IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA PANAMA CITY DIVISION

NORWEGIAN HULL CLUB et al.,

Plaintiffs,

v. CASE NO. 5:21cv181-RH-MJF

NORTH STAR FISHING COMPANY LLC et al.,

Defendants.

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ORDER DENYING SUMMARY JUDGMENT IN PART

This is a dispute over the amount due under a builder's risk insurance policy. The policy insured a fishing vessel, the M/V North Star. The vessel was under construction in Panama City, Florida, when Hurricane Michael came ashore. The ship became unmoored, drifted, and suffered substantial damage.

The plaintiffs are the policy's underwriters—in effect, the insurers. They filed this action for declaratory relief, asserting they have paid the policy limits and owe nothing more. The defendants are the ship's owner, North Star Fishing Company LLC, and the ship's builder, Eastern Shipbuilding Group Inc. The

defendants assert the plaintiffs owe a substantial additional amount based on the policy's escalation clause:

> In the event of any increase or decrease in the cost of labor or materials, or in the event of any change in the specifications or design of the Vessel (not constituting a material change for purposes of the held covered provisions of the Subject Matter clause), the Agreed Value shall be adjusted accordingly, but any increase shall be limited to ____ per cent. of the Agreed Value as provisionally declared, and the Amount Insured shall be adjusted proportionately; provided that the Assured shall pay premium at the full Policy rate on the total construction cost of the Vessel of this insurance, but the Underwriters shall in no event be liable under this Policy for more than the Agreed Value provisionally declared plus said percentage thereof.

The rub is obvious: the blank in which a percentage could have been inserted was left blank. The plaintiffs say this means there can be no escalation. The defendants say this means there is no limit on any otherwise-proper escalation.

The two sides have filed cross-motions for summary judgment addressing this issue. Each side says the clause unambiguously supports its position, but that is not so. The clause is ambiguous.

The policy says it "shall be governed by the Laws of the State of New York." The plaintiffs say that, under New York law, a clause with a blank that has not been filled in is inoperative. But that is so only "if the parties so intended." *Boyd v. Haritidis*, 657 N.Y.S.2d 463, 465 (N.Y. App. Div. 1997). Here, each side has presented nonconclusory parol evidence supporting its position—evidence that,

if credited, would support a finding that the parties intended either no escalation clause, or an unlimited escalation clause, or perhaps something in between, more in line with the 15% to 25% often inserted into this blank in this builder's risk form. *See New York v. Home Indem. Co.*, 486 N.E.2d 827, 829 (N.Y. 1985) (explaining that when parties offer nonconclusory extrinsic evidence, the resolution of an ambiguity is for the trier of fact). The defendants assert the policy's selection of New York law is invalid, but on the issue of the validity and meaning of the escalation clause, summary judgment would properly be denied under any potentially applicable choice of law. *See, e.g.*, *Marshall v. Thurston Cnty.*, 267 P.3d 491, 494 (Wash. Ct. App. 2011) (Washington law); *Bayco Dev. Co. v. Bay Med. Ctr.*, 832 So. 2d 921, 922 (Fla. 1st DCA 2002) (Florida law); *Gulf Tampa Drydock Co. v. Great Atl. Ins. Co.*, 757 F.2d 1172, 1174 (11th Cir. 1985) (stating that admiralty law generally looks to "appropriate state law" in determining questions involving a marine insurance contract).

In sum, neither side is entitled to summary judgment on this issue.

The plaintiffs' summary-judgment motion presents an additional issue. The defendants assert claims under Washington statutes addressing the obligations of insurers in responding to claims. Washington is North Star's home, the policy might have been entered or delivered there, and amounts due North Star, not Eastern, might be payable there. The plaintiffs say the statutes do not apply

because New York law governs even on matters of this kind. If the contract's choice-of-law provision were held invalid or inapplicable, the governing law would not be New York's, but it also might not be Washington's—the loss occurred in Florida, and amounts due Eastern might be payable there. This part of the summary-judgment motion will be heard at the pretrial conference.

The parties should address choice of law—including any role of admiralty jurisdiction—in their trial briefs. The October 21, 2021 order denying as moot the motion to dismiss the original complaint said, in dictum, that the case is not within the court's admiralty jurisdiction. ECF No. 20 at 2. The defendants had addressed admiralty jurisdiction in the motion to dismiss, but the plaintiffs had not responded. The October 21 order should not have addressed the issue without full briefing. In their trial briefs, the parties should treat admiralty jurisdiction as an open issue. *See Kossick v. United Fruit Co.*, 365 U.S. 731, 735 (1961) ("[A] contract to repair or to insure a ship is maritime, but a contract to build a ship is not.") (internal citations omitted); *see also Bender Shipbuilding & Repair Co. v. Brasileiro*, 874 F.2d 1551, 1553 (11th Cir. 1989) (stating marine insurance policies are "generally recognized" as being marine contracts and therefore within admiralty jurisdiction, but "[t]he interest insured, and not just the risk insured against, must be maritime.").

There is recent, binding authority on the enforceability of choice-of-law provisions in marine insurance policies. *See Great Lakes Ins. SE v. Wave Cruiser LLC*, 36 F.4th 1346 (11th Cir. 2022).

Choice of law and admiralty jurisdiction ultimately might make no difference in the outcome. Regardless of how these issues are resolved, parol evidence will be admissible and the case will go to trial on both the escalation-clause issue and damages—that is, the amount the defendants will recover if the escalation clause is held operative. But choice of law and admiralty jurisdiction may affect other issues, perhaps including entitlement to a jury trial. *See St. Paul Fire & Marine Ins. Co. v. Lago Canyon, Inc.*, 561 F.3d 1181, 1189 (11th Cir. 2009). If it is held that the case is within admiralty jurisdiction and that, under *Lago Canyon*, there is no right to a jury trial, an advisory jury may nonetheless be empaneled—a possibility that may be addressed at the pretrial conference. *See id.* at 1192-99 (Wilson, J., concurring) (asserting the prior precedent relied on in *St. Paul* was incorrectly decided and a jury trial should be available).

For these reasons,

IT IS ORDERED:

1. The plaintiffs' summary-judgment motion, ECF No. 57, is denied in part and remains pending in part.

2. North Star's summary-judgment motion, ECF No. 58, as joined by Eastern, ECF No. 61, is denied.

SO ORDERED on February 8, 2023.

s/Robert L. Hinkle
United States District Judge