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.

____/

FINDINGS OF FACT AND CONCLUSIONS OF LAW

When Hurricane Michael came ashore near Panama City, Florida, the M/V North Star was under construction there, nearing completion. The vessel became unmoored, drifted, ran aground, and suffered substantial damage. The vessel's owner, North Star Fishing Company, LLC, and the builder, Eastern Shipbuilding Group Inc., were the assureds under an owner-controlled builder's risk insurance policy.

The policy's underwriters—in effect, the insurers—recognized their obligation to pay the cost to repair the vessel, up to the policy's limit. But the parties disagreed on the limit. The underwriters filed this action against the

assureds seeking a declaration that they have paid all that is due under the policy. The assureds counterclaimed for the additional amount spent to repair the vessel. The assureds also asserted claims under State of Washington statutes.

The case has been tried to the court. Findings of fact and conclusions of law were set out on the record at some length at the conclusion of the trial. *See* ECF No. 184 at 235, 248–52, 256–58, 261, 268–73, 277–99. This order summarizes the ruling. A more complete recitation would serve no purpose. Credibility determinations are made consistent with the result.

I

For most types of insurance, comprehensive policies set out in excruciating detail all applicable terms. But in marine insurance, where it is often said the parties must act with utmost good faith, the written contract often consists only of a cover slip. A builder's risk cover slip typically identifies the lead underwriter, assured, and vessel, sets out the vessel's agreed value, incorporates by reference specific industry-approved clauses, and confirms any departure from the approved clauses. Even together, the cover slip and incorporated clauses do not include all the excruciating detail typical in most nonmarine policies. Much is left to the tradition that has grown up in the industry—and has been approved by the courts—through the centuries. This case followed that pattern.

The terms of the builder's risk policy at issue were set out in a cover slip. The slip incorporated by reference "American Institute Builders Risks Clauses (Feb 8, 1979)13-L," often referred to as the "American clauses."

The parties agreed on a final contract value of $77 million. The cover slip included that amount. It was standard practice in the industry for the insurer's potential liability under a builder's risk policy of this kind to extend not only to the agreed contract value but also to any increased amount under an "escalation" clause. The American clauses that were explicitly incorporated into this policy by reference included such a 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.

Any reasonable participant in this industry would have understood—and it is more likely than not that these parties actually understood—that this policy included this escalation clause, so that, if, as actually occurred, the cost of labor and materials incurred by Eastern in the construction of this vessel exceeded $77 million, the underwriters' limit of liability also would exceed $77 million.

Two circumstances do not change this conclusion.

First, before entry into this policy, there was no mention at all of escalation. That means, of course that there also was no mention of the maximum percentage of escalation—no mention of the number that would appropriately be inserted into the blank in the standard escalation clause. Even so, the standard practice in the industry was for there to be not only escalation but also a cap—a maximum percentage by which coverage could increase. The standard London escalation clause—the clause most often used by the London broker and the underwriter directly involved in this negotiation—caps escalation at 25%, unless otherwise explicitly indicated. The form American escalation clause, in contrast, does not include a maximum percentage; the clause instead has a blank into which the parties can insert the maximum percentage. But in the United States, as in London, the industry norm is 25%. A reasonable participant in the industry would have understood, in these circumstances, based on the actual communications that did and did not occur between the parties, that this contract included escalation under the American clause capped at 25%. That is what these parties intended.

Second, after entry into the contract, the assureds' American broker Robert Taylor sent the assureds a document apparently intended to inform them of the policy's terms. The document had no table of contents but included provisions that could be divided into three categories. The first consisted of content unilaterally

inserted by Mr. Taylor but never seen nor agreed to by the underwriters and thus not part of the contract. The second included copies of the cover slip, together with endorsements not relevant here. The copies showed the names, percentages, and attestations of the subscribing underwriters. The third category consisted of a blank copy of the American clauses that were incorporated by reference into the contract—a copy of the kind that could be downloaded from the internet, with none of the blanks filled in. The unfilled blanks were for the policy number, names of the underwriters and names of the assureds and loss payees, the vessel's hull number and type, the beginning and ending dates of the coverage, the agreed value, and the maximum escalation percentage. That the escalation percentage was left blank was hardly surprising—every blank in the form was left blank—and was of no substantive import. Indeed, the underwriters did not see the document compiled by Mr. Taylor and did not know he left all the blanks in the form blank.

The cost of labor and materials incurred during the original construction of this vessel, prior to the hurricane, exceeded the agreed $77 million contract value by more than 25%. Because the insurance contract, properly understood, provided for escalation capped at 25%, the contract provided maximum coverage of $77 million multiplied by 1.25—a total of $96.25 million. The reasonable cost to repair the physical damage to the vessel caused by the hurricane exceeded $96.25 million.

The assureds paid a premium based on the agreed $77 million value. Under the escalation clause, the assureds must pay an additional premium at the same rate for the increased coverage. The bottom line: the underwriters' principal liability to the assureds is $96.25 million reduced by the deductible and reduced by the increase in the premium. The underwriters have paid $77 million less the deductible, leaving a net principal amount due of $19.25 million less the increase in the premium.

The increase in the premium is $121,178.75. The calculation is this. The original premium was $415,415. The policy period was extended six months at a rate of .015% of the agreed contract value per month. The premium for the six months thus was $77,000,000 x .00015 x 6 = $69,300. So the total premium was $415,415 + $69,300 = $484,715. The 25% escalation made the assured responsible for an additional 25% of that amount: $484,715 x 0.25 = $121,178.75.

The principal amount of the judgment that will be entered based on this order is $19,250,000 – $121,178.75 = $19,128,821.25.

II

The assureds also seek an award of prejudgment interest. This section's subsection A addresses whether prejudgment interest should be awarded. Subsection B addresses the interest rate. Subsection C addresses the period for which interest should be awarded and calculates the award.

A

Prejudgment interest must be awarded as a matter of law and in any event would be awarded as a matter of discretion. This is so regardless of whether the issue is governed by admiralty law or by New York law based on the cover slip's choice-of-law provision: "This policy shall be governed by the Laws of the State of: New York."

1

Under admiralty law, prejudgment interest must be awarded unless "peculiar circumstances" make an award unjust. *See Ins. Co. of N. Am. v. M/V Ocean Lynx*, 901 F.2d 934, 942 (11th Cir. 1990) ("As a general rule, pre-judgment interest should be awarded in admiralty cases. Pre-judgment interest is not a penalty, but compensation to the plaintiff for the use of funds that were rightfully his."); *see also Sunderland Marine Mut. Ins. Co. v. Weeks Marine Const. Co.*, 338 F.3d 1276, 1280 (11th Cir. 2003) ("It is the general rule of this circuit to award pre-judgment interest in admiralty cases."); *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540, 1550–51 (11th Cir.1987) (holding that a district court has discretion *not* to award prejudgment interest in an admiralty case only if peculiar circumstances would make such an award unjust), *abrogated on other grounds by The Dutra Grp. v. Batterson*, 139 S. Ct. 2275 (2019). There are no peculiar circumstances here that would make an award unjust.

2

Under New York law, a party who obtains a judgment for a liquidated sum that should have been paid at a set time in the past is entitled to prejudgment interest. A court has no discretion to withhold such an award. *See, e.g.*, *Spodek v. Park Prop. Dev. Assocs.*, 759 N.E.2d 760, 762 (N.Y. 2001); *Arizona Premium Fin. Co., Inc. v. Emps. Ins. Of Wausau*, 586 F. App'x 713, 717 (2d Cir. 2014).

B

The proper *rate* of prejudgment interest turns on whether the issue is controlled by admiralty law or by New York law.

1

The underwriters have vigorously asserted throughout this litigation that the cover slip's choice-of-law provision is controlling—that on substantive issues related to the contract, New York law controls. The underwriters are correct. *See Great Lakes Ins. SE v. Wave Cruiser LLC*, 36 F.4th 1346, 1354 (11th Cir. 2022).

The choice of New York law applies not only to the underlying contract-interpretation questions but also to prejudgment interest. *See Schwimmer v. Allstate Ins. Co.*, 176 F.3d 648, 650 (2d Cir. 1999) ("The awarding of prejudgment interest is considered a question of substantive law."); *Venn v. St. Paul Fire & Marine Ins. Co.*, 99 F.3d 1058, 1066 (11th Cir. 1996) (holding, in a case in which state law supplied the rule of decision, that "[w]hether a successful claimant is entitled to

prejudgment interest is a question of state law") (citing *Royster Co. v. Union Carbide Corp.*, 737 F.2d 941 (11th Cir. 1984)).

Even if the cover slip's choice-of-law provision were somehow deemed to leave it to New York's choice-of-law rules to determine whose law applies to prejudgment interest, the result would be the same. "Under New York choice of law rules, the law of the jurisdiction that determines liability governs the award of pre-judgment interest." *Schwimmer*, 176 F.3d at 650; *see also Entron, Inc. v. Affiliated FM Ins. Co.*, 749 F.2d 127, 131 (2d Cir.1984).

Under New York law, prejudgment interest accrues at 9% per annum. N.Y. C.P.L.R. § 5004(a). This order awards interest at that rate.

2

When, as here, a claim is within the court's admiralty jurisdiction, the court properly applies a uniform body of admiralty law. That uniform body of law includes this: choice-of-law provisions are valid, at least when not unreasonable or unjust. *See Wave Cruiser*, 36 F.4th at 1353–54; *see also Marine Ins. Co. v. Shackleford*, 945 F.3d 1135, 1143 (11th Cir. 2019).

These parties' choice of New York law was neither unreasonable nor unjust. The transaction bore no direct relationship to New York, but neither was it centered entirely or even predominantly in any other single jurisdiction. The transaction involved a Norwegian lead underwriter, following underwriters from

other countries, a State of Washington vessel owner, a Florida shipbuilder, and a vessel being built in Florida for sailing in international waters. Under circumstances like these, parties might reasonably opt for a well-developed body of law in a major commercial center—a body of law acceptable to both sides. Indeed, that the chosen jurisdiction was not any participant's home might have made its selection all the more reasonable.

In sum, as a matter of admiralty law, the choice-of-law provision is valid, so prejudgment interest is governed by New York law. The rate is 9%.

If, however, the choice-of-law clause did not apply to prejudgment interest, this order still would award interest at 9%, as a matter of the court's discretion under substantive admiralty law. This accords with the law of the circuit but is contrary to the circuit's most recent treatment of the issue.

In *Sunderland Marine Mutual Insurance Co. v. Weeks Marine Construction Co.*, 338 F.3d 1276, 1280 (11th Cir. 2003)—an admiralty case—the court said the "rate of pre-judgment interest that should be awarded is the prime rate during the relevant period." *Sunderland*, 338 F.3d at 1280. For this, the court cited Seventh and Eighth Circuit decisions. But under *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), Fifth Circuit decisions issued before October 1, 1981, are binding in the Eleventh Circuit. *Sunderland* overlooked contrary, binding Fifth Circuit decisions. *See Gator Maine Serv. Towing, Inc. v. J. Ray McDermott &*

Co., 651 F.2d 1096, 1101 (5th Cir. Unit A July 29, 1981) (upholding prejudgment interest rate of 10% and stating: "Admiralty courts enjoy broad discretion in setting prejudgment interest rates"); *Harrison v. Flota Mercante Grancolombiana*, 577 F.2d 968, 988 (5th Cir. 1978) (approving an award at the forum state's statutory rate of 6%); *In re M/V Vulcan*, 553 F.2d 489, 491 (5th Cir. 1977) (upholding an award at 12%—the prevailing party's cost of borrowing—even though the forum state's statutory rate was 10%); *Geotechnical Corp. v. Pure Oil Co.*, 214 F.2d 476 (5th Cir. 1954) (holding an admiralty court is not bound by, but may consider, the forum state's statutory rate, and upholding an award at the forum state's 5% statutory rate).

None of these cases involved contract damages or choice-of-law clauses, so they do not undermine the conclusion set out above that New York law is controlling here on the question of the prejudgment interest rate. But if the issue was governed only by admiralty law, the rate would be discretionary, and the forum state's statutory rate could properly be considered.

It seems reasonable, too, that the statutory rate in the jurisdiction identified in a choice-of-law clause could be considered. Even if not binding, that rate would provide some indication of a reasonable rate. And the choice-of-law provision would provide some indication of the parties' confidence in that jurisdiction's laws. The rates in other relevant jurisdictions could perhaps also be considered.

Money and credit, after all, flow easily among nations and states, especially in international transactions of this kind.

The New York 9% rate was within but near the upper limit of a reasonable rate during the relevant period. The rate in Florida—the forum as well as home to one of the assureds—averaged about 5% during that period. *See* Fla. Stat. § 55.03. The rate in Washington—home to the other assured—was 12%. *See* Wash. Rev. Code § 4.56.110(6) (setting the residual prejudgment interest rate at the maximum rate permitted under Wash. Rev. Code § 19.52.020); Wash. Rev. Code § 19.52.020(1) (establishing a maximum rate of 12%). Overall, the best exercise of discretion, if this were a matter of discretion rather than a mandatory application of New York law, would be to award interest at 9%.

C

The underwriters paid the assureds with commendable promptness from the outset until the underwriters reached their asserted $77 million limit. They formally declined to make further payments on October 30, 2020. The record does not show the precise dates when the underwriters should have paid the additional amount due under this order—as it turns out, $19,128,821.25.

The underwriters say that if prejudgment interest is awarded, it should commence as of October 30, 2020. Pls.' Suppl. Trial Br., ECF No. 100 at 8. That is reasonable. Some part of the overall unpaid amount might have been payable

earlier, some perhaps later. Determining the dates more precisely would not be worth the cost of doing so.

Prejudgment interest from October 30, 2020, to the date of the judgment, April 21, 2023, totals $4,259,176.17, calculated as $19,128,821.25 x 903/365 x .09.

III

For these reasons,

IT IS ORDERED:

(a) The clerk must enter judgment:

1. Providing for the defendants jointly to recover from the plaintiffs severally at their appropriate percentages the amount of $19,128,821.25 as principal plus $4,259,176.17 as prejudgment interest for a total of $23,387,997.42;
2. Declaring that the limit of coverage under the policy as in effect on October 10, 2018 was $96,250,000;
3. Dismissing all other claims with prejudice; and
4. Reserving jurisdiction to award costs and attorney's fees.

(b) The deadline to file a bill of costs or motion to determine entitlement to attorney's fees under Local Rule 54.1 is extended to May 22, 2023.

SO ORDERED on April 21, 2023.

s/Robert L. Hinkle
United States District Judge