UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 20-61978-CIV-SMITH

POLAR VORTEX, LLC,

Plaintiff,

vs.

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON SUBSCRIBING TO POLICY YHL1700840,

Defendant.
_____/

ORDER GRANTING IN PART DEFENDANT'S MOTION TO DISMISS

This matter is before the Court on Defendant's Motion to Dismiss Amended Complaint [DE 13], Plaintiff's Response [DE 14], and Defendant's Reply [DE15]. This action arises out of an insurance claim Plaintiff made on a policy of marine insurance, issued to Plaintiff by Defendant. Plaintiff made the claim after its sailing vessel "Polar Vortex" (the "Vessel") was damaged during Hurricane Irma in September 2017, while in the U.S. Virgin Islands. Plaintiff's Amended Complaint [DE 12] alleges four counts against Defendant: (1) breach of contract for failure to declare a constructive total loss; (2) breach of contract for failure to pay the tender claim; (3) breach of the duty of utmost good faith and fair dealing; and (4) misrepresentation. Defendant seeks to dismiss all four counts and Plaintiff's demand for attorney's fees. For the reasons that follow, the Motion to Dismiss is granted in part with leave to replead.

I. FACTS ALLEGED IN THE AMENDED COMPLAINT

Plaintiff is the owner of the Vessel, a 2014 57' Fontaine Pajot catamaran sailing vessel, and its tender, a dinghy. Defendant issued Marine Yacht Insurance Policy No. YHL1700840 for the Vessel, including the tender (the "Policy"). The Policy covered the period from February 23,

2017 through February 23, 2018. The Policy included coverage limits of $1,000,000 for Hull and Machinery and $1,000,000 for Protection and Indemnity. The Policy provides coverage "against ALL RISKS of physical loss or damage to the property covered from any external cause." Thus, damage caused by hurricanes and windstorms are covered losses under the Policy. Under the Policy, the agreed value of the Vessel is $1,000,000.

On September 5, 2017, the Vessel was docked at Compass Point Marina, St. Thomas, U.S. Virgin Islands. Between September 5 and 6, 2017, Hurricane Irma struck the island of St. Thomas. During the hurricane, the Vessel broke loose from her moorings. The Vessel was blown until she became impaled on a piling. The piling entered the master cabin and resulted in a hole approximately six feet high and four feet wide. The port hull of the Vessel became flooded with water and sank. The tender also sustained damage during the hurricane.

Under the Policy, the insured has a responsibility to mitigate any loss and protect the Vessel and its equipment following a loss. Failure to do so can result in a loss of coverage under the Policy. After the loss, Plaintiff took steps to safeguard the Vessel and mitigate loss, including raising the Vessel, which took several days, and patching the hole. By the time the Vessel was lifted and hauled safely to a shipyard, Plaintiff had incurred $160,210.79 in salvage and preservation expenses.

Although notified of the loss, Defendant did not arrange to have a surveyor present during the salvage operations. Defendant did not advise Plaintiff of any restrictions or limitations on the salvage operations. Defendant's surveyor, Will Howe ("Howe"), arrived on the scene on September 27, 2017, 22 days after the hurricane and 16 days after the salvage operations had commenced. On October 28, 2017, Plaintiff was advised that Howe was appointed by Defendant to handle the claim. According to Plaintiff, Howe told Plaintiff that it had a duty to minimize the

claim, safeguard the Vessel, and arrange for salvage efforts, which Plaintiff did. Howe also told Plaintiff that he had been asked to survey the damage to the Vessel, investigate the cause of the loss, prepare a damage report and an estimated cost of repairs.

Howe issued a Preliminary Damage Report, which did not include a cost estimate for repairs. According to Plaintiff, the Preliminary Damage Report placed Defendant on notice that the Vessel could not be restored to its pre-loss condition within the Policy limits. Defendant advised Plaintiff that the Vessel was reparable, could be restored to its pre-loss condition, was not a constructive total loss, and that it was Plaintiff's responsibility under the Policy to repair the Vessel. On October 27, 2017, Defendant's adjuster informed the Vessel's captain that he should arrange for delivery of the Vessel to Florida to be hauled and repaired. Plaintiff asked the captain if the Defendant was deeming the Vessel a total loss and the captain replied that Defendant has not responded to his inquiry and that the adjuster did not believe so at the time he did the survey. On October 31, 2017, Plaintiff's General Counsel spoke with Defendant's underwriter, who stated that the Vessel was not a total loss.

Plaintiff, relying on Defendant's statements that the Vessel was repairable within the Policy limits, transported the Vessel to Fort Lauderdale for repairs in late November 2017. Defendant hired marine surveyor Neil Maclaren to survey the Vessel in Florida. Instead of performing the usual and customary tasks of a marine surveyor, Maclaren acted as an adjuster. On January 25, 2018, Plaintiff's General Counsel wrote an email to Defendant's representatives stating:

> To date, we have expended roughly $255,000 on salvage, discovery and repair preparations (please refer to sheet 2 of the attached spreadsheet). Furthermore, we understand that, at a minimum, another $612,000 will be required to repair the hull/machinery. Rob Mitchell (copied here) has provided all of our paid invoices to date as well as repair estimates. When can we expect to receive reimbursement of the salvage/discovery/repair prep expenses? What are the next steps in the repair process? When will advances be made available? Of further note, we are rapidly

> approaching the insured limit of the hull and machinery. At what point will the vessel be declared a total loss?

Plaintiff alleges that this January 25, 2018 email constituted a tender of the vessel to Defendant, triggering Defendant's obligation to accept or reject abandonment and declare the Vessel a constructive total loss.

Maclaren never advised Plaintiff that the cost of repair would exceed the insured value of the Vessel, despite making such a determination. As repairs progressed, Maclaren noted that the method of construction of the Vessel would increase the repair costs and Defendant denied repair costs for certain damages resulting from the method of construction. Defendant also omitted other repair costs covered by the Policy and improperly prorated certain necessary repairs and expenses required to restore the Vessel to its pre-loss condition. Despite being aware of damage to the tender, Maclaren never adjusted the claim accordingly.

The Policy's Constructive Total Loss clause states: "No recovery for a constructive total loss shall be had hereunder unless the expense of recovering and repairing the vessel shall exceed the amount of insurance on hull and machinery." Plaintiff alleges that, at the outset of the claim, Defendant failed to consider the salvage and "Sue and Labor" expenses incurred in recovering the Vessel as part of Defendant's determination of whether there was a total loss, in contravention of the Constructive Total Loss clause.

Plaintiff contends that the October 28, 2017 denial of a total loss by Howe; the unanswered questions about what constituted a total loss; the October 31, 2017 telephone conference with Defendant's representative, who rejected a total loss; the December 26, 2017 inquiry into whether the Vessel was a total loss; and the January 25, 2018 email inquiry regarding the declaration of the Vessel as a total loss each individually constituted a tender of the Vessel to Defendant, triggering

Defendant's obligation to accept or reject abandonment and declare the Vessel a constructive total loss.

In reliance on Defendant's position that the Vessel was not a total loss, Plaintiff continued with the repair process. In early 2019, Maclaren estimated that the cost to repair would exceed the Policy limits. Despite being apprised that the expense of recovering and repairing the Vessel exceeded the agreed value of the Vessel and the Policy, Defendant did not declare the Vessel a constructive total loss, despite such requests by Plaintiff.

Plaintiff stopped the repairs when the total expenditures reached $1,241,894.47, including repairs, salvage, temporary repairs, and transportation to Fort Lauderdale. On June 17, 2019, Plaintiff submitted a formal Notice of Tender of Abandonment and Sworn Proof of Loss, which Defendant rejected. A Notice of Tender of Abandonment is a procedural notice of relinquishment or unconditional surrender of all rights to a vessel by its insured owner to the insurer in the event of a total constructive loss. The Policy states "it is especially declared and agreed that no acts of the Insurer or Insured in recovery, saving or preserving the property insured shall be considered as a waiver or acceptance of abandonment."

II. MOTION TO DISMISS STANDARD

The purpose of a motion to dismiss filed pursuant to Federal Rule of Civil Procedure 12(b)(6) is to test the facial sufficiency of a complaint. *See* Fed. R. Civ. P. 12(b)(6). The rule permits dismissal of a complaint that fails to state a claim upon which relief can be granted. *Id.* It should be read alongside Federal Rule of Civil Procedure 8(a)(2), which requires a "short and plain statement of the claim showing that the pleader is entitled to relief." Although a complaint challenged by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff is still obligated to provide the "grounds" for his entitlement to relief, and a "formulaic

recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

When a complaint is challenged under Rule 12(b)(6), a court will presume that all well-pleaded allegations are true and view the pleadings in the light most favorable to the plaintiff. *American United Life Ins. Co. v. Martinez*, 480 F.3d 1043, 1066 (11th Cir. 2007). However, once a court "identif[ies] pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth," it must determine whether the well-pled facts "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). A complaint can only survive a 12(b)(6) motion to dismiss if it contains factual allegations that are "enough to raise a right to relief above the speculative level, on the assumption that all the [factual] allegations in the complaint are true." *Twombly*, 550 U.S. at 555. However, a well-pled complaint survives a motion to dismiss "even if it strikes a savvy judge that actual proof of these facts is improbable, and 'that a recovery is very remote and unlikely.'" *Id.* at 556.

III. DISCUSSION

Defendant seeks to dismiss all four counts of Plaintiff's Amended Complaint. Defendant maintains that Count 1, 2, and 3 fail to state a cause of action and that Count 4 is an impermissible shotgun pleading. Defendant also seeks dismissal of Plaintiff's requests for attorney's fees.

A. Count 1

Defendants move to dismiss Count 1 for breach of contract because, under maritime law, it is Plaintiff's responsibility to tender abandonment of the Vessel to Defendant when the Vessel is a total loss. Defendant maintains that Plaintiff's Amended Complaint does not allege that Plaintiff tendered abandonment to Defendant. Plaintiff responds that it did tender abandonment. Plaintiff further argues that a formal tender of abandonment would have been futile, the Policy

does not require a formal tender of abandonment, and whether Plaintiff abandoned the Vessel is a question of fact, not appropriate for a motion to dismiss.

Tender of abandonment is a maritime concept that arises in the context of a constructive total loss. The two concepts have been explained as follows:

> The concept of constructive total loss is peculiar to marine insurance. Where an insured vessel has not been lost or totally destroyed, but the owner reasonably determines that the cost of repairs exceeds the value of the restored vessel, he may recover the full insured value of the vessel on condition that he promptly tender her to the underwriter, so that the latter may reclaim any residual value. . . . It is the condition of the vessel, not the act of tendering abandonment, which determines whether there is in fact a constructive total loss.. . . [N]o matter how great the damage, the choice whether to tender abandonment belongs to the owner, who may elect to treat the loss as partial.

In re Amended in re ALVA S.S. CO., 66 A.D. 622 (WCC), 1979 U.S. Dist. LEXIS 12178, at *9-10 (S.D.N.Y. May 24, 1979). It is the insured's responsibility to determine if a constructive total loss has occurred and to tender abandonment.

> It is the duty of the insured, as we conceive it, to make a prompt and adequate investigation, both to determine the cause of his vessel's misfortune and the possibility and cost of raising and repairing it. If such investigation satisfied him that it sank by reason of one of the perils insured against, and that it would cost more than its value to raise and repair it, he had the right, provided he acted promptly, to abandon his interest in the vessel to the insurer.

Klein v. Globe & Rutgers Fire Ins. Co., 1924 A.M.C. 452, 460 (W.D. Pa. 1924), *aff'd* 2 F.2d 137 (3d Cir. 1924). However, if an insurer would have refused the tender and tender would have been futile, a failure to tender does not block recovery for constructive total loss. *Magnum Marine Corp., N.V. v. Great Am. Ins. Co.*, 835 F.2d 265, 268 (11th Cir. 1988).

Defendant moves to dismiss because Count 1 seeks to shift the burden to Defendant, the insurer, to declare a constructive total loss. As set out above, the burden is on the insured, Plaintiff in the instant matter, to determine whether there has been a constructive total loss, not on the

insurer. However, Count 1 of the Amended Complaint alleges that "Defendant breached the contract of insurance by failing, in good faith, to timely declare the vessel a constructive total loss following Plaintiff's inquiry regarding same." (Am. Compl. ¶ 118.) Count 1 also alleges that Plaintiff "made a claim for benefits under the Policy . . . for physical loss and damage to the Vessel" and "inquired on many occasions as to the declaring the vessel a constructive total loss in light of the magnitude of the damages." (Am. Compl. ¶ 114.) Thus, as pled, Plaintiff has alleged that Defendant breached its duties under the Policy by failing to declare the Vessel a total loss in response to Plaintiff's inquiries. Defendant, however, does not have such an obligation under the law. Plaintiff must first determine that the Vessel is a constructive total loss; but that is not what Plaintiff has pled. Consequently, Count 1 is dismissed with leave to replead.

B. Count 2

Defendant moves to dismiss Count 2 for breach of contract for failure to pay Plaintiff's tender claim. Defendant asserts that Plaintiff has failed to state a cause of action because Plaintiff has not adequately alleged that Plaintiff made a claim for damages to the tender. In response, Plaintiff cites to several paragraphs of the Amended Complaint. However, a review of those allegations indicates that several of them do not reference the tender. Nowhere in the Amended Complaint has Plaintiff clearly pled that it made a claim specifically for the damages to the tender. Consequently, Count 2 is dismissed with leave to replead.

C. Count 3

Defendant seeks to dismiss Count 3 for breach of Defendant's duty of utmost good faith and fair dealing, also known as "*uberrimae fidei.*" Defendant argues that Plaintiff is again trying to shift the burden to Defendant to declare a constructive total loss. Defendant further notes that Plaintiff failed to timely tender abandonment because Plaintiff waited to tender abandonment until

nearly two years after repairs commenced. Plaintiff responds that it has adequately pled its cause of action.

A review of the allegations in Count 3 indicates that Plaintiff has pled multiple ways in which Defendant breached its duty of utmost good faith and fair dealing. Defendant's failure to declare the Vessel a constructive total loss is not the only way in which Defendant has allegedly breached this duty. Plaintiff has also pled that Defendant breached this duty by failing to truthfully and honestly communicate with Plaintiff about the scope of loss and damage to the Vessel and in Defendant's adjustment of the claim, by misleading Plaintiff with respect to the feasibility of repairing the Vessel and Plaintiff's obligations under the Policy, and by failing to provide Plaintiff with a complete and accurate assessment of damages and repair costs. Thus, while Defendant did not have the duty to declare the Vessel a constructive total loss, Plaintiff has sufficiently pled a claim for breach of Defendant's duty of utmost good faith and fair dealing.

D. Count 4

Defendant argues that Count 4 for misrepresentation should be dismissed as an impermissible shotgun pleading because it incorporates all of the prior substantive allegations. Plaintiff does not dispute that Count 4 incorporates all of its prior allegations; instead, it argues that all the allegations are germane and provide background. Plaintiff requests leave to replead if the Court finds that Count 4 should be dismissed. Given Plaintiff's concession and request for leave to replead, Count 4 is dismissed with leave to replead. Plaintiff is reminded that a claim for misrepresentation must comply with Federal Rule of Civil Procedure 9(b).

E. Attorney's Fees

Defendant contends that there is no general maritime law rule for the provision of attorney's fees in marine insurance cases; therefore, New York law, as set out in the Policy's choice

of law provision, applies. According to Defendant, New York law does not allow an insured to recover its attorney's fees from its insurer in a successful suit for coverage. Plaintiff responds that maritime law does address attorney's fees.

Plaintiff relies on *Natco Limited Partnership v. Moran Towing of Florida, Inc.*, 267 F.3d 1190, 1193 (11th Cir. 2001), for the proposition that "Attorneys' fees generally are not recoverable in admiralty unless (1) they are provided by the statute governing the claim, (2) the nonprevailing party acted in bad faith in the course of the litigation, or (3) there is a contract providing for the indemnification of attorneys' fees." Plaintiff states in its response that it has included attorney's fees in its prayer for relief to preserve its right to seek fees should the Court find bad faith. However, as Defendant points out, Plaintiff's Amended Complaint does not allege any facts giving rise to bad faith. Thus, Plaintiff's Amended Complaint has failed to allege an entitlement to attorney's fees and Plaintiff's demand for such is dismissed.

Accordingly, it is

ORDERED that Defendant's Motion to Dismiss Amended Complaint [DE 13] is **GRANTED in part:**

a) Counts 1, 2, and 4 are **DISMISSED without prejudice.**

b) Plaintiff's demand for attorney's fees is **DISMISSED.**

c) Plaintiff shall file a second amended complaint in accordance with this Order by **October 12, 2021.**

DONE and ORDERED in Fort Lauderdale, Florida, this 29th day of September, 2021.

RODNEY SMITH
UNITED STATES DISTRICT JUDGE

cc: All Counsel of Record