N UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
IN ADMIRALTY

CASE NO. 0:24-cv-61293-WPD

AIG PROPERTY CASUALTY COMPANY, as Subrogee of VOILE PARTNERS, LP.

Plaintiff,

v.

FLYHOPCO LLC dba BRADFORD MARINE, A Florida limited liability company,

Defendants.

_____/

ORDER

THIS CAUSE is before the Court on Defendant's Motion to Dismiss the Complaint [DE 6] filed on August 13, 2024 (the "Motion"). The Court has reviewed the Complaint [DE 1], the Motion [DE 6], Plaintiff's Response in Opposition to the Motion to Dismiss filed August 22, 2024 [DE 11] and Defendant's Reply to the Response, filed September 5, 2024 [DE 15] and is otherwise fully advised on the premises.

I. BACKGROUND

On July 22, 2024, Plaintiff AIG Property Casualty Company ("Plaintiff") filed its Complaint as Subrogee of Voile Partners LP. The Complaint alleges that AIG is an insurance company engaged, in part, in insuring motorboats. Compl. ¶ 1. At all material times, AIG insured Voile Partners' motor yacht, a 1997 130' vessel manufactured by Palmer Johnson Yachts, Hull I.D. No. PAJO2222K797 (hereafter "Vessel"). *Id.* On or about January 27, 2023, Voile Partners entered into Dockage and Repair Contract ("Contract") with Defendant Flyhopco, LLC, d/b/a/

Bradford Marine, LLC ("Bradford") or ("Defendant"). Compl. ¶ 6. In exchange for an agreed to consideration Bradford agreed to "provide repair and other services for the Vessel as described in Proposal, Quotes and/or Work Orders." *Id.* Part of the services to be provide by Bradford was to place scaffolding around Vessel in order to paint it. *Id.* Bradford also contractually agreed to provide "dockage for the Vessel while it is being repaired or stored" at Bradford. *Id.* The Contract contained the following clause:

> The Company **may**, at any time without advance notice, shift or cause to be shifted the Vessel or any other vessels to or from a location within the Company's premises or to a sub-contractor's premises, including Billfish. The Owner and the Vessel accept this transportation, and the Owner and the Vessel agree and consent that the Company, or any of its affiliates or sub-contractors, or the Company's agents, may transport or haul the Vessel about the premises or the sub-contractor's premises, and in and out of the water. The Company shall determine, in **its sole discretion**, when this necessity arises and whether an affiliate or sub-contractor shall be utilized. The Owner acknowledges and consents that, in the event of hurricane or other emergencies, **the Company may, in its sole discretion**, select alternate docking methods such as rafting, tying across two piers, or others. **It is the responsibility of the Owner to effectuate such a shift**, but if the Owner is not available, then Company employees will do so on Owner's behalf and tie the Vessel up at the new location without assuming responsibility for the safety of the Vessel, which at all times shall remain the **Owner's sole obligation, and the Owner and the Vessel hereby release the Company of and from any and all liability related to such shifting and any tying up, docking and/or undocking related thereto.**

Compl. ¶ 7., DE 1-1. Bradford berthed the Vessel in Slip C 14, which was covered by a concrete roof, common to several other slips, and erected scaffolding and tented Vessel. Compl. ¶ 8. This left Vessel dead in the water unable to be moved. *Id*. Bradford at that time knew that the vertical clearance between the top of Vessel and the roof of Slip C 14 was insufficient to prevent Vessel from hitting the roof in the event of any above expected normal tides. Compl. ¶ 9. On April 13, 2023, it was reported that Fort Lauderdale recorded a large amount of rainfall. Compl. ¶ 10. During this time, it was reported that water levels on the New River rose by 4 feet. Compl. ¶ 11 As the water level rose, the air draft between the Vessel's masthead and the underside of the

concrete roof of Slip C 14 decreased progressively until the mast came into contact with the underside of the roof. Compl. ¶ 12. The upward force of the mast acting on the underside of the concrete roof caused the roof to fracture and crushed the painted aluminum mast and boom, causing extensive damage to a small open radar array, antennas, lights and two large KVH dome antennas. Compl. ¶ 13. As a result of the damage suffered by Vessel, Voile Partners presented a claim to AIG. The latter paid Voile Partners the amount of $239, 921.33 to repair Vessel. As a result, AIG has become subrogated to all of Voile Partners' rights and interests to the extent of payments made. Compl. ¶ 14.

Plaintiff alleges that on April 13, 2024, Defendant materially breached its Contract by failing to exercise its discretion to move the Vessel when an emergency arose. Moreover, Defendant Bradford knew that the docking arrangement created an imminent or clear and present danger and nevertheless failed to take action to prevent harm. Compl. ¶ 19. Specifically, Defendant was aware that once the scaffolded Vessel was moored at Slip C14, Vessel became immobile and could not be removed in the event of an emergency. *Id.* Defendant was aware at the time of docking that Slip C14 was not suitable for Vessel given that the clearance between top of Vessel and the roof of the shed was insufficient to account for anticipated tides. *Id*. Despite this knowledge Bradford failed to take appropriate action to prevent damage. *Id.*

Plaintiff alleges four Counts in its complaint. Count I is a claim for Breach of Contract, specifically Breach of Implied Covenant of Good Faith and Fair Dealing. Count II is a claim for Breach of Contract and Gross Negligence or Willful Misconduct. Count III is a claim for Breach of Warranty of Workmanlike Performance. Count IV is a claim for Gross Negligence and/or Willful Misconduct.

II. LEGAL STANDARD

To adequately plead a claim for relief, Rule 8(a)(2) requires "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957). Under Rule 12(b)(6), a motion to dismiss should be granted only if the plaintiff is unable to articulate "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (abrogating *Conley*, 355 U.S. at 41). "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Twombly*, 550 U.S. at 556). The allegations of the claim must be taken as true and must be read to include any theory on which the plaintiff may recover. *See Linder v. Portocarrero*, 963 F. 2d 332, 334–36 (11th Cir. 1992) (citing *Robertson v. Johnston*, 376 F. 2d 43 (5th Cir. 1967)).

The Court need not take allegations as true if they are merely "threadbare recitals of a cause of action's elements, supported by mere conclusory statements." *Iqbal*, 129 S. Ct. at 1949. In sum, "a district court weighing a motion to dismiss asks 'not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.'" *Twombly*, 550 U.S. at n.8 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other grounds, Davis v. Scherer*, 468 U.S. 183 (1984)).

III. DISCUSSION

In its Motion to Dismiss, Defendants argue that Count I fails to state a claim for breach of the implied covenant of good faith and fair dealing, and Counts II, III, and IV are based on internally inconsistent allegations. The Court addresses each argument in turn.

A. Count I: Implied Covenant of Good Faith and Fair Dealing

Defendant argues that Count I fails to state a claim for breach of implied covenant of good faith and air dealing because (1) it is premised on a discretionary right, not an obligation, to move the vessel. (2) there is no independent cause of action for breach of the implied covenant under Florida Law; (3) there is no allegation of conscious and deliberate action to frustrate the agreement, such that Plaintiffs can allege a breach of contract, and (4) the Vessel could not be moved in any case. The Court agrees.

The Implied Covenant of Good Faith and Fair Dealing is implied in every Maritime contract.[1] See, e.g., *Flores v. Am. Seafoods Co*., 335 F.3d 904, 913 (9th Cir. 2003); *Misano di Navigazione, S.p.A. v. United States*, 968 F.2d 273, 274-75 (2d Cir. 1992). A failure to exercise discretion as permitted by a contractual provision may give rise to a claim for breach of implied covenant of good faith and fair dealing. *Abels v. JPMorgan Chase Bank*, N.A., 678 F.Supp.2d 1273, 1278-1279 (S.D.Fla. 2009) ("[T]he failure to perform a discretionary act in good faith may be a breach of the implied covenant of good faith and fair dealing.").

However, because the implied covenant may not replace expressly bargained for contract terms, the implied duty of good faith comes into play in discretionary actions only where the contract is silent as to any standards to be used in exercising that discretion. *See Burger King Corp. v. Broad St. Licensing Grp., LLC*, 469 F. App'x 819, 822 (11th Cir. 2012) ("where a discretionary clause is 'silent with regard to the methodology or standards to be used' in exercising that discretion, imposing a reasonableness standard of good faith and fair dealing does not vary any express contractual terms.") (quoting *Cox v. CSX Intermodal, Inc.,* 732 So.2d 1092, 1098 (Fla.Dist.Ct.App.1999)); *Amica Mut. Ins. Co. v. Morowitz,* 613 F. Supp. 2d 1358, 1361

[1] See *Wilburn Boat v. Fireman Fund, Inc.,* 348 U.S. 310 (1955) (in the absence of established maritime law, state law applies).

(S.D. Fla. 2009) ("As a general rule, the implied covenant of good faith and fair dealing may fill gaps when one party has the authority to make discretionary decisions without defined standards (because the contract is *silent* as to any standards), but such should not be utilized to 'block the use of terms that actually appear in the contract.'") (quoting *Speedway SuperAmerica, LLC v. Tropic Enters., Inc.,* 966 So.2d 1, 3 n. 2 (Fla. 2d DCA 2007); *Speedway SuperAm., LLC v. Tropic Enters., Inc.*, 966 So.2d 1, 3 (Fla.Dist.Ct.App.2007) ("Despite broad characterizations of the implied covenant of good faith, we have recognized that it 'is a gap-filling default rule,' which comes into play 'when a question is *not resolved* by the terms of the contract or when one party has the power to make a discretionary decision without defined standards.'") (emphasis added) (quoting *Publix Super Markets, Inc. v. Wilder Corp. of Del.*, 876 So. 2d 652, 654 (Fla. 2d DCA 2004)).

Accordingly, Plaintiff may not maintain a claim for breach of implied covenant of fair dealing. The Contract expressly states that defendant "*may*, at any time without advance notice, shift or cause to be shifted the Vessel" (emphasis added). Further, the Contract states, **"***the Company may, in its sole discretion,* select alternate docking methods such as rafting, tying across two piers, or others." (emphasis added). Here, the Contract does not lack standards, but instead expressly grants this option to defendants in their sole discretion. When a Contract is clear as to its grant of discretion, it may have sufficient standards such that the implied covenant does not apply. *See Amica Mut. Ins. Co. v. Morowitz*, 613 F. Supp. 2d 1358, 1361 (S.D. Fla. 2009) ("Here. . . Boat Policy states that the insurer 'will settle or defend, as [*it] see[s] fit.*' (emphasis added). This emphasized language establishes that the Boat Policy was not silent with regard to the standards for making the discretionary decision of when to settle or defend but, instead, expressly granted absolute and unlimited discretion concerning such decisions."). In addition, the Contract contains language as to the types of situations where Defendant *could* exercise its discretion, as well as the kinds of locations where the Vessel could be moved. The

Contract states, "[t]he Company may, at any time without advance notice, shift or cause to be shifted the Vessel or any other vessels *to or from a location within the Company's premises or to a sub-contractor's premises, including Billfish*" (emphasis added). The Contract continues, "*in the event of hurricane or other emergencies*, the Company may, in its *sole discretion*, select alternate docking methods such as *rafting, tying across two piers,* or others" (emphasis added).

Thus, the Contract does not lack standards as to who, when, or how discretion may be exercised. Defendant had the sole discretion to move the Vessel. For some reason, Defendant did not move Vessel. Defendant was entitled to decline to move Vessel pursuant to the express and unequivocal language in the contract that vested the choice solely in the Defendant. In the event that Defendant had chosen to move Vessel, guidelines existed as to how discretion could be exercised. The implied covenant is not needed to fill a gap here. Accordingly, Plaintiff fails to state a cause of action for breach of the implied covenant of good faith. Defendant's Motion to Dismiss is granted as to Count I.

B. Counts II, III, and IV

Next, Defendant argues as to Counts II, III, and IV that the allegations are internally inconsistent and therefore the counts should be dismissed. Specifically, Defendant contends the following: while Plaintiff alleges, on one hand, that the issue was *normal* spring tides, the Complaint also states that Vessel was docked at the berth for regular cycles of Spring tides from January 27, 2023, through April 13, 2023, without issue. Second, Plaintiff alleges that the problem was "above expected normal tides," or in other words, *unexpected* tides. Plaintiff does not allege any damage prior to April 13, 2023, at which time, Defendant argues, a storm of "biblical proportions" befell Fort Lauderdale.

To the extent that Plaintiff's claims are internally inconsistent, Defendant cites no binding precedent that suggests that this Court must dismiss a complaint for inconsistent allegations. Defendant fails to argue that any of the elements of Counts II, III, or IV were not plead, as it must do to prevail on a motion to dismiss. Therefore, Defendant's argument that Plaintiff's allegations are internally inconsistent are insufficient to dismiss Plaintiff's claims at this stage.

C. Judicial Notice

Defendant asks this Court to take Judicial Notice of the "unprecedented rainfall of April 13, 2023." Defendant provides a litany of news articles describing the storm as "once in a lifetime," "of biblical proportions," and a "1-in-a-1000-year event," among other similar phraseology. In response, Plaintiff argues that "[i]n essence, Bradford would have the Court consider, out of turn, the defense of 'Act of God.'"

Plaintiff is correct. A motion to dismiss focuses on the sufficiency of the allegations in the complaint, not the ultimate merits of the case. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Defenses that add information outside of the factual allegations of the Complaint, rather than explain the sufficiency of the allegations, are inappropriate at this stage and will not be considered by the Court.

Moreover, the "taking of judicial notice of facts is, as a matter of evidence law, a highly limited process." *Shahar v. Bowers,* 120 F.3d 211, 214 (11th Cir. 1997). "The reason for this caution is that the taking of judicial notice bypasses the safeguards which are involved with the usual process of proving facts by competent evidence in district court." *Id.*; *see also* Fed.R.Evid. 201(e). To the extent that the Court was willing to take judicial notice at this time, Defendant does not cite to any source that indicates what was the effect of the rain on the tide levels experienced in the *New River estuary*, which is the relevant fact.

Accordingly, the Court declines Defendant's invitation to take judicial notice of any fact at this juncture. Defendant is free to make these arguments at later stages as it prosecutes its case.

Accordingly, it is hereby **ORDERED** and **ADJUDGED** that:

1. Defendant's Motion to Dismiss [DE 6] is hereby **GRANTED IN PART AND DENIED IN PART**;
2. Defendant's Motion as to Count I is hereby **GRANTED**;
3. Count I of Plaintiff's Complaint is hereby **DISMISSED** for failure to state a claim;
4. Defendant's Motion as to Counts II, III, and IV are hereby **DENIED**;
5. Counts II, III, and IV may proceed;
6. While it appears that amendment of Count I is likely futile, in an abundance of caution, the Court will permit Plaintiff one additional opportunity to amend this claim if he so chooses;
7. Accordingly, on or before **October 25, 2024**, Plaintiff shall either file (1) a Notice stating that Plaintiff intends to proceed on the Amended Complaint only as to Count II, III, and IV[2] or (2) a Second Amended Complaint attempting to replead Count I.

DONE and **ORDERED** in Chambers in Fort Lauderdale, Florida on this 10th day of October 2024.

WILLIAM P. DIMITROULEAS
United States District Judge

Copies to:

Counsel of record.

[2] In the event Plaintiff files a Notice stating that Plaintiff intends to proceed on the Amended Complaint only as to Counts II, III, and IV Defendants will have fourteen (14) days from the date of the filing of that Notice to file their Answer(s).