) ¶ 1; Defendant Daniel Libby, d/b/a/ D&E Enterprises Opposing and Additional Statement of Material Fact in Response to Defendant Thunder Bay's Motion for Summary Judgment ("Libby Responsive SMF") (Docket No. 90) ¶ 1. At that time, Thunder Bay owned and operated the F/V *Thunder Bay*. *Id*. As the vessel's captain, the plaintiff had overall responsibility for the maintenance and upkeep of the vessel, including her equipment and nets, as well as overall responsibility for his own safety and that of his crew. *Id*.

On October 12, 2005, Loper-Bright owned and operated the fishing vessel F/V *Retriever*. *Id*. ¶ 2. Dennis Murphy served as that vessel's captain. *Id*. Sometime prior to October 12, 2005, Loper-Bright and Thunder Bay decided to engage in a type of fishing known as pair trawling, where the two vessels would pull a single net between them. *Id*. There was never any written agreement concerning the pair trawling. *Id*.

Libby is an independent contractor serving the commercial fishing industry. *Id*. ¶ 3. He owned and operated a net reel truck that was used to assist fishing vessels in repairing their nets. *Id*. On October 12, 2005, the plaintiff was injured in Portland, Maine, when the net reel on the back of a Libby truck broke free and landed upon him. Plaintiff's Statement of Material Facts in Support of His Motion for Partial Summary Judgment ("Plaintiff's SMF") (Docket No. 66) ¶ 1; Defendant Thunder Bay Inc.'s Response to the Plaintiff's Statement of Material Facts ("Thunder Bay Responsive SMF") (Docket No. 83) ¶ 1.

Shore side gear work includes all of the tasks needed to prepare a vessel to set to sea, including net maintenance and repair. *Id*. ¶ 14.[1] From time to time, the crews of the two vessels

[1] Libby begins his response to this paragraph of Thunder Bay's statement of material facts with the word "denied." Libby Responsive SMF ¶ 14. However, the sentences that follow do not deny any of the factual statements included in Thunder Bay's statements that I include in the factual recitation above. All of those statements are deemed admitted, as they are supported by the citations given in support of the paragraph by Thunder Bay.

would assist each other with shore side gear work. *Id*. On October 12, 2005, the plaintiff was assisting the F/V *Retriever* in repairing its net. *Id*. ¶ 15. Libby had been retained to assist in this operation. *Id*. He owned and operated a net reel truck that made the repair job less labor-intensive. *Id*. The net reel weighs approximately 500 pounds, and can weigh as much as 5,000 pounds with a net. Defendant D&E's Amended Additional Statement of Material Facts ("Libby SMF") (included in Libby Responsive SMF beginning at 16) ¶ 5; Third-Party Defendant, Loper-Bright Enterprises, Inc.'s Reply to D&E's Additional Statement of Material Facts ("Loper-Bright Responsive SMF") (Docket No. 101) ¶ 5. At the time of the plaintiff's accident, a part of the net reel frame assembly on the back of Libby's truck broke. Plaintiff's SMF ¶ 5; Thunder Bay Responsive SMF ¶ 5. Edward Smith, an employee of Libby, was sitting in the driver's seat of the truck at the time of the accident. *Id*. ¶ 6. He saw the net reel fall or break away from the truck and land on the plaintiff. *Id*. ¶ 7.

Whenever Libby's services were ordered by a fishing vessel, it was understood that some crewmen of that vessel would be involved in removing and replacing the net on the vessel. *Id*. ¶ 27. It was common for Libby's employees to work with the crewmen of the vessel being serviced. *Id*. ¶ 28. After becoming the captain of the F/V *Thunder Bay*, the plaintiff used Libby's net reel services between five and eight times before October 12, 2005. *Id*. ¶ 35. Libby was the primary supplier of net services to the F/V *Thunder Bay*. *Id*. ¶ 36. When the F/V *Retriever*'s net was used for pair trawling with the F/V *Thunder Bay*, the receipts from the sale of the catch were divided, with 55% going to *Retriever* and 45% to *Thunder Bay*. *Id*. ¶ 31.

On the date of the accident, Libby was hired to remove the pair trawling net from the F/V *Retriever* and lay it out on the ground so that the crews of both vessels could make repairs to the net. *Id*. ¶ 30. In order to begin the process, the Libby truck backed its net reel up to the edge of

the dock and the stern of the F/V *Retriever*. Third-Party Defendant, Loper-Bright Enterprises, Inc.'s Statement of Material Facts ("Loper-Bright SMF") (Docket No. 68) ¶ 16; Defendant Daniel Libby, d/b/a D&E Enterprises Opposing and Additional Statement of Material Facts ("Libby's L-B Responsive SMF") (Docket No. 88) ¶ 16. After the net was hooked onto the Libby net reel, the net reel spooled most, but not all, of the net onto the reel. *Id*. ¶ 17. Then, the truck containing the net reel drove away from the F/V *Retriever* down the dock while the F/V *Retriever*'s net reel was paying out the net. *Id*. The truck came to a stop approximately 200 feet from the F/V *Retriever*, and the plaintiff and the crew members of the F/V *Retriever* then began to untangle the net. *Id*. ¶ 18. One crew member of the F/V *Thunder Bay*, Philip Cuccuro, was also helping with the net. Libby SMF ¶ 22; Loper-Bright Responsive SMF ¶ 22. The plaintiff told Cuccuro to go take a nap while the others untangled the net. *Id*. ¶ 23.

All crew members of the F/V *Retriever* other than Patrick Ring stopped working on the net repairs to attend a safety meeting onboard the F/V *Retriever*. Loper-Bright SMF ¶ 19; Libby's L-B Responsive SMF ¶ 19. Murphy, the captain of the F/V *Retriever*, told Ring to assist the plaintiff while the other crew members attended the safety meeting. *Id*. Ring continued to work with the plaintiff to repair and untangle the net. *Id*. ¶ 20.

After the net had been untangled, the plaintiff assisted Smith in reeling the net onto the net reel on the back of the Libby truck so that it could be reeled back onto the F/V *Retriever*'s net reel. Plaintiff's SMF ¶ 32; Thunder Bay Responsive SMF ¶ 32. Smith backed up the truck by stepping on and off of the brakes while the plaintiff operated the hydraulic controls to take up the net. Loper-Bright's SMF ¶ 24; Libby's L-B Responsive SMF ¶ 24. The winding of the net and the weight of the net being taken up by the net reel caused the truck to go backwards. *Id.* If Smith had engaged the clutch of the truck the net reel would have become disengaged. *Id*. The

net wound up unevenly. *Id*. ¶ 25. As a result, the plaintiff told Smith to stop the truck. *Id*. ¶ 26. After Smith stopped the truck, the plaintiff reversed the net reel and let some of the net fall off the net reel and onto the ground. *Id*. ¶ 27.

The plaintiff then left the controls of the net reel and walked behind the truck to begin pushing the net over onto the reel above so that it would spool onto the net reel more smoothly. *Id*. ¶ 28. Paul Lavalley came upon the scene while the plaintiff was in the process of attempting to spool the net onto the net reel more smoothly. *Id*. ¶ 29. The plaintiff asked Lavalley to help out by operating the hydraulic controls on the left side of the truck. *Id*. Lavalley operated the hydraulic controls of the truck while the plaintiff began pushing and guiding the net onto the net reel. *Id*. ¶ 31. The accident occurred within five minutes after Lavalley began assisting Libby and the plaintiff. *Id*. ¶ 32. Lavalley testified at deposition that he saw the net reel on the F/V *Retriever* turn a quarter turn prior to the accident. *Id*. ¶ 33(a). Ring states by affidavit that the net reel on the F/V *Retriever* was not in use at the time of the accident and had not been in use for one to two hours before the accident. *Id*. ¶ 34.[2]

On the day of the accident, Libby had been told by the plaintiff to bill Thunder Bay for the net services that it was providing at the time of the accident, although no bill was ever sent. Plaintiff's SMF ¶ 37; Thunder Bay Responsive SMF ¶ 37.

Libby's design, construction, fabrication, welding, and modification of the net reel assembly occurred sometime in 2001. Thunder Bay's SMF ¶ 33; Plaintiff's Responsive SMF ¶ 33; Libby's Responsive SMF ¶ 33. Thunder Bay had no involvement in these activities. *Id*. ¶ 34. The net reel assembly had a crack that existed before Libby's work on the F/V *Retriever*'s net on October 12, 2005. *Id*. ¶ 35. The expert witnesses named by the parties agree that the

[2] Libby denies this paragraph of Loper-Bright's statement of material facts, Libby's L-B Responsive SMF ¶ 34, but the denial addresses only a portion of that paragraph, which I have not included in my recitation of the undisputed facts.

precise cause of the fracture is unknown but disagree about when it first developed and whether it could have been discovered before the accident. Libby SMF ¶ 48; Loper-Bright Responsive SMF ¶ 48.

III. Discussion

A. Plaintiff's Motion for Partial Summary Judgment

The plaintiff seeks summary judgment on the issue of agency, that is, on his allegation that Libby's employees were agents of Thunder Bay during the accident. Plaintiff's Motion for Partial Summary Judgment Against Thunder Bay, Inc. on the Issue of Agency ("Plaintiff's Motion") (Docket No. 65) at 1-2. This motion addresses only Count I of the amended complaint. *Id*. at 6. Count I invokes the Jones Act, 46 U.S.C. §30104, *et seq.* Amended Complaint ("Complaint") (Docket No. 37) ¶ 8. The plaintiff asserts that there is no "dispute over [his] status as a Jones Act seaman." Plaintiff's Motion at 7 n.1. Thunder Bay does not take issue with this assertion. Defendant Thunder Bay Inc.'s Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment ("Thunder Bay's Opposition") (Docket No. 84).

The scope of a maritime employer's liability to a seaman under the Jones Act is derived from the Supreme Court's ruling in *Sinkler v. Missouri Pac. R. Co*., 356 U.S. 326 (1958). In that case, the Supreme Court held that agency depends on whether the activity conducted by the alleged agent is "a vital operational activity" of the alleged master and that common law principles of liability do not apply. *Id*. at 327, 329. It is the broad purpose of the statute at issue that governs and it must be given "an accommodating scope." *Id*. at 330-31. In *Hopson v. Texaco, Inc.*, 383 U.S. 262 (1966), the Supreme Court specified that the Jones Act incorporates the standards of the statute at issue in *Sinkler*, *id*. at 263.

In order to establish agency under the *Sinkler/Hobson* doctrine in a Jones Act case, a plaintiff must establish that a third-party, here Libby, performed operational activities of the employer-defendant, here the vessel owner, Thunder Bay, which furthered the task of the vessel owner and were part of the vessel owner's total enterprise, and that Libby performed those activities under contract. *Sinkler*, 356 U.S. at 331-32. Here, the plaintiff contends that Libby "had been hired as a matter of operational necessity" for Thunder Bay's continued pair trawling to remove the net so that it could be worked on by the crews of both vessels. Plaintiff's Motion at 11. "Helping to repair the net used by pair trawling boats is surely an activity meant to further the task and is part of the total enterprise of both boats whose joint efforts with a single net yield a catch which profits both." *Id*. at 12 (internal punctuation omitted).

The plaintiff goes on to assert that Libby was under contract with Thunder Bay because the plaintiff hired Libby with the knowledge and authorization of the captain of the F/V *Retriever* and told Libby to bill Thunder Bay. *Id*. He contends that "no reasonable factfinder could conclude and no reasonable inference could be drawn other than that [Libby] was hired by and therefore under contract to the F/V *Thunder Bay* at the time of Plaintiff O'Brien's accident, though clearly on these facts [Libby] also had a contractual relationship with the F/V *Retriever* as well." *Id*. at 13-14. In the alternative, describing the pair trawling as a "joint venture," the plaintiff cites authority for the proposition that every joint venturer is an agent of the joint venture and binds all other joint venturers by its actions unless it has no authority to act in the manner at issue. *Id*. at 14; *see QAD Investors, Inc. v. Kelly*, 2001 ME 116, ¶¶ 15-18, 776 A.2d 1244, 1248-50 (liability of partners to a third party); *A. Willmann & Assocs. v. Penseiro*, 158 Me. 1, 5-6, 176 A.2d 739, 741 (1962) (joint venture governed by practically same rules that govern partnerships).

Thunder Bay responds that there was no contract between Libby and Thunder Bay. Thunder Bay's Opposition at 2-4. The plaintiff bases his claim that a contract existed between Thunder Bay and Libby on the asserted facts that the plaintiff "personally went to [Libby's] business location on the day of the accident and hired [Libby] to pull the net off the F/V *Retriever* and then return it to the F/V *Retriever* once it was untangled and repaired so the F/V *Thunder Bay* and F/V *Retriever* could return to pair trawling that day." Plaintiff's Motion at 13.[3] Of these, and the other facts cited by the plaintiff (the plaintiff was authorized by his employer and the captain of the F/V *Retriever* to use Libby, and had done so in the past; the two vessels were sharing net receipts; crewmen from both vessel were expected to work on the net; *id.*), only the assertion that the plaintiff hired or contracted with Libby provides a basis for a finding that the plaintiff's employer and Libby had entered into a contract with respect to the net reel service. He relies on paragraphs 23-24, 30, and 37 of his statement of material facts to support this assertion.

The flaw in the plaintiff's argument is that paragraphs 23, 24, and 30 of his statement of material facts are denied by Thunder Bay. Thunder Bay's Responsive SMF ¶¶ 23, 24, 30. Paragraph 37 is qualified in a manner that makes it less likely that the fact that Libby was told to bill Thunder Bay for his services that day supports a conclusion that Thunder Bay had itself contracted with Libby. *Id.* ¶ 37. Thunder Bay's denials of paragraphs 23 and 24 are well-supported by its citations to the summary judgment record. The same is not true for its denial of paragraph 30, for which no citation to the summary judgment record is provided. *Id.* ¶ 30.

[3] The plaintiff may have intended a document entitled "Plaintiff's Reply Statement of Material Facts" (Docket No. 95), which contains one statement and to which no responses have been filed, to bolster this assertion. The document states that "Daniel Libby testified that Timothy O'Brien, not Dave Reingardt, called D&E [Libby] to arrange for net services on the day of the accident and then O'Brien went out to D&E [Libby]." For the reasons discussed in text, this asserted fact does not conclusively establish the existence of a contract between Libby and Thunder Bay.

Paragraph 30 of the plaintiff's statement of material facts is thus deemed admitted, to the extent that it is supported by the references given to the summary judgment record. Local Rule 56(f).

The first cited authority in paragraph 30, paragraph 5 of the plaintiff's affidavit, suggests that he requested that Libby remove the pair trawling net on behalf of the F/V *Retriever* rather than on behalf of Thunder Bay ("I went out to the D&E [Libby] facility with the authority and knowledge of the captain of the F/V *Retriever* and requested that D&E [Libby] remove the pair trawling net from the F/V *Retriever*[.]"). Affidavit of Timothy G. O'Brien (Exh. 1 to Plaintiff's SMF) ¶ 5. The second cited authority, Libby's answers to the plaintiff's interrogatories numbers 6 and 10, merely establishes that the plaintiff called Libby "to service the net on the F/V *Retriever*[,]" and that Libby understood that the plaintiff "hired my business to carry out the operation[,]" Defendant Daniel Libby, d/b/a D&E Enterprises' Responses to Plaintiff's Interrogatories (Exh. 7 to Plaintiff's SMF) Responses 6 & 10. Neither of these facts necessarily establishes the existence of a contract between Thunder Bay and Libby. The third and final cited authority, the plaintiff's own response to Libby's second interrogatory, contributes nothing to the consideration of the issue at hand. Plaintiff's Answers to Daniel Libby's dba D&E Enterprises's Interrogatories (Exh. 6 to Plaintiff's SMF) Response 2. Accordingly, the plaintiff is not entitled to summary judgment on Count I on the basis of a contract between Thunder Bay and Libby, as disputed issues of material fact remain with respect to this element of the claim.

With respect to the alternative contention -- that Thunder Bay and the F/V *Retriever* were engaged in a joint venture, rendering the plaintiff's asserted authority from the F/V *Retriever* to hire Libby sufficient to make his employer liable for any negligence of Libby -- Thunder Bay contends that there is no evidence that it and the F/V *Retriever* ever intended to create a joint venture, or, more specifically, "to share liability akin to a partnership relationship." Thunder

Bay Opposition at 5-10. The plaintiff offers little analysis of the joint venture that he contends existed other than that "it is clear that the decision to pair trawl constituted a classic joint venture[.]" Plaintiff's Motion at 14. Thunder Bay, on the other hand, offers an extensive analysis of the legal elements of a joint venture. Thunder Bay's Opposition at 5-10. Unfortunately, Thunder Bay does not cite to the statements of material facts submitted by the parties in support of this analysis, but rather directly to the record. Facts recited in the body of a brief, without citation to a statement of material facts, are not cognizable on summary judgment. *Talarico v. Marathon Shoe Co.*, 221 F.Supp.2d 35, 39 n.1 (D. Me. 2002). The court should not be expected to parse Thunder Bay's statement of material facts to determine whether the untethered facts presented in its brief also appear in its statement of material facts; that is the task that the parties' statements of material facts are intended to obviate. *See, e.g., Rutledge v. Macy's East, Inc.*, 2001 WL 1117108 (D. Me. Sept. 17, 2001), at *10 n.21.

In his reply brief, the plaintiff for the first time cites paragraphs of his statement of material facts in support of his joint-venture argument. Plaintiff's Reply to Defendant Thunder Bay Inc.'s Opposition to Plaintiff's Motion for Summary Judgment (Docket No. 96) at 5. Of those cited paragraphs, 16, 18, 24, and 31, paragraph 24 is effectively denied by Thunder Bay. Thunder Bay's Responsive SMF ¶ 24. Paragraph 31 is qualified such that it denies the portion of that paragraph for which the plaintiff cites it. *Id.* ¶ 31. The remaining cited paragraphs establish only that the two vessels began pair trawling in September 2005 "in an effort to increase the catch and earnings of both vessels" and that the F/V *Thunder Bay* was authorized to pair trawl with the F/V *Retriever*. Plaintiff's SMF ¶¶ 16, 18. Those two facts do not a joint venture make.

Under Maine law, which the parties appear to agree is applicable in this case, "the paramount issue" in determining whether a joint venture exists "is the intent of the parties, and

the whole scope of the arrangement must be examined and each of its parts considered in relation to all the other parts to ascertain that intent." *Nancy W. Bayley, Inc. v. Maine Employment Sec. Comm'n*, 472 A.2d 1374, 1378 (Me. 1984) (citation and internal punctuation omitted). Elements of a joint venture include (1) joinder of property, skills, or risks or commingling of the properties and interests of the alleged joint venturers; (2) mutual right to control the carrying out of the alleged joint venture; and (3) discussion or agreement on the scope or duration or other requisite terms of the alleged joint venture agreement. *Allen Chase & Co. v. White, Weld & Co.*, 311 F.Supp. 1253, 1259 (S.D.N.Y. 1970). Here, the plaintiff offers evidence only of a possible joinder of skills or commingling of interests, but none of the other elements. The record does not reveal whether the owners of the two vessels agreed to share losses. *See id*. Mere community of interest is not enough. *United States v. Standard Oil Co. of California*, 155 F.Supp. 121, 148 (S.D.N.Y. 1957). Here, the record also fails to reveal whether joint control and management of the property of the alleged joint venture existed. *Id*.

Because there is insufficient evidence in the summary judgment record to establish that the two vessels were engaged in a joint venture at the time of the plaintiff's accident, the plaintiff is not entitled to summary judgment on Count I on this basis.

This conclusion makes it unnecessary to consider the parties' final dispute, whether Libby was performing an operational activity for Thunder Bay when the accident occurred.

B. Loper-Bright's Motion for Summary Judgment

Loper-Bright, the third-party defendant, moves for summary judgment on Libby's claims against it. Third-Party Defendant, Loper-Bright Enterprises, Inc.'s Motion for Summary Judgment ("Loper-Bright Motion") (Docket No. 67) at 1. It contends that Libby cannot prove that Loper-Bright owed the plaintiff a duty of care or that it proximately caused the plaintiff's

accident. *Id*. at 8-13. The third-party complaint seeks contribution and indemnification for any judgment, award, damages, or settlement in the primary action against Libby. Defendant Daniel Libby, d/b/a D & E Enterprises' Third-Party Complaint ("Third-Party Complaint") (Docket No. 23) at 3-4. Both counts allege negligence by Loper-Bright or by the F/V *Retriever*, which was owned at the relevant time by Loper-Bright. *Id*. ¶¶ 12, 15.

Loper-Bright cites applicable case law but does not explain why it did not owe the plaintiff a duty of care, other than characterizing Libby's theories of liability as "purely conjectural." Loper-Bright Motion at 8. It simply avers, in conclusory fashion, "even assuming arguendo that D&E [Libby] could establish a duty and a breach, i.e. negligence, on the part of the F/V Retriever, it cannot demonstrate that the F/V Retriever was a proximate cause of the accident." *Id*. This is simply an insufficient presentation to allow the court to conclude that Loper-Bright is entitled to summary judgment on this basis.

Loper-Bright goes on to argue that, assuming that Libby "might be able to prove" that "Loper-Bright owed D&E [Libby] a duty of care not to operate its net reel at the same time that D&E [Libby] operated its net reel[,]" and if "there is admissible evidence that Loper-Bright violated this duty," Libby cannot recover against Loper-Bright "because it is wholly speculative whether the F/V Retriever exerted any force upon D&E's [Libby's] net reel." *Id*. at 10. This argument fatally misperceives the claim asserted against Loper-Bright in the third-party complaint. The third-party complaint alleges that Loper-Bright caused injury to the plaintiff, not Libby, and that its negligence was directed at the plaintiff, not Libby. Third-Party Complaint ¶¶ 12, 15. Thus, Loper-Bright's motion does not address the negligence that is alleged against it in the third-party complaint.

Loper-Bright goes on to discuss what it terms Libby's second theory of liability, that Lavalley[4] negligently operated the controls of Libby's net reel at the time of the accident. Loper-Bright Motion at 10-11. The theory apparently ties this negligence to Loper-Bright by alleging that the use of Lavalley to operate the net reel was necessitated by the crew of the F/V *Retriever* abandoning the net repair job when all but one left to attend the safety meeting. *Id*. at 8. As characterized, I agree with Loper-Bright that this theory fails on summary judgment, as there is no evidence that Lavalley was negligent, that any particular training was required in order to operate the net reel controls appropriately, or that, if so, Lavalley lacked such training. However, I do not read Libby's opposition to this motion to assert such a theory of liability.

Loper-Bright posits as Libby's third and last theory of liability on its third-party claim that the F/V *Retriever* "abandoned" the net reel operation, leaving it with fewer people than necessary to perform the work safely, causing Libby and the plaintiff to spool the net onto Libby's reel in a lopsided manner, causing the plaintiff to attempt to remedy the problem by standing where the reel fell on him. *Id*. at 12. Loper-Bright asserts that this theory "extends the application of but for causation to the breaking point." *Id*. It also argues that Libby may not pursue this theory because Libby also contends that the plaintiff was in charge of the net reel operation. *Id*. The latter argument is inconsistent with the long-accepted practice of pleading, and even arguing at trial, in the alternative. The former argument does not convince me that no duty running from Loper-Bright to the plaintiff could exist as a matter of law. Similarly, Loper-Bright's contention that, if the plaintiff was negligent, it could not have been, and, if the plaintiff was not negligent, it similarly could not have been, *id*. at 12-13, is not convincing.

Loper-Bright invites the court to "enter judgment on any of D&E's [Libby's] three negligence theories it deems to be unsupported by the record," *id*. at 13, but two of those

[4] The parties spell this witness's name both as Lavalley and Lavallee. I have used the first spelling I encountered.

"theories" as described by Loper-Bright do not appear to me to be consistent with either the third-party complaint or Libby's opposition to Loper-Bright's motion. Entering judgment on a "theory" rather than a claim would be an empty exercise under the circumstances present here.

The failure of Loper-Bright's motion on its face to demonstrate an entitlement to summary judgment on the third-party complaint makes it unnecessary to consider Libby's arguments in opposition.[5] Third-Party Defendant Loper-Bright's motion for summary judgment should be denied.

C. Thunder Bay's Motion for Summary Judgment

Defendant Thunder Bay moves for summary judgment on all counts of the plaintiff's complaint and "summary judgment dismissal" of all cross-claims asserted against it by defendant Libby. Thunder Bay Inc.'s Motion for Summary Judgment ("Thunder Bay Motion") (Docket No. 69) at 1. Counts I-III of the amended complaint are asserted against Thunder Bay; Count IV is asserted against Libby. Amended Complaint ¶¶ 8-14. Libby has cross-claimed against Thunder Bay for contribution and indemnification. Daniel Libby, d/b/a D&E Enterprises' Cross-Claim (Docket No. 39) ¶¶ 7-9 & demand.

The plaintiff acknowledges that Thunder Bay seeks summary judgment on Count II of the amended complaint, which asserts an unseaworthiness claim, and asserts that he "dismisses Count II." Plaintiff's Memorandum in Opposition to Defendant Thunder Bay, Inc's Motion for Summary Judgment ("Plaintiff's Opposition") (Docket No. 75) at 2. Of course, the plaintiff may not simply "dismiss" a count of his complaint at this stage of the case. Federal Rule of Civil Procedure 41(a)(1) provides that a plaintiff may dismiss a claim or action without order of the

[5] For the future guidance of the parties, Libby's assumption that Loper-Bright's duty to its own seaman-employees under the Jones Act also ran to the plaintiff and Lavalley, the passer-by, Daniel Libby, d/b/a D&E Enterprises' Opposition to Third-Party Defendant Loper-Bright Enterprises, Inc.'s Motion for Summary Judgment (Docket No. 87) at 10-11, will require the citation of convincing authority before being adopted by this court.

court only before service by an adverse party of an answer or motion for summary judgment, whichever occurs first, or by filing a stipulation of dismissal signed by all parties who have appeared in the action. Neither alternative is applicable here, where answers have long since been filed and no stipulation of dismissal has been submitted. However, Thunder Bay also phrases its motion as one for dismissal of Count II, Thunder Bay Motion at 2, 16. Given the plaintiff's acquiescence, I recommend that Thunder Bay's motion to dismiss Count II be granted.

1. Counts I and III

Counts I and III of the amended complaint raise claims under the Jones Act and for maintenance and cure. Thunder Bay contends that the evidence "exonerates" it from any claim of negligence or causation. Thunder Bay Motion at 4. Thunder Bay does not say, but apparently assumes, that a finding that it is not liable on the Jones Act claim necessarily means that it is not liable on the claim for maintenance and cure. Neither count is mentioned in the body of the motion.[6]

Here again, Thunder Bay cites directly to the summary judgment record rather than to its statement of material facts, and, as previously noted, facts so presented are not cognizable on a motion for summary judgment. That makes it impossible for the court to consider Thunder Bay's first argument, that it was not negligent. Thunder Bay Motion at 4-6. I can consider Thunder Bay's second argument, that the *Hopson/Sinkler* doctrine does not apply to this case, *id.* at 6-15, to the extent that I was able to consider it on the plaintiff's cross-motion for summary judgment on the issue of agency. I cannot consider any additional facts that might be included in Thunder Bay's memorandum of law.

[6] Thunder Bay requests the entry of judgment in its favor on Count IV of the amended complaint in the introductory section of its motion. Thunder Bay Motion at 1-2. However, Count IV of the amended complaint is asserted only against Libby. Amended Complaint ¶¶ 13-14 and demand. The introductory section of Thunder Bay's motion does not mention Count III of the amended complaint, which is asserted against Thunder Bay. I will assume that Thunder Bay means to seek judgment on Count III, not Count IV.

Thunder Bay asserts that the *Hopson/Sinkler* doctrine does not apply because the plaintiff cannot show that Libby was negligent in performing Thunder Bay's operational activities under contract with Thunder Bay. *Id*. at 7. With respect to the existence of a contract between Thunder Bay and Libby, the evidence properly before the court is in conflict, as I noted earlier. This evidence shows that the plaintiff may or may not have "hired" Libby for the net reeling services, that Libby may or may not have been told to bill Thunder Bay for its services, and that Libby may or may not have understood that the plaintiff had hired him. This is insufficient to allow the court to conclude that no contract existed between Thunder Bay and Libby. I note as well that the plaintiff's alternative argument, that a joint venture between the two vessels was underway, making any contract between Libby and Loper-Bright a contract between Libby and Thunder Bay as well under the circumstances, is unopposed by Thunder Bay, which did not submit a reply memorandum with respect to its motion. That material factual dispute accordingly remains unresolved as well.

Even if there was such a contract, Thunder Bay contends, Libby was not performing "operational activities" of Thunder Bay at the time of the plaintiff's accident. *Id*. at 10-12. On this point, the only evidence properly before the court is that identified by the plaintiff in his memorandum of law in opposition to the motion. Plaintiff's Opposition at 6-7. Viewed with favorable inferences in favor of the plaintiff, as required in connection with a motion for summary judgment, those facts cannot be read to establish that Libby was not performing operational activities of Thunder Bay at the time of the accident. For example, it is necessary to the operation of fish trawling that a net be kept in good repair; the F/V *Thunder Bay* and the F/V *Retriever* were engaged in pair trawling, using the F/V *Retriever*'s net; work on nets is a traditional part of pair trawling; it was expected that crews of both vessels would work with

Libby to repair the net; both crews had worked on the net repair; and net repair costs were taken off the top from gross profits before the vessels divided the proceeds of the sale of a catch. Plaintiff's Opposition at 6-7; Plaintiff's SMF ¶¶ 17, 19-22, 27, 31, 38.

Finally, Thunder Bay argues that Libby's alleged negligence occurred "long before the plaintiff's accident" and thus predated any agency relationship between the two. Thunder Bay Motion at 12-15. Again, none of the evidence recited in Thunder Bay's memorandum may be considered in connection with this argument. In his response, the plaintiff contends that Libby's negligence includes failing to inspect the net reel equipment before it was used on the day of the accident and not knowing that the equipment was "defectively designed and already broken" on the day of the accident. Plaintiff's Opposition at 8-9. It is not necessary to reach this argument because Thunder Bay has not properly placed before the court any evidence that Libby was not negligent on the day in question, the starting point of its argument.

2. The Cross-Claim

Thunder Bay contends that it is entitled to summary judgment on Libby's cross-claim for indemnity and contribution because Libby "has not alleged negligence against Thunder Bay, aside from any negligence occasioned by the plaintiff himself, as an employee of Thunder Bay." Thunder Bay Motion at 16. Since "[t]he plaintiff's recovery will be decreased in proportion to his own negligence[,]" Thunder Bay asserts, Libby "will never be in a situation where it is liable for Thunder Bay's negligence." *Id.* I do not read Libby's cross-claim to be limited to seeking recovery for damages caused by the plaintiff's own negligence. Libby agrees, responding that it seeks recovery for damages caused by Thunder Bay's own negligence "for failing to properly staff the net repair operation and to independently inspect its agent's equipment." Daniel Libby, d/b/a D&E Enterprises' Opposition to Defendant Thunder Bay, Inc.'s Motion for Summary

Judgment (Docket No. 89) at 8. On the showing made, it is possible that Thunder Bay may have been negligent in a manner that caused the plaintiff's damages, independent of any negligence by the plaintiff in his individual capacity.

The motion for summary judgment on the cross-claim should be denied.

IV. Conclusion

For the foregoing reasons, I recommend that (1) the plaintiff's motion for partial summary judgment (Docket No. 65) be **DENIED**; (2) Loper-Bright's motion for summary judgment (Docket No. 67) be **DENIED**; (3) Thunder Bay's motion to dismiss Count II of the amended complaint (included in Docket No. 69) be **GRANTED**; and (4) Thunder Bay's motion for summary judgment (Docket No. 69) be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 28th day of August, 2008.

/s/ John H. Rich III
John H. Rich III
United States Magistrate Judge

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