UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 20-62643-CIV-SINGHAL

CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON SUBSCRIBING TO POLICY NO. B0901LH1620115000,

Plaintiff,

v.

EMPRESS MARINE VENTURES, LTD.,

Defendant.
_____/

ORDER

THIS CAUSE is before the Court on Plaintiff's Motion to Dismiss Counterclaim of Empress Marine Ventures, Ltd. and Motion to Strike Jury Trial Demand ("Motion to Dismiss") (DE [15]). Defendant filed its response (DE [16]) and Plaintiff filed a subsequent reply (DE [19]). Accordingly, the matter is ripe for review.

I. PROCEDURAL HISTORY

Plaintiff Certain Underwriters at Lloyd's of London Subscribing to Policy No. B0901LH1620115000 ("Plaintiff") commenced this action as an admiralty and maritime cause within the meaning of Federal Rules of Civil Procedure 9(h), 38(e), and 82. On December 22, 2020, Plaintiff filed the Complaint for Declaratory Relief ("Complaint") (DE [1]) against Defendant Empress Marine Ventures, Ltd. ("Defendant") seeking a determination that an express warranty of the Policy was violated due to Captain Sackmann's failure to observe laws and regulations related to navigation within a marked channel, and as to Underwriters' determination that the reasonable cost of repairs to the

Vessel did not exceed $4.15 million. On March 12, 2021, in response to the Complaint (DE [1]), Defendant filed its Motion to Dismiss & Counterclaim (DE [9]).

On March 19, 2021, Plaintiff filed its Amended Complaint for Declaratory Relief ("Amended Complaint") (DE [10]) pursuant to 28 U.S.C. § 2201, in connection with a dispute over insurance coverage related to repairs to the M/Y "Never Say Never" (the "Vessel"), a 2011 130' Sunseeker Predator motor yacht, hull identification no. GB-XSK05273E111, registered in the Cayman Islands under official no. 743599 and owned by Defendant. (Am. Compl. (DE [10]) ¶ 11). Plaintiff asserts a claim for Breach of Express Warranty (Count I) and Declaratory Judgment (Count II). On April 2, 2021, Defendant filed its Answer & Counterclaim (DE [14]). Defendant asserts a claim for Breach of Covenant of Good Faith and Fair Dealing (Count I) and Declaratory Judgment pursuant to 28 U.S.C. § 2201 (Count II) against Plaintiff (the "Counterclaim").

Plaintiff issued a Hull and Machinery Policy to Defendant, policy no. B0901LH1620115000 (the "Policy"), with effective dates of July 31, 2016 to July 31, 2017 to insure the Vessel. (Am. Compl. (DE [10]) ¶ 10); *see also* (Am. Compl. (DE [10-1]) Ex. A). Plaintiff contends the Policy does not cover Defendant's losses. Defendant, on the other hand, contends the $9.5 million in coverage provided under the policy is owed in its entirety.

II. BACKGROUND FACTS

In December 2016, the Vessel was in transit from Fort Lauderdale, Florida to Casa di Campo in the Dominican Republic, under the temporary command of relief captain, Dusty Sackmann ("Captain Sackmann"), with the Vessel's Chief Engineer, Russell Masterman, also on board. (Am. Compl. (DE [10]) ¶ 17). On December 28, 2016, while

entering the channel to Puerto Plata on the northern coast of the Dominican Republic, the Vessel grounded after Captain Sackmann, was unable to discern a partially submerged channel marker and was operating the Vessel outside of a marked channel (the "Incident"). *Id.* at 18. The Vessel sustained some damage to her structure, hull, fuel and water tanks, starboard stabilizer and propulsive stern gear as a result of the Incident and was moved by Captain Sackmann to Ocean World Marina in Puerto Plata, Dominican Republic. *Id.* at ¶ 20–22. The Vessel's permanent captain, Robin Todd ("Captain Todd"), rejoined the Vessel shortly after the Incident, where the Vessel was docked at Ocean World Marina. *Id.* at ¶ 22. During the approximate four weeks that the Vessel was docked at Ocean World Marina, it sustained additional damage due to heavy weather (the "Marina Incident"). *Id.*

On January 23, 2017, Plaintiff instructed a surveyor to survey the Vessel to ascertain the extent of the damage and on January 24, 2017, the Vessel was towed back to Fort Lauderdale, Florida, for additional inspection and assessment of repairs needed. During the Vessel's towage, the Vessel encountered heavy pitching waves and sustained some additional damage (the "Towage Incident"). (Am Compl. (DE [10]) ¶ 23–24). On January 28, 2017, the Vessel arrived in Fort Lauderdale, Florida and was taken in tow up the New River towards Lauderdale Marine Center. *Id.* at ¶ 24. Defendant subsequently made three insurance claims relating to the Incident, the Marina Incident, and the Towage Incident. *Id.* at 25.

Plaintiff caused a full investigation to be conducted related to the three incidents to determine the extent of coverage and the reasonable cost of repairs to the Vessel. (Am. Compl. (DE [10]) ¶ 26). The Vessel was hauled out on February 3, 2017 and blocked

off for inspection by Defendant's surveyors, Roy Shorter and Alan Doman of A1 Surveyors (collectively "A1 Surveyors"). *Id.* at ¶ 27–28. Plaintiff claims it requested a repair protocol, estimates for repair and a survey report following the inspection of A1 Surveyors to try to adjust the loss but it did not receive a survey report from the initial survey and the work was not sent out for bid to multiple shipyards. *Id.* at ¶ 29–30. Instead, Defendant retained Sunseeker Yacht Services in Fort Lauderdale, Florida to commence repairs to the Vessel. *Id.* at ¶ 31.

On June 16, 2017, the Vessel was hauled out again for under cover repairs at the Lauderdale Marine Center "East Yard" coordinated by Captain Todd, A1 Surveyors, and Peter Gimpel, a Naval Architect with Winchester Design Group, Inc. (Am. Compl. (DE [10]) ¶ 33). On May 13, 2019, Captain Todd's employment contract with Defendant was terminated, and the Vessel's chief engineer, Russel Masterman, coordinated the repairs from that point until his departure from the Vessel, at which time, repairs were coordinated by Captain James Farnborough. *Id.* at ¶ 34. Plaintiff claims it was willing to cooperate and resolve the claims, but Defendant caused the Vessel to undergo repairs over the next nearly four and a half years, without proper management and coordination of repairs or supervision of contractors, causing the repair costs to exceed $8.2 million. Due to the prolonged nature of repairs to the Vessel and the repeated, substantial increases in costs of repair, Plaintiff retained the services of Peter Stembridge, the Managing Director of Seawing Europe, to assist in continuing to investigate and handle the claims. *Id.* at ¶ 35. Plaintiff, in conjunction with their expert, Peter Stembridge, determined that the reasonable cost to repair the Vessel was half that amount. *Id.* at ¶¶ 36–51; *see also* (Am. Compl. (DE [10-2]) Ex. B).

In its Counterclaim (DE [14]), Defendant asserts marine surveyors began examining the Vessel to ascertain the scope and extent of damages inflicted on the Vessel in February 2017 and concluded that "removing interior hull and machinery is necessary in order to properly assess the scope and extent of damages suffered by the Vessel." (Ans. (DE [14]) ¶ 20–21 (p. 11 of 16)). They estimated the repairs would take well over a year and were completed in November 2020. *Id.* at ¶ 22–24. Defendant claims these delays were caused by Plaintiff and Plaintiff's specific acts of omission including not declaring the Vessel a total loss at the outset and not properly investigating the claims. *Id.* at ¶ 26. Defendant alleges Plaintiff's insurance adjuster, Neil McLaren, initially claimed the Vessel could be repaired for approximately $700,000.00 but failed to properly document or justify the initial estimate for the cost of repairs and then withdrew from the assignment. *Id.*; *see also id.* at ¶ 31. Defendant claims Plaintiff delayed in assigning a new insurance adjuster to the assignment which further delayed financing for repairs. *Id.* at ¶ 26.

Defendant produced documentation to Plaintiff, which evidenced the total cost of repairs exceeded $8 million dollars. (Ans. (DE [14]) ¶¶ 27–28). The Vessel was appraised at a fair market value of approximately $9,500,000 to $10,000,000 and the Policy provides for $9,500,000.00 in coverage. *Id.* at ¶ 29–30. Defendant claims the discrepancies between the insurance adjuster's initial assessment and the total Peter Stembridge determined to be the total cost of repairs constitute evidence of negligent claims management and bad-faith dealings. *Id.* at ¶ 31–34.

III. LEGAL STANDARD

At the pleading stage, a complaint must contain "a short and plain statement of the claim showing the [plaintiff] is entitled to relief." Fed. R. Civ. P. 8(a). Although Rule 8(a) does not require "detailed factual allegations," it does require "more than labels and conclusions . . . a formulaic recitation of the cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). To survive a motion to dismiss, "factual allegations must be enough to raise a right to relief above the speculative level" and must be sufficient "to state a claim for relief that is plausible on its face." *Id.* at 555. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

In considering a Rule 12(b)(6) motion to dismiss, the court's review is generally "limited to the four corners of the complaint." *Wilchombev v. TeeVee Toons, Inc.*, 555 F.3d 949, 959 (11th Cir. 2009) (quoting *St. George v. Pinellas Cty.*, 285 F.3d 1334, 1337 (11th Cir. 2002)). Courts must review the complaint in the light most favorable to the plaintiff, and it must generally accept the plaintiff's well-pleaded facts as true. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Am. United Life Ins. Co. v. Martinez*, 480 F.3d 1043, 1057 (11th Cir. 2007). However, pleadings that "are no more than conclusions are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Iqbal*, 556 U.S. at 679.

IV. DISCUSSION

"[U]nder Florida law, courts will enforce 'choice-of-law provisions unless the law of the chosen forum contravenes strong public policy.'" *Maxcess, Inc. v. Lucent Techs.,*

Inc., 433 F.3d 1337, 1341 (11th Cir. 2005) (quoting *Mazzoni Farms v. E. I. Dupont De Nemours & Co.*, 761 So. 2d 306, 311 (Fla. 2000)). The parties do not dispute that New York law is controlling under the Policy. *See* (Am. Compl. (DE [10-1], p. 7) (Plaintiff's Exhibit A, the insurance policy at issue in this litigation stating "Choice of law & Jurisdiction: New York"). Accordingly, New York law governs substantive issues.

In the instant motion, Plaintiff moves to dismiss Defendant's Counterclaim (DE [14]) arguing Count I is barred by New York Law, Count II is redundant, and Defendant's request for jury trial is improper. Defendant argues it has stated a valid claim for breach of an implied covenant of good faith and fair dealing—not a non-existent tort claim—and Count II is not redundant as Defendant is permitted to plead in the alternative pursuant to Federal Rules of Civil Procedure 8(d)(2) and 57. Additionally, Defendant contends its counterclaims are entitled to a jury trial pursuant to the "savings to suitors" clause found in 28 U.S.C. § 1333(1). This Court will address each of Plaintiff's arguments in turn.

A. Defendant's Counterclaim (DE [14]) – Count I

Plaintiff argues Defendant's breach of the covenant of good faith and fair dealing claim is merely a surrogate for a bad faith claim, which is not recognized under New York law. At the outset, this Court must clarify such doctrine is recognized. *See N.Y. Marine & Gen. Ins. Co. v. Tradeline (L.L.C.)*, 266 F.3d 112, 123 (2d Cir. 2001) (quoting *Puritan Ins. Co. v. Eagle S.S. Co. S.A.*, 779 F.2d 866, 870 (2d Cir. 1985)) ("Parties to a marine insurance contract are held to the highest degree of good faith."). *Uberrimae fidei* is a doctrine in admiralty law that requires "the party seeking insurance . . . to disclose all circumstances known to it which materially affect the risk." *Fireman's Fund Ins. Co. v. Great Am. Ins. Co.*, 822 F.3d 620, 633 (2d Cir. 2016) (quoting *Folksamerica Reinsurance*

Co. v. Clean Water of N.Y., Inc., 413 F.3d 307, 311 (2d Cir. 2005)). "The duty of *uberrimae fidei* is a reciprocal one." *Commercial Union Ins. Co. v. Flagship Marine Servs.*, 982 F. Supp. 310, 314 (S.D.N.Y. 1997) (citing *Compagnie de Reassurance d'Ile de France v. New England Reinsurance Corp.*, 944 F. Supp. 986, 1003 (D. Mass. 1996)). However, Plaintiff's argument seems to indicate that Defendant's count I converts a breach of contract claim into an independent tort claim. Defendant argues Plaintiff's argument is not relevant to this litigation because Defendant does not assert a tort claim, instead, its claim for breach of implied covenant of good faith and fair dealing is related to a maritime insurance contract, specifically, the Policy. This Court agrees and will not address whether New York case law recognizes a tort claim in certain actions arising out of a breach of contract.

"In New York, breach of the implied duty of good faith and fair dealing 'is merely a breach of the underlying contract.'" *Nat'l Mkt. Share, Inc. v. Sterling Nat'l Bank*, 392 F.3d 520, 525 (2d Cir. 2004) (quoting *Fasolino Foods Co. v. Banca Nazionale Del Lavoro*, 961 F.2d 1052, 1056 (2d Cir. 1992)). "New York law . . . does not recognize a separate cause of action for breach of the implied covenant of good faith and fair dealing when a breach of contract claim, based upon the same facts, is also pled." *Advanced Water Techs., Inc. v. Amiad U.S.A., Inc.*, 457 F. Supp. 3d 313, 318 (S.D.N.Y. 2020) (quoting *Harris*, 310 F.3d at 81)); *see also ICD Holdings S.A. v. Frankel*, 976 F. Supp. 234, 243–44 (S.D.N.Y. 1997) ("A claim for breach of the implied covenant will be dismissed as redundant where the conduct allegedly violating the implied covenant is also the predicate for breach of covenant of an express provision of the underlying contract.").

First, Plaintiff argues Defendant's Counterclaim has no claim for breach of contract. *See* (Mot. (DE [15]) at 8). Then, Plaintiff argues Defendant's Count II is essentially a breach of contract claim, and because a claim for breach of the duty of good faith and fair dealing cannot survive when the claim is pleaded alongside a breach of contract claim, Plaintiff argues it should be dismissed. *See* (Reply (DE [19]) at 4). Defendant's response is limited to whether New York law allows claims for breach of implied covenant of good faith and fair dealing.

"In New York, all contracts imply a covenant of good faith and fair dealing in the course of performance." *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 7153 (2002). "This covenant embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Id.* "While the duties of good faith and fair dealing do not imply obligations inconsistent with other terms of the contractual relationship, they do encompass any promises which a reasonable person in the position of the promisee would be justified in understanding were included." *Id.* "Under New York law, 'to state a cause of action alleging breach of an implied covenant of good faith and fair dealing, the plaintiff must allege facts which tend to show that the defendant sought to prevent performance of the contract or to withhold its benefits from the plaintiff.'" *Osuna v. Citigroup, Inc.*, 820 Fed. Appx. 38, 42 (2d Cir. 2020) (citations omitted). "The boundaries set by the duty of good faith are generally defined by the parties' intent and reasonable expectations in entering the contract." *Cross & Cross Props., Ltd. v. Everett Allied Co.*, 886 F.2d 497, 502 (2d Cir. 1989) (citing *Restatement (Second) of Contracts* § 205 (1981)). "To establish a *prima facie* case for breach of contract, a plaintiff must plead and prove:

(1) the existence of a contract; (2) a breach of that contract; and (3) damages resulting from the breach." *Nat'l Mkt. Share, Inc.*, 392 F.3d at 525 (citations omitted).

The threshold of sufficiency that a complaint must meet to survive a motion to dismiss is exceedingly low. *See Ancata v. Prison Health Services, Inc.*, 769 F.2d 700, 703 (11th Cir. 1985). Here, Defendant has alleged a valid marine insurance contract existed between the parties, every contract contains an implied covenant of good faith and fair dealing, and Plaintiff's conduct in handling Defendant's insurance claims amounted to bad faith. Defendant goes on to list actions and omissions by Plaintiff, which purportedly caused delays. *See* (Ans. (DE [14]) ¶ 26). Defendant also alleges Plaintiff initially undervalued the cost of repairs by millions of dollars and ultimately concluded the total cost of repairs was half the actual cost. Accordingly, Defendant's counterclaim for breach of implied covenant of good faith and fair dealing survives a motion to dismiss.

B. Defendant's Counterclaim (DE [14]) – Count II

Plaintiff argues Defendant's count II should be dismissed as redundant because it is a reiteration of the claims made by Plaintiff in its Amended Complaint (DE [10]) and duplicative of Defendant's count I. Defendant opposes dismissal and argues it is permitted to plead a claim seeking declaratory relief in the alternative to its breach of implied covenant of good faith and fair dealing. Notably, Plaintiff does not argue the count is not well-pled.

Under the federal Declaratory Judgment Act, a court maintains broad discretion over whether to exercise jurisdiction over claims. "The Declaratory Judgment Act provides that a court **may** declare the rights and other legal relations of any interested party, not that it **must** do so." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 136

(2007) (quoting 28 U.S.C. § 2201(a)); *see also Ameritas Variable Life Ins. Co. v. Roach*, 411 F.3d 1328, 1330 (11th Cir. 2005) (The Declaratory Judgment Act "only gives the federal courts competence to make a declaration of rights; it does not impose a duty to do so."). The courts thus have "unique and substantial discretion in deciding whether to declare the rights of litigants." *Wilton v. Seven Falls Co.*, 515 U.S. 277, 286 (1995).

In this case, Defendant's claims in Count II of the Counterclaim (DE [14]), read in conjunction with the Amended Complaint (DE [10]), plainly reveal that the two are mirror images of one another. This is a declaratory judgment action as to whether there is insurance coverage for a loss and to determine the reasonable cost of repairs to the Vessel. "Thus, when presented with a redundant counterclaim for declaratory judgment, a court may either strike or dismiss the filing." *Ctr. Hill Courts Condo. Ass'n, Inc. v. Rockhill Ins. Co.*, 2019 WL 7899220 *2 (S.D. Fla. Apr. 9, 2019). "When determining whether to exercise jurisdiction over a counterclaim, or, alternatively, whether to dismiss the same as redundant, a court must consider whether the declaratory action serves a useful purpose." *Id.* (citing *Medmarc Cas. Ins. Co. v. Pineiro & Byrd, PLLC*, 783 F. Supp. 2d 1214, 1217 (S.D. Fla. 2011)) (internal quotation omitted). Significantly, "[w]here a district court has before it a declaratory judgment action and a direct action containing all of the issues in the declaratory judgment action, and decides the common issues in the direct action, it may exercise its discretion to dismiss the declaratory judgment complaint." *Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.)*, 4 F.3d 1095, 1100 (2d Cir. 1993); *see also Knights Armament Co. v. Optical Sys. Tech.*, 568 F. Supp. 2d 1369, 1374-75 (M.D. Fla. 2008) (finding that the court's discretion whether to sustain a claim under Florida's Declaratory Judgment Act "extends to cases where a direct action

involving the same parties and the same issues has already been filed."). While this Court recognizes Florida law permits a claim for declaratory relief to be pled in the alternative, a declaratory action is already pending. *See* Fla. Stat. § 95.11. Accordingly, Defendant's count II is dismissed.

C. Defendant's Counterclaim (DE [14]) – Jury Demand

Under 28 U.S.C. § 1333(1), federal district courts "have original jurisdiction, exclusive of the courts of the States, of . . . [a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." 28 U.S.C. § 1331(1). The Eleventh Circuit has explained:

> Under the savings-to-suitors clause, **a plaintiff** in a maritime case alleging an *in personam* claim has three options: (1) the plaintiff may file suit in federal court under admiralty jurisdiction . . . ; (2) the plaintiff may file suit in federal court under diversity jurisdiction; or (3) the plaintiff may file suit in state court.

St. Paul Fire & Marine Ins. Co. v. Lago Canyon, Inc., 561 F.3d 1181, 1187 n.13 (11th Cir. 2009) (citations omitted) (emphasis added). "Section 1333 vests district courts with original jurisdiction over civil admiralty or maritime disputes, but the statute 'saves to suitors'—meaning plaintiffs—'all other remedies to which they are otherwise entitled.'" *Deroy v. Carnival Corp.*, 963 F.3d 1302, 1313 (11th Cir. 2020) (quoting 28 U.S.C. § 1333(1)). "One remedy the saving-to-suitors clause safeguards is the right to a jury trial." *Id.* (citing *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 444-45 (2001) ("Trial by jury is an obvious, but not exclusive, example of the remedies available to suitors.").

The Eleventh Circuit, however, has explained the history of Federal Rule of Civil Procedure 9(h) ("Rule 9(h)") "and how it preserves a non-jury trial when cases involve both admiralty and some other basis for jurisdiction." *St. Paul Fire & Marine Ins. Co.*, 561

F.3d at 1187 (citing *Harrison v. Flota Mercante Grancolombiana, S. A.*, 577 F.2d 968, 986 (5th Cir. 1978)). Plaintiff brought this case pursuant to the Court's admiralty jurisdiction. Defendant filed its counterclaims under diversity of citizenship as an alternative basis for jurisdiction. "[I]n such dual jurisdiction cases, the plaintiff may elect to proceed in admiralty under Rule 9(h), rather than under diversity jurisdiction, and **thereby preclude a defendant from exercising his right to trial by jury**." *Id.* (citing *Harrison*, 577 F.2d at 986) (emphasis added). Accordingly, it is hereby

ORDERED AND ADJUDGED that Plaintiff's Motion to Dismiss Counterclaim of Empress Marine Ventures Ltd. and Motion to Strike Jury Trial Demand (DE [15]) is **GRANTED IN PART** as to Count II of Defendant's Counterclaim (DE [14]) and Jury Demand and **DENIED IN PART** as to Count I of Defendant's Counterclaim (DE [14]). Accordingly, Plaintiff's response to Count I of Defendant's Counterclaim (DE [14]) is due by **March 13, 2022**.

DONE AND ORDERED in Chambers, Fort Lauderdale, Florida, this 28th day of February 2022.

RAAG SINGHAL
UNITED STATES DISTRICT JUDGE

Copies furnished to counsel of record via CM/ECF