UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 1:17-cv-20790-KMM

Isreal Alejandro Cazar Treto,

Plaintiff,

v.

Princess Cruise Lines, Ltd.,

Defendant.
_____/

ORDER DENYING MOTION TO REMAND AND GRANTING MOTION TO COMPEL ARBITRATION

THIS CAUSE came before the Court upon Defendant Princess Cruise Lines, Ltd.'s Motion to Dismiss and Compel Arbitration (ECF No. 8) and Plaintiff Israel Alejandro Cazar Treto's Motion to Remand (ECF No. 11). Both motions are fully briefed and now ripe for review. For the reasons that follow, Defendant's Motion to Compel Arbitration is GRANTED and Plaintiff's Motion to Remand is DENIED.

I. BACKGROUND

Isreal Alejandro Cazar Treto ("Plaintiff") worked as a crewmember for Princess Cruise Lines Ltd. ("Defendant") on nine different cruises between 2006 and 2013. *See* Defendant's Response in Opposition to Plaintiff's Motion to Remand ("Remand Opposition") (ECF No. 13) at 1; Plaintiff's Response in Opposition to Defendant's Motion to Compel Arbitration ("Arbitration Opposition") (ECF No. 9) at 2. On May 13, 2013, while aboard the vessel M/S Sun Princess ("Sun Princess") for the ninth cruise, Plaintiff allegedly slipped and fell down a set of stairs leading to the crew laundry room. *See* Complaint (ECF No. 1-2) ¶ 12; Notice of Removal (ECF No. 1) ¶ 6.

The Parties agree that prior to each of at least the first eight cruises, Plaintiff signed an employment contract with Defendant that incorporates a Collective Bargaining Agreement ("CBA"), which contains an arbitration clause. *See* Arbitration Opposition at 2–3, 6; Defendant's Reply in Support of its Motion to Compel Arbitration ("Arbitration Reply") (ECF No. 10) at 7 n.5. However, Plaintiff contends that there was also a ninth contract, signed before his ninth cruise, which neither party has produced. *See* Arbitration Opposition at 3. Plaintiff further contends that this ninth contract did not contain "an arbitral clause, arbitration agreement or other document indicating she [sic] would be bound by the CBA for the relevant employment period . . . ." *Id.* at 7.

Plaintiff filed suit in the Circuit Court for the 11th Judicial Circuit in and for Miami-Dade County, Florida based on injuries allegedly sustained from his fall, alleging one count of Jones Act negligence and one count of unseaworthiness against Defendant. *See* Complaint ¶¶ 12–28. Defendant removed the case to this Court and now moves to compel arbitration in Bermuda. *See* Notice of Removal ¶¶ 12–14; Motion to Dismiss and Compel Arbitration ("Arbitration Motion") (ECF No. 8). Plaintiff moves to remand to state court and also opposes the Arbitration Motion. *See* Motion to Remand and Brief Regarding Subject Matter Jurisdiction ("Remand Motion") (ECF No. 11).

II. ANALYSIS

Neither party argues that this matter should be adjudicated in this Court. On the one hand, Defendant moves this Court to compel arbitration pursuant to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the Convention"), and its implementing legislation, 9 U.S.C. §§ 201–208 (the "Convention Act"). *See* Arbitration Motion at 1–4. Defendant argues arbitration is appropriate in Bermuda because the eighth employment

contract, which Plaintiff signed on June 7, 2012, (the "2012 Contract"), applies to the incident in question and requires Plaintiff to arbitrate "any and all claims or disputes" with Defendant in Bermuda. *See id.* at 1–2.

Plaintiff, on the other hand, argues that the matter should not be subject to arbitration because the 2012 Contract does not apply to the incident aboard the Sun Princess, and in fact, Defendant has failed to produce any contract that applies to the incident in question. *See* Arbitration Opposition at 4–5. Additionally, Plaintiff argues that this Court does not have jurisdiction because the Jones Act and the "saving to suitors" clause of 28 U.S.C. § 1333 both require that this matter be remanded back to state court. *See* Remand Motion at 3–4. Because Plaintiff raises a jurisdictional issue, the Court considers it first.

A. Motion to Remand

The Complaint lodges two claims: Jones Act negligence and a maritime claim of unseaworthiness. Plaintiff argues that both of these claims are not removable. *See* Remand Motion at 1–7.

Generally, these claims are not removable to federal court.[1] *See, e.g.*, *Trifonov v. MSC Mediterranean Shipping Co. SA*, 590 F. App'x 842, 844–45 (11th Cir. 2014) ("Jones Act claims are generally not subject to removal."); *see also Am. Dredging Co. v. Miller*, 510 U.S. 443 (1994) (noting that Congress "appears to have withheld from Jones Act defendants the right of removal generally applicable to claims based on federal law.").

[1] Contrary to Plaintiff's assertions, the Court notes that "a suit under the Jones Act for negligence and under the maritime law for unseaworthiness . . . are not separate and independent claims or causes of action" for the purposes of determining the propriety of removal. *Pate v. Standard Dredging Corp.*, 193 F.2d 498, 501 (5th Cir. 1952). *Pate* is binding on this Court. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc) (adopting as binding precedent all the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981).

However, when these claims properly fall within the scope of an arbitration clause under the Convention, they are nevertheless subject to removal for the purposes of compelling arbitration. The Eleventh Circuit has made it "clear" that "Jones Act claims may be subject to arbitration under the Convention." *Trifonov*, 590 F. App'x at 845 (citing *Lindo v. NCL (Bahamas), Ltd.*, 652 F.3d 1257, 1286–87 (11th Cir. 2011)); *see also Allen v. Royal Caribbean Cruise, Ltd.*, 2008 WL 5095412, at *3–4 (S.D. Fla. Sept. 30, 2008), *aff'd*, 353 Fed. Appx. 360 (11th Cir. 2009) (finding that a case could be "removed notwithstanding the Jones Act claims"). Similarly, the "saving to suitors" clause of 28 U.S.C. § 1333 "does not bar application of the Convention"—as a result such cases may be removed to federal court and compelled to arbitration. *Pysarenko v. Carnival Corp.*, Civ. No. 14-20010, 2014 WL 1745048, at *8 (S.D. Fla. Apr. 30, 2014), *aff'd*, 581 F. App'x 844 (11th Cir. 2014).

Thus, if Plaintiff's claims properly fall within the scope of an arbitration clause under the Convention, this case is properly removed and shall be compelled to arbitration notwithstanding the procedural bars otherwise applicable to Jones Act negligence and unseaworthiness maritime claims. *See, e.g.*, *Pysarenko*, 2014 WL 1745048 at *8. If not, however, this case must be remanded back to state court because these claims are not otherwise removable. *See, e.g.*, *Florian v. Carnival Corp.*, Civ. No. 10-20721-JLK (ECF No. 15) (May 25, 2010) (finding that Jones Act case "must be remanded" where jurisdictional prerequisites under the Convention Act were not satisfied).

B. Motion to Compel Arbitration

The Convention Act "generally establishes a strong presumption in favor of arbitration of international commercial disputes." *Trifonov*, 590 F. App'x at 843 (citation and quotation marks omitted). "In deciding a motion to compel arbitration under the Convention Act, a court conducts

a very limited inquiry." *Bautista v. Star Cruises*, 396 F.3d 1289, 1294–95 (11th Cir. 2005) (internal quotation marks and citations omitted). Specifically, a district court "must order arbitration" unless the four jurisdictional prerequisites are not met, or one of the Convention's affirmative defenses applies.[2] *Id.* The jurisdictional prerequisites require that "(1) there is an agreement in writing within the meaning of the Convention; (2) the agreement provides for arbitration in the territory of a signatory of the Convention; (3) the agreement arises out of a legal relationship, whether contractual or not, which is considered commercial; and (4) a party to the agreement is not an American citizen, or that the commercial relationship has some reasonable relation with one or more foreign states." *Id.*

Plaintiff does not dispute that elements two, three, and four are satisfied here. Nor could Plaintiff do so. The second element is satisfied because the contract that Defendant contends applies—the 2012 Contract—provides that arbitration would occur in Bermuda, which is a signatory to the Convention. *See* Exhibit 1 to Arbitration Motion (ECF No. 8-1) (hereinafter the "2012 Contract"); *see also Krstic v. Princess Cruise Lines, Ltd. (Corp)*, 706 F. Supp. 2d 1271, 1275 n.4 (S.D. Fla. 2010) ("Bermuda is a signatory to the Convention."). The third element is satisfied because "an employment contract is 'commercial'" within the meaning of the Convention. *See Bautista v. Star Cruises*, 396 F.3d 1289, 1299 (11th Cir. 2005). Finally, the fourth element is satisfied because neither party to the agreement is an American citizen. *See* Arbitration Motion at 7 ("the Sun Princess is a Bermuda flagged vessel, and Plaintiff is a citizen and resident of Mexico."). Plaintiff also does not assert any affirmative defenses.

[2] "The affirmative defenses authorized by the Convention have a 'limited scope' allowing parties to avoid arbitration only where the arbitration is 'null and void, inoperative or incapable of being performed' as those terms are defined within the Convention." *Polychronakis v. Celebrity Cruises, Inc.*, Civ. No. 08-21806, 2008 WL 5191104, at *2 (S.D. Fla. Dec. 10, 2008).

Instead, Plaintiff exclusively attacks the first element: whether there was an agreement in writing within the meaning of the Convention. Plaintiff argues Defendant has failed to establish the existence of a written agreement mandating arbitration for disputes arising from the ninth cruise, during which the alleged injuries occurred. *See, e.g.*, Arbitration Opposition at 5.

Defendant argues that the employment contract Plaintiff signed prior to the eighth cruise governs disputes during the ninth cruise, including the claims here. *See* 2012 Contract. The 2012 Contract provides, in relevant part, that the "Employee understands and agrees that the Collective Bargaining Agreement ("CBA") between the Company and the Unions attached hereto is incorporated into and made part of this Contract and is binding on the Employee and Company." *Id.* The 2012 Contract also provides that "any and all disputes of any kind or nature whatsoever between Employee and Company shall be resolved by binding arbitration in Bermuda as set forth in Article 15 of the attached CBA." *Id.* Article 15 of the Collective Bargaining Agreement (or "CBA"), in turn provides:

> BY ACCEPTING EMPLOYMENT WITH COMPANY, EMPLOYEE UNDERSTANDS, AGREES TO AND ACCEPTS THE OBLIGATION TO ARBITRATE ANY DISUTE AS FURTHER SET FORTH IN THIS ARTICLE 15. THE PARTIES HEREBY KNOWINGLY AND VOLUNTARILY WAIVE ANY RIGHT THEY MAY HAVE TO A JURY TRIAL, AND WAIVE ANY RIGHT TO HAVE A COURT DETERMINE THE ENFORCEABILITY OF THE AGREEMENT TO ARBITRATE.
>
> . . .
>
> In the absence of another controlling government-mandated contract containing a dispute resolution provision or procedure, the parties intend and agree that every conceivable claim, demand, dispute, action, suit, petition or controversy of any kind or nature without any limitation whatsoever that Employee may bring or assert against Companies or that Companies may bring or assert against Employee, regardless of where, when or how the incident or matters giving rise to such dispute occurs, are international commercial disputes and **shall be referred to and resolved**

> **exclusively by binding arbitration in Bermuda** pursuant to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York 1958), 21 U.S.T. 2517, 330 U.N.T.S. 3, 1970 U.S.T. Lexis 115, ("the Convention"), to the exclusion of any other fora, in accordance with the Arbitration Act 1986 of Bermuda ("Arbitration Act").

See Exhibit 2 to Arbitration Motion at 14 (ECF No. 8-2) (hereinafter "CBA") (emphasis in original).

Plaintiff does not contest that the 2012 Contract or the CBA incorporated therein contains a valid arbitration provision, but rather argues that the 2012 Contract did not cover the relevant employment period during which Plaintiff was injured. *See* Arbitration Opposition at 2–3; *id.* at 7 ("Defendant has yet to produce an executed employment agreement for this time frame."). Specifically, Plaintiff argues that the 2012 Contract applies only to his eighth cruise (aboard the Caribbean Princess), which began in June of 2012 and ended when he disembarked from that ship in December of 2012. *Id.* at 2–3. Plaintiff contends that a distinct (ninth) employment period began when he boarded the Sun Princess in February of 2013. *Id.* Plaintiff concludes that the 2012 Contract is an "irrelevant employment contract" because it was only during his "ninth employment period" that Plaintiff suffered his May 13, 2013 injuries. *Id.* at 2–5.

In support, Plaintiff cites two cases—*Florian v. Carnival Corp.*, Civ. No. 10-20721-JLK (ECF No. 15) (May 25, 2010) and *Filipovic v. Seabourn Cruise Line Limited*, Civ. No. 15-20611-JEM (ECF No. 25) (Feb. 3, 2016) (Report and Recommendation)—which stand for the simple proposition that a plaintiff who has not signed an agreement requiring arbitration covering the period in question cannot be compelled to arbitrate. *See* Arbitration Opposition at 6–7. In an attempt to establish that this proposition applies to the case at bar, Plaintiff makes two arguments.

First, Plaintiff points to language in the CBA, which provides: "[t]he terms become effective the day the Employee signs onto the vessel up to and including the day when the Employee signs off the vessel." *See* Arbitration Opposition at 8 (quoting CBA at 5). However, this clause must be viewed in the context of the entire CBA, which is incorporated by reference into the 2012 Contract.[3] Article 2 of the CBA provides that:

> **In the event the employee fails to execute the Contract, works aboard any vessel operated or manned by the Company during any period after signing off without executing a new Contract**, or is transferred to any other vessel or vessel under construction owned, operated or controlled by Company without signing a new Contract, **this CBA shall nonetheless apply and govern Employee's employment**.

See CBA at 5 (emphasis added). In other words, Article 2 provides—in no uncertain terms—that the CBA governs Plaintiff's employment relationship with Defendant in the event that another employment agreement is not executed prior to Plaintiff's embarking on another cruise. Because the CBA explicitly states it will continue to apply as long as Plaintiff is employed aboard a Princess vessel or until he executes a new employment contract, the CBA's arbitration clause continued to apply during Plaintiff's employment aboard the Sun Princess (including on the date of the May 13, 2013 incident) unless he signed another employment contract.

Second, Plaintiff appears to argue that he signed a ninth contract with Defendant upon embarking the Sun Princess.[4] *See, e.g.*, Arbitration Opposition at 2 ("Plaintiff's ninth contract, which covers the relevant employment period, began on or about February 2013 onboard the

[3] *See* 2012 Contract ("Employee understands and agrees that the Collective Bargaining Agreement ("CBA") between the Company and the Unions attached hereto is incorporated into and made part of this Contract and is binding on the Employee and Company.").

[4] The Court notes however, that on other occasions, Plaintiff appears to indicate that there was no ninth contract. *See, e.g.*, Arbitration Opposition at 8 ("An employee cannot be bound to the provisions of a contract he never signed").

M/S Sun Princess."); *id.* at 7 ("Plaintiff began his ninth employment contract on February 2013"). In support of this, he points to "Defendant's practice" for "crewmembers to sign a contract at the beginning of each employment period." Arbitration Opposition at 2.[5] The record reflects eight different employment contracts for each of the eight cruises Plaintiff went on prior to embarking on the Sun Princess in February of 2013. *See* Composite Exhibit 3 to Arbitration Reply (ECF No. 10-3); 2012 Contract; *see also* Arbitration Reply at 7 n.5; Arbitration Motion at 2 n.1.

While it is true that Plaintiff generally signed new employment agreements with Defendant before each cruise, Plaintiff has provided absolutely no evidence that a ninth agreement was executed prior to his boarding the Sun Princess in February of 2013. Because Defendant made a "prima facie showing of the existence of an agreement to arbitrate" (the 2012 Contract), the burden "shifts to the party opposing arbitration." *Desimoni v. TBC Corp.*, No. 2:15-CV-366-FTM-99CM, 2016 WL 3675460, at *5 (M.D. Fla. June 9, 2016), *report and recommendation adopted*, No. 2:15-CV-366-FTM-99CM, 2016 WL 3633540 (M.D. Fla. July 7, 2016); *see e.g.*, *Herrera Cedeno v. Morgan Stanley Smith Barney, LLC*, 154 F. Supp. 3d 1318, 1325–26 (S.D. Fla. 2016) ("the burden then shifts to Plaintiff to show that no valid contract existed and to meet that burden [ ]he must unequivocally deny that an agreement to arbitrate was

[5] Plaintiff also points to a supposed "admission" by Defendant's counsel. *See, e.g.*, Arbitration Opposition at 2 ("Defendant admits Plaintiff worked for nine employment contracts"); *id.* at 7 ("Defendant admits Plaintiff began his ninth employment contract on February 2013"). Defendant's supposed "admission" states in full: "Plaintiff worked nine contracts aboard Princess cruise ships between 2006 and 2013." *See* Arbitration Motion at 1; Remand Opposition at 1. While Defendant's choice of words is somewhat confusing, the Court understands Defendant to be using the word "contract" as a term of art to mean employment periods because (1) it is preceded by the verb "worked" as opposed to "executed" and (2) the entire context of the brief makes clear that Defendant believes that Plaintiff did not execute a contract subsequent to the 2012 Contract.

reached and must offer some evidence to substantiate the denial." (citations and quotation marks omitted)). Plaintiff's bare assertion that there was a ninth contract—bolstered by no evidence—does not satisfy Plaintiff's burden of providing any evidence of a subsequent agreement abrogating the 2012 Contract.

Therefore, the Court finds that the arbitration provisions contained in the CBA, which were incorporated into the 2012 Contract, continued to apply to Plaintiff's work on the ninth cruise aboard the Sun Princess, including the alleged injury occurring on May 13, 2013. Accordingly, pursuant to 9 U.S.C. Section 206, the Court finds it appropriate to send the entire above-styled matter to arbitration as set forth in the CBA. *See* 9 U.S.C. § 206 ("A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States.").

C. Dismissal is Warranted

Plaintiff argues that if the Court sends the matter to arbitration, the Court should not dismiss the case, but instead should issue a stay pending a decision in the arbitration. *See* Arbitration Opposition at 2. Defendant argues that the Court should dismiss the case. *See* Arbitration Reply at 1–2.

The Federal Arbitration Act provides, in pertinent part, that a court compelling arbitration "shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement." 9 U.S.C. § 3 (emphasis added). There is no statutory reference to dismissal. However, courts in this district have taken both approaches. *Compare Perera v. H & R Block E. Enterprises, Inc.*, 914 F. Supp. 2d 1284, 1290

(S.D. Fla. 2012), 914 F. Supp. 2d 1284, 1290 (S.D. Fla. 2012) (dismissing arbitrable claims) *with Albert v. Nat'l Cash Register Co.*, 874 F. Supp. 1328 (S.D. Fla. 1994) (staying arbitrable claims).

The Eleventh Circuit has, at one point, suggested that when claims are subject to arbitration, it is error to dismiss the claims rather than stay them. *See Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698 (11th Cir. 1992) (reversing dismissal of arbitrable claims, remanding with instructions to enter stay, and stating that "[u]pon finding that a claim is subject to an arbitration agreement, the court should order that the action be stayed pending arbitration"). More recently, however, the Eleventh Circuit has affirmed dismissal when all claims are subject to arbitration. *See, e.g.*, *Caley v. Gulfstream Aerospace Corp.*, 333 F. Supp. 2d 1367 (N.D. Ga. 2004) (compelling arbitration and dismissing the case), *aff'd* 428 F.3d 1359 (11th Cir. 2005); *Olsher Metals Corp. v. Olsher*, Civ. No. 01-3212-JORDAN, 2003 WL 25600635, at *9 (S.D. Fla. Mar. 26, 2003), *aff'd,* 90 F. App'x 383 (11th Cir. 2003)[6] (dismissing case with prejudice because all of the plaintiff's claims must be submitted to arbitration).

Because all of Plaintiff's claims are subject to arbitration here, the Court finds that dismissal of the case is appropriate.

III. CONCLUSION

For the foregoing reasons, it is hereby ORDERED AND ADJUDGED that

(1) Defendant's Motion to Compel Arbitration (ECF No. 8) is GRANTED. The Parties are hereby DIRECTED to arbitrate this dispute as outlined in the CBA.

(2) Plaintiff's Motion to Remand (ECF No. 11) is DENIED.

(3) All other pending motions are DENIED AS MOOT.

(4) This case is DISMISSED.

[6] For text of the Eleventh Circuit's Order, *see* 2004 WL 5394012 (11th Cir. Jan. 26, 2004).

(5) The Clerk of the Court is instructed to CLOSE this case.

DONE AND ORDERED in Chambers at Miami, Florida, this 10th day of August, 2017.

K. MICHAEL MOORE
CHIEF UNITED STATES DISTRICT JUDGE

cc: All counsel of record