UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 23-61769-CIV-COHN/HUNT

MV LADY B, LLC,

Plaintiff,

v.

ROLLY MARINE SERVICE COMPANY,

Defendant.
_____/

ORDER GRANTING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE is before the Court on Defendant Rolly Marine Service Company's Motion for Summary Judgment [DE 33] ("Motion"). The Court has considered the Motion, Plaintiff MV Lady B, LLC's Response [DE 42], Defendant's Reply [DE 46], and the record in this case, and is otherwise advised in the premises. For the reasons stated herein, the Court will grant the Motion in part.

I. Background

Plaintiff MV Lady B, LLC is the owner of M/Y LADY B, a 2008 85' Pacific Mariner (the "Vessel"). Defendant operates a shipyard in Fort Lauderdale, Florida. Plaintiff brought the Vessel to Defendant's shipyard for repairs on August 2, 2022. DE 41 ¶ 30. The parties executed several form agreements prior to the commencement of repairs. See DE 41-8 (the "Sign-In Documents"). The Sign-In Documents contain basic information about the Vessel and its crew but do not identify the scope of the work to be performed. Id. Nor do the Sign-In Documents contain much in the way of terms detailing the parties' rights and obligations.

The parties agree that the scope of work included the installation of headliner, wallpaper, flooring, and carpet, as well as electrical, plumbing, and carpentry repairs. Plaintiff asserts that it submitted an approved scope of work on August 4, 2022, two days after the Vessel arrived at Defendant's shipyard, that listed the above items, among others. DE 41-2 (the "Repair List"). Defendant disputes that it approved the Repair List and insists that the scope of work was instead identified in various work orders agreed to by the parties between August 3, 2022, and December 13, 2022. DE 45 ¶ 34; DE 32-2 at 71-81 (the "Work Orders").[1] Plaintiff's sole member, Bridgett VanDerHoff, and the Vessel's Captain, Tom Molenhouse, testified at their depositions that the dates on certain Work Orders do not correspond to the date the work was requested by Plaintiff. DE 32-1 ("VanDerHoff Dep.") at 41:19-23; DE 32-4 ("Molenhouse Dep.") at 259:8-19, 260:4-10. But Plaintiff concedes that at some point, "the scope of work . . . was expanded by the Parties to include additional repairs and renovations on the Vessel." DE 21 ¶ 12.

When the parties agreed to additional work is important because Plaintiff removed the Vessel from Defendant's shipyard on December 23, 2022. DE 32 ¶ 9. Defendant claims that this was less than two weeks after Plaintiff had approved the most recent Work Order. DE 33 at 6. According to Defendant, Plaintiff's premature removal of the Vessel deprived Defendant of an adequate opportunity to complete certain work and to conduct a quality control check on the work that had been completed. DE 32 ¶¶ 9-10. Plaintiff counters that Defendant had the Vessel for over four months during which it repeatedly missed deadlines to complete the work. DE 41 ¶

[1] The Court refers to the Sign-In Documents and Work Orders collectively as the "Agreement."

9. Captain Molenhouse testified that the Vessel was removed on December 23, 2022, to avoid further delays caused by the holidays. Molenhouse Dep. at 263:15-264:7.[2]

Plaintiff's expert, Stewart Hutcheson, testified that Defendant's repairs were not incomplete but were defective, not yacht-quality, and needed to be redone. DE 41-35 ("Hutcheson Dep.") at 71:1-5, 98:3-25-99:5, 102:23-103:2, 107:4-7, 110:12-17, 111:5-17, 120:17-23, 122:10-12, 123:11-25. In a July 6, 2023, letter, he also stated that Defendant's defective repairs of the Vessel "render[ed] [it] unfit for charter." DE 41-13. Additionally, Plaintiff's sole member testified that since the Vessel left Defendant's shipyard it has had "a smell" that Plaintiff cannot eliminate. VanDerHoff Dep. at 69:25-70:10. This smell, described as "mechanical," is limited to the Vessel's portside stateroom. DE 41-31 ("Kerrigan Dep.") at 127:2-8, 150:22-25. Still, Plaintiff claims that this smell has reduced the value of the Vessel by $400,000.00. DE 41 ¶ 62 (incorrectly numbered on Plaintiff's Statement of Facts as ¶ 60); DE 41-22 (Declaration of James McConville).

On June 20, 2023, the parties attended a joint inspection of the Vessel and examined the issues identified by Plaintiff. DE 32 ¶ 12. That day, Defendant, through counsel, purported to "exercis[e] its rights to perform warranty repairs on certain completed components of the [work] reflected on [Defendant's] work orders," including replacing the wallpaper and part of the headliner. DE 41-7. Plaintiff did not accept this offer and has not brought the Vessel back to Defendant's shipyard after it was removed on December 23, 2022. DE 32 ¶¶ 14, 16.

Plaintiff paid at least $917,330.00 to Defendant for materials and services

[2] Defendant was closed for the holidays from approximately December 24, 2022, to January 1, 2023. DE 32 ¶ 8.

provided for the Vessel. DE 45 ¶ 38.[3] Plaintiff further contends that it was "forced to engage alternative contractors to repair the defective repairs at a cost of $428,228.96." DE 41 ¶ 63 (incorrectly numbered on Plaintiff's Statement of Facts as ¶ 61).

Based on the foregoing, Plaintiff brings claims for breach of maritime contract and breach of the implied warranty of workmanlike performance. See DE 21 (Second Amended Complaint). Plaintiff seeks damages for, *inter alia*, "repair costs, delays costs, lost charter income, [and] diminution of value." Id. ¶¶ 35, 43. In its Motion, Defendant argues that: (1) Plaintiff's claims are barred due to Plaintiff's failure to provide Defendant an opportunity to complete its unfinished work or cure any alleged defects; and (2) Plaintiff is prohibited from recovering damages for lost charter income and diminution of value. For the reasons set forth below, the Court: (1) declines to find that Plaintiff's claims are barred due to its failure to provide an opportunity to cure; and (2) will preclude Plaintiff from claiming damages for diminution of value but not damages for lost charter income.

II. Legal Standard

The Court will grant summary judgment if the pleadings, the discovery and disclosure materials on file, and any affidavits show "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. The movant "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett,

[3] Plaintiff asserts that it paid $1,076,330. DE 41 ¶ 39; DE 41-19.

477 U.S. 317, 323 (1986). To discharge this burden, the movant must demonstrate a lack of evidence supporting the nonmoving party's case. Id. at 325.

After the movant has met its burden under Rule 56, the burden of production shifts to the nonmoving party who "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The nonmoving party may not rely merely on allegations or denials in its own pleading, but instead must come forward with specific facts showing a genuine issue for trial. Fed. R. Civ. P. 56; Matsushita, 475 U.S. at 587.

As long as the nonmoving party has had ample opportunity to conduct discovery, it must come forward with affirmative evidence to support its claim. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986). "A mere 'scintilla' of evidence supporting the opposing party's position will not suffice; there must be enough of a showing that the jury could reasonably find for that party." Walker v. Darby, 911 F.2d 1573, 1577 (11th Cir. 1990). If the evidence advanced by the nonmoving party is merely colorable, or is not significantly probative, summary judgment may be granted. Anderson, 477 U.S. at 249–50.

III. Discussion

A. The Court Cannot Read an Implied Right to Cure into the Parties' Agreement

It is undisputed that the parties' Agreement does not contain an express provision requiring that Plaintiff provide Defendant with an opportunity to cure allegedly defective work before removing the Vessel. Nor has Defendant identified any applicable statutory obligation. Instead, Defendant relies on "an implied common law right to an opportunity to cure." DE 46 at 3.

To determine whether the Court may read this implied right into the parties' Agreement, the Court "look[s] to the general common law of contracts." Internaves de Mexico s.a. de C.V. v. Andromeda Steamship Corp., 898 F.3d 1087, 1093 (11th Cir. 2018) (explaining that the "interpretation of maritime contracts sounds in federal common law."). Simply put, Defendant's position finds no support in the general common law of contracts. Courts overwhelmingly disfavor reading implied terms into a contract. See, e.g., Hughes v. Sw. Airlines Co., 961 F.3d 986, 989–90 (7th Cir. 2020) ("Like many states, Texas disfavors reading implied terms into a contract."); Series AGI W. Linn of Appian Group Inv'rs DE, LLC v. Eves, 158 Cal. Rptr. 3d 193, 203–04 (Ct. App. 2013) ("Implied terms are disfavored at law."). Doing so

> can only be justified when the implied term is not inconsistent with some express term of the contract and where there arises from the language of the contract itself, and the circumstances under which it was entered into, an inference that it is absolutely necessary to introduce the term to effectuate the intention of the parties.

23 Williston on Contracts § 63:21 (4th ed.). See also Valtrol, Inc. v. Gen. Connectors Corp., 884 F.2d 149, 152 (4th Cir. 1989) ("Implied covenants . . . must clearly arise from the language used, or be indispensable to effectuate the intent of the parties.") (citations omitted); Hall v. Nat'l City Bank of Pennsylvania, No. 06-CV-217--JTC, 2010 WL 1405443, at *4 (W.D.N.Y. Mar. 31, 2010) (courts "may imply a missing term in a . . . contract only when it is necessary to prevent injustice and it is abundantly clear that the parties intended to be bound by such term.") (quotation omitted).

Courts have also specifically declined to infer a right to cure default or breach. See Al Owaidah v. Mazzei, No. EDCV 18-246-KK, 2020 WL 1041091, at *12 (C.D. Cal. Jan. 27, 2020) ("the Court declines to 'insert in the contract language which one of the

parties now wishes were there' by finding that Plaintiff had an implied right to cure.") (quotation omitted); Aurora Loan Services LLC v. NBGI, Inc., No. CV0706501GAFRCX, 2009 WL 10670622, at *11 (C.D. Cal. Apr. 27, 2009) ("it would be inappropriate for the Court to infer a provision that would require LBB to provide NBGI with an opportunity to cure its breaches.").

In support of its position, Defendant principally relies on Centerplan Constr. Co., LLC v. City of Hartford, 343 Conn. 368, 412, 274 A.3d 51, 78 (2022), where the court stated that "[u]nder our common law, when a contract is silent as to notice and cure rights, the right to cure is implied in every contract as a matter of law unless expressly waived." (citing McClain v. Kimbrough Construction Co., 806 S.W.2d 194, 198 (Tenn. App. 1990) and 5 P. Bruner & P. O'Connor, Construction Law (2014) § 18:15, p. 909). Notably, Centerplan is a construction case which relies on McClain—another construction case—and a construction law treatise. The other case that Defendant discusses is also a construction case that cites to Centerplan: Gray Constr., Inc. v. Medline Indus., Inc., No. CV SAG-19-03405, 2023 WL 2333218 (D. Md. Mar. 1, 2023).

At most, the above cases support the proposition that there is an implied right to cure in construction contracts. See id. at *13 (explaining that "various treatises have recognized an implied right to cure ***in construction contracts***.") (emphasis added). But Defendant offers no support, outside the context of construction contracts, for an implied right to cure. The Court therefore applies the general common law principles of contract law that counsel reading implied terms into a contract only under limited circumstances and hold that "it is not the function of the courts to remake the contract agreed to by the parties, but rather to enforce it as it exists." Aurora Loan Services,

2009 WL 10670622, at *12. Here, there is nothing in the Agreement that gives rise to "an inference that it is absolutely necessary to introduce [a right to cure provision] to effectuate the intention of the parties." See Williston on Contracts § 63:21. Accordingly, to the extent that Defendant's Motion is based on Plaintiff's failure to provide an opportunity to cure, it is **DENIED**.[4]

B. Plaintiff Cannot Seek Damages for Loss of the Vessel's Market Value

As noted above, Plaintiff seeks damages not only for the cost of repairs but also for the allegedly diminished value of the Vessel. Plaintiff acknowledges that, generally, the doctrine of *restitutio in integrum* applies in maritime cases and limits the damages afforded to the owner of a vessel, not considered a total loss, to the reasonable cost of repairs. DE 42 at 6. But Plaintiff argues that there is an exception to this rule when a vessel cannot be fully repaired to her pre-loss condition. Id. In those situations, Plaintiff claims that damages for diminished value are appropriate so long as the basis for diminished value is functional defects that remain after the completion of the repairs and not merely cosmetic defects or "stigmatic damages" (due to the vessel having undergone repairs). Id. at 6-9 (citing Dominican Mar., S.A. v. M/V Inagua Beach, 572 F.2d 892 (1st Cir. 1978)). Here, Plaintiff claims that the mechanical smell of the Vessel's portside stateroom allegedly caused by Defendant's defective repairs is a functional defect that supports damages for diminished value.

Assuming without deciding that an exception to the *restitutio in integrum* doctrine exists when a vessel cannot be fully repaired to her pre-loss condition and that the

[4] This is not to say that Plaintiff's removal of the Vessel is irrelevant. It certainly may support Defendant's affirmative defenses and impact Plaintiff's damages. At this stage, however, absent an express provision in the Agreement providing Defendant with a right to cure, the Court cannot find that Plaintiff's removal of the Vessel serves as an absolute bar to its claims.

portside stateroom's mechanical smell is properly considered a functional defect, Plaintiff has failed to offer any evidence that this defect cannot be repaired. To be sure, Plaintiff has offered evidence of several unsuccessful repair efforts, including attempting to eliminate the smell by engaging a mold remediation company, checking water and plumbing lines for leaks, and temporarily removing the portside stateroom's air handler. Kerrigan Dep. at 147:11-150:21. But there is no evidence supporting Plaintiff's assertions that the odor "cannot be remediated," DE 41 ¶ 64 (incorrectly numbered on Plaintiff's Statement of Facts as ¶ 62), and that "the costs to make . . . repairs [to attempt to eliminate the odor] are not practical." DE 42 at 8.

In fact, the owner of the repair company that Plaintiff hired to repair Defendant's allegedly defective work testified that "the next step in the [repair] process" would be following the recommendation of a surveyor and broker to remove headliner to access the area above the ceiling of the stateroom to further inspect potential causes of the odor. Kerrigan Dep. at 151:19-152:12. While he further stated that this "would cost a significant amount of money," id. at 152:13-18, there is no evidence as to the cost of this additional inspection. Nor has Plaintiff's expert rendered an opinion that eliminating the smell is impossible or cost prohibitive.[5]

Accordingly, Plaintiff has failed to show that post-repair loss of value is recoverable and Defendant's Motion, as it relates to this issue, will be **GRANTED**.

[5] Given Plaintiff's position that the smell has reduced the value of the Vessel by several hundred thousand dollars, the cost of additional repairs would presumably need to be staggering to be considered impractical.

C. Fact Issues Preclude Summary Judgment on Plaintiff's Claim for Lost Charter Income

Lastly, Defendant argues that Plaintiff should be precluded from seeking damages for lost charter income. DE 33 at 11-16. Defendant claims that these damages are speculative because "[t]he Vessel never had a successful fare paying charter." Id. at 11. Plaintiff did have two fully executed contracts for charters scheduled on July 20, 2023, and August 6, 2023, that it claims it was forced to cancel because Defendant's defective repairs rendered the Vessel unfit for charter. DE 41 ¶ 25. But Defendant disputes that these cancellations were attributable to its conduct, noting that the charters were scheduled for nearly seven months from the date the Vessel was removed from Defendant's shipyard. Ample time, in Defendant's view, for Plaintiff to repair Defendant's allegedly defective work.

Plaintiff "is entitled to receive loss of use damages only if able to prove, with reasonable certainty, that profits had actually been, or may reasonably be supposed to have been, lost." Cent. State Transit & Leasing Corp. v. Jones Boat Yard, Inc., 206 F.3d 1373, 1376 (11th Cir. 2000). In Sharp v. Hylas Yachts, LLC, 872 F.3d 31, 40 (1st Cir. 2017), the court rejected the defendant's argument that "the 'reasonable certainty' standard can only mean that 'to be awarded damages for lost profits, a recreational vessel must have a history of income. Absent such history, these damages are too speculative and cannot be awarded.'" The Sharp court observed that "no court has crafted so strict a rule" and that "[i]nstead, courts have consistently observed that 'what constitutes reasonable certainty is of necessity a fact-intensive inquiry in which the issue of evidentiary sufficiency can only be determined on a case-by-case basis.'" Id. (quoting Yarmouth Sea Prods., Ltd. v. Scully, 131 F.3d 389, 395 (4th Cir. 1997)).

Here, Plaintiff has clearly adduced sufficient evidence to present the fact-intensive question of lost charter income to the Court at trial. Plaintiff's sole member testified that when she purchased the Vessel on July 14, 2022, she purchased it as a charter yacht. VanDerHoff Dep. at 63:2-8. Approximately one month after Plaintiff purchased the Vessel, Plaintiff contracted with Allied Marine to market the Vessel for charter. DE 41-9 (Charter Marketing Agreement). The Vessel's insurance policy has always included charter coverage. VanDerHoff Dep. at 64:9-19. And, as noted above, Plaintiff actually contracted to charter the Vessel on July 20, 2023, and August 6, 2023. DE 41-10 & DE 41-11. In light of the foregoing, the Court cannot find Plaintiff's lost charter income damages speculative simply because Plaintiff has no history of charter income.

Likewise, factual issues preclude a finding that any lost charter income is not attributable to Defendant's conduct. To make such a finding, the Court would first need to determine which of Defendant's repairs were defective. Then, the Court would need to determine how long Plaintiff reasonably needed, under the circumstances, to correct those defective repairs. Only at that point could the Court, as Defendant requests, consider whether Plaintiff should have had the Vessel fit for the charters scheduled during the summer of 2023. These fact-intensive inquiries are obviously inappropriate at summary judgment. Accordingly, to the extent that Defendant's Motion seeks to preclude Plaintiff from claiming damages for lost charter income, it is **DENIED**.

III. Conclusion

For the foregoing reasons, it is hereby **ORDERED AND ADJUDGED** that Defendant Rolly Marine Service Company's Motion for Summary Judgment [DE 33] is **GRANTED in part and DENIED** in part as set forth above.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 9th day of October, 2024.

Copies provided to counsel of record via CM/ECF