SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

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NEW YORK UNIVERSITY, NYU SCHOOL OF MEDICINE, and NYU HOSPITALS CENTER,

Plaintiffs,

-against-

Index No. 653535/15

TURNER CONSTRUCTION COMPANY,

Defendants.

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C.E. Ramos, J.S.C.:

Defendant Turner Construction Company (Turner) moves to dismiss the first and second claims, in addition to all claims seeking recovery of business interruption losses (CPLR 3211 [a] [1], [5], [7]).

Background

The allegations of the complaint are assumed to be true for the purposes of disposition.

Plaintiffs New York University (NY University), NYU School of Medicine, and NYU Hospitals Center (together, NYU) assert one claim for breach of contract by NY University and one claim for negligence by all plaintiffs (NYU). In total, NYU seeks in excess of $1 billion in property and business interruption/loss of use damages allegedly sustained as a result of Super Storm Sandy flooding to its Langone Medical Center (Langone campus). Turner was a contractor performing construction work for NYU at the Langone campus, which abuts the FDR Drive on Manhattan's east

side, when Super Storm Sandy inundated New York with vast swaths of water.

NYU alleges that the majority of the damage that it experienced was caused by Turner's failure to meet basic standards of care and construction techniques when it created and then failed to protect vulnerabilities at a construction site of a new "energy building." Construction of the energy building was performed pursuant to a December 2011 contract, named the Energy Building Construction Management Agreement (energy building contract).

NYU alleges that Turner's failures allowed water from the storm surge to enter buildings adjacent to the energy building which resulted in wide-ranging harm, causing NYU to suffer physical damage and business interruption in excess of $1 billion.

Discussion

Turner moves to dismiss the claims for breach of contract and negligence on the grounds that NY University mandated that Turner enroll in its owner-controlled insurance policy (OCIP), in which NY University broadly waived "any and all claims against Turner for "property damage." In addition, Turner asserts that the parties entered into other agreements which contain express and specific waiver provisions. NYU also procured property insurance covering its real and personal property at the Langone

campus, and waived any claims against Turner for damages arising from floods (like that caused by Super Storm Sandy) and from "ensuing loss" from defective work (as alleged in the complaint).

In opposition, NYU disputes that it waived any claims in the OCIP and highlights that the parties specifically included a merger clause in section 19.1 of the energy building contract. According to NYU, this merger clause contained in the energy building contract bars integration of the prior agreements it references, and thus, the waiver provisions contained in those prior agreements are of no import.

The sound rule in the construction of contracts is that where the language is clear, unequivocal and unambiguous, the contract is to be interpreted by its own language (*R/S Assocs. v New York Job Dev. Auth.*, 98 NY2d 29, 33 [2002]). Thus, "when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms" (*Id.*).

The Court agrees with Turner that the energy building contract unambiguously incorporates the waiver provision of the OCIP policy, and other property insurance policies, described below. Here, the numerous references in the energy building contract to a prior agreement manifest the parties' intent that they be read together, as part of the entire contract between the parties, rather than a separate contract (*see generally J. Remora*

Maint. LLC v Efromovich, 103 AD3d 501, 502 [1st Dept 2013]).

The energy building contract, dated December 2011 between NYU and Turner, references a February 2009 agreement between Turner and NYU pursuant to which Turner has been providing "pre construction services" for the energy building contract (defined therein and hereinafter as the hospital agreement):

> "WHEREAS, pursuant to an agreement dated as of February 3, 2009, with NYU Hospitals Center ... the Construction Manager [Turner] has been providing pre-construction services for the [energy building] project and is continuing to do so" (*Id.*, at 2, annexed to Chertoff Aff. As Exh. F).

The energy building contract also states that Turner acknowledges that its services "for the Project under the Hospital Agreement and construction of the Project under this Agreement will overlap" (*Id.*, § 2.2). In another provision, it states that Turner "shall continue performing pre-construction services for the Project as set forth in the Hospital Agreement until such services have been completed" (*Id.*, § 3.2).

With respect to the OCIP, the energy building contract's definition of "contract documents" makes clear that it includes "the OCIP Contract Enabling Language annexed hereto as Exhibit K" (emphasis in original) (*Id.*, § 1.1). In Exhibit K to the energy building contract, the parties agreed that NY University may elect to procure and maintain an OCIP for the project, which is a "single insurance program that insures the project Owner [NYU] and ... Turner ... for work performed at each Project Site" (*Id.*

At K). Under the energy building contract, Turner's participation in the OCIP was mandatory.

NY University does not dispute that Turner had the option of using, and did use, an OCIP for its insurance requirements under the energy building contract. Turner was enrolled in the OCIP as a named insured.

The OCIP contains a broad waiver by NY University against Turner (and vice versa) for "any and all claims" for "property damage":

> "With respect to any 'property damage' to the project site [energy building] and any and all resultant 'property damage' arising out of the ongoing operations of you, any subcontractor, or another other contractors working directly or indirectly on their behalf, each Insured, including the Named Insured [NY University], agree to waive any and all a) claims against any other Insured [Turner or NYU]" (OCIP Policy, Builder's Risk Exclusion and Waiver of Claims Subrogation Rights, annexed to Chertoff Aff. As Exh G.).

The OCIP broadly defines property damage as including: "physical injury to tangible property, including all resulting loss of use of that property ... Loss of use of tangible property that is not physically injured" (*Id.*, at section V).

Property damage, as defined in the OCIP, and as employed in the waiver of claims provision, encompasses all of the damages claimed by NYU in its complaint. In its complaint, NYU alleges that the energy building suffered extensive property damage when 11 million gallons of water from Super Storm Sandy passed through an excavation opening that Turner created at the energy building

construction site in order to connect to subterranean floors of other surrounding buildings, resulting in extensive property damage and business interruption losses.

The merger clause contained in the energy building contract, which states that "This Agreement ... and all Contract Documents," constitutes the entire agreement and understanding of the parties, does not bar integration of the terms of the OCIP policy (*Id.*, § 19.1).

Further, both the hospital agreement and the energy building contract required NYU to procure property insurance relating to Turner's work at the energy building construction site. Section 11.4.1 of the energy building contract states that NYU agrees to

> "provide and maintain ... all necessary property insurance for each Project ... The Owner's property insurance shall be placed upon the entire Work at the Site, to the full insurable value thereof. Such insurance shall insure against the perils of ... flood ... The Construction Manager [Turner] and its Subcontractors and sub-subcontractors shall be added as additional insureds to the property insurance provided under this section." (*Id.*).

The hospital agreement contains a nearly identical provision, also set forth in section 11.4.1 (compare Chertoff Aff. Exhs. E and F).

To this end, NYU procured "all-risk" property insurance from Factual Mutual Insurance Company (FM all risk policy) covering its real and personal property at the Langone campus, which covers the energy building and adjacent properties. Its

subsidiaries NY University and NYUHC are named insureds under that policy, which includes a maximum limit per occurrence of $1,850,000,000. NYU's FM all risk policy states, in the declarations page:

> "This Policy covers property, as described in this Policy, against ALL RISKS OF PHYSICAL LOSS OR DAMAGE, except as hereinafter excluded, while located as described in this Policy" (caps in original) (FM all risk policy, annexed to Chertoff Aff. As Exh. I).

Notably, NYU commenced a separate insurance coverage lawsuit against FM in the Southern District of New York (FM SDNY action), seeking a declaration that FM is obligated to indemnify it for losses for property damage under the FM all risk policy as a result of "catastrophic impacts" caused by Superstorm Sandy to the Langone campus (FM SDNY action complaint, annexed to Chertoff Aff. As Exh. M). In its pleadings, NYU alleges that the FM all risk policy provides property damage coverage for real and personal property, including business interruption losses and "ensuing loss" as a result of faulty workmanship and construction or design, and seeks coverage for the same damages claimed in this action (*Id.*, ¶ 31,). That lawsuit is pending.

By NYU's own judicial admissions, the FM all risk policy covers the losses allegedly caused by Turner in this action.

The hospital agreement also contains a broad waiver of claims provision which bars claims for damages "at or adjacent to the Project Site [energy building project]" as a result of NYU's

procurement of the FM all risk policy:

> "If during a Project construction period the Owner insures properties, real or personal or both, at or adjacent to the Project Site by property insurance policies separate from those insuring the Project ... the Owner [NYU] shall waive all rights against the Contractor [Turner] ... for damages caused by fire or other causes of loss covered by separate insurance (Hospital agreement, § 11.4.3, annexed to Chertoff Aff. As Exh. E).[1]

NYU also procured a builder's risk insurance policy (builder's risk policy) for property damage to the energy building site itself, through Zurich Insurance Company, under which the named insureds are NY University and additional named insureds are, inter alia, "all contractors and subcontractors ... at the project location" (Builders risk policy, annexed to Chertoff Aff. As Exh. J). The "insured project" under that policy is "New construction of a Energy Building for the campus" (*Id.* at Declarations page).

Finally, the energy building contract itself contains a broad waiver of claims as between NYU, Turner and subcontractors "with respect to damages (whether or not due to negligence of any such party) caused by ... other perils" covered by insurance by the builder's risk policy in both the hospital agreement and

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[1] It appears that NYU is seeking damages sustained to buildings adjacent to the energy building, rather than for damages to the energy building project site itself. To the extent that NYU's property damage and business interruption claims relate to harm sustained by the buildings adjacent to, or adjoining the energy building, such damages are clearly subject to the waiver under the hospital agreement and are otherwise covered by the FM all risk policy.

energy building contract (Energy building contract, § 11.4.2, annexed to Chernoff Aff. As Exh. F).

The Court rejects NYU's contention that GOL § 5-323 precludes the enforceability of the waivers. It is well-settled that "[i]nsofar as damages for injuries are in fact compensable under an insurance policy mandated by contract, a provision waiving all rights to recover for those same injuries other than from the proceeds of the insurance policy does not constitute a violation of the statute [GOL § 5-323]" (*Board of Educ., Union Free School Dist. No. 3, Town of Brookhaven v Valden Assocs.*, 46 NY2d 653, 657 [1979]).

The Court has considered NYU's remaining arguments and finds them unavailing.

Accordingly, it is

ORDERED that defendant's motion to dismiss is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of the defendant.

Dated: February 2, 2018

ENTER:

J.S.C.

CHARLES E. RAMOS