Docket #0029 Date Filed: 10/9/2024

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE: ZACHRY INDUSTRIAL, INC., Debtor.	§ § § §	Case No. 24-90377 (MI) Chapter 11

ALLIANZ GLOBAL RISKS US INSURANCE CO.; CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON SUBSCRIBING TO POLICY NO. B0180ME2219036; GREAT LAKES INSURANCE SE; GUIDEONE NATIONAL INSURANCE COMPANY; and TOKIO MARINE AMERICA INSURANCE COMPANY, as subrogees of FLNG Policy Procurement LLC; FLNG Liquefaction, LLC; FLNG Liquefaction 2, LLC; and FLNG Liquefaction 3, LLC, Plaintiffs, v. ZACHRY INDUSTRIAL, INC.; ZACHRY INDUSTRIES, INC.; JVIC DEMERGER FABRICATION, INC.; ZACHRY ENTERPRISE SOLUTIONS DEMERGER, INC.; CB&I LLC n/k/a; MCDERMOTT INTERNATIONAL LTD.; CHIYODA INTERNATIONAL CORPORATION; and PSRG, INC., Defendants.	§ § § §

ZACHRY INDUSTRIAL, INC.'S RULE 12(b)(6) MOTION TO DISMISS AND JOINDER TO (1) CB&I LLC'S RULE 12(b)(6) MOTION TO DISMISS, AND (2) CHIYODA INTERNATIONAL CORPORATION'S RULE 12(b)(6) MOTION TO DISMISS AND JOINDER TO CB&I LLC'S RULE 12(b)(6) MOTION TO DISMISS

Defendant Zachry Industrial, Inc., ("Zachry Industrial")[1] files this Motion to Dismiss and Joinder pursuant to Federal Rule of Civil Procedure 12(b)(6) (as incorporated by Federal Rule of Bankruptcy Procedure 7012), and respectfully shows the Court as follows:

I.
EXECUTIVE SUMMARY

Zachry Industrial joins and adopts the CB&I and CIC Motions to Dismiss [Adv. P. Doc. Nos. 13, 22, 27] in their entirety because they demonstrate why the economic-loss rule, the statute of limitations, and Federal Rule of Civil Procedure 8(a) all separately require dismissal of Plaintiffs' negligence claim (as subrogee of FLNG) against the Contractors.[2] Zachry Industrial files this Motion to Dismiss to raise an additional, independent ground for dismissal: the waiver of subrogation and release provisions in the parties' EPC Contract.[3]

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[1] Plaintiffs have named JVIC Demerger Fabrication, Inc., and Zachry Enterprise Solutions Demerger, Inc. as defendants in this action. These entities were formed after the execution of the EPC contracts related to the FLNG Facility and have been merged out of existence. Likewise, Defendant Zachry Industries, Inc. was not a party to any EPC contract related to the FLNG Facility.

[2] The capitalized terms not otherwise defined in this Joinder have the same meaning as in the Motions to Dismiss.

[3] Zachry Industrial will refer to the Fixed Price Separated Turnkey Agreement for the Engineering, Procurement and Construction of the Freeport Train 3 Liquefaction Project, dated as of the 24th Day of March, 2015 as the "EPC Contract." The relevant insurance and waiver provisions of the EPC Contract cover all three Trains of the FLNG Facility.

The EPC Contract requires each party to obtain insurance to cover various types of losses at the FLNG Facility, including stating the scope of that required coverage and impact on liability for various types of harm. Attachment O to the EPC Contract required FLNG to obtain property insurance covering "physical loss or damage" to both the Existing Facility (defined to include the facilities at the site prior to Zachry Industrial's work) and Expansion Facility (defined to include "the Train 1 Expansion, Train 2 Expansion and Train 3 Expansion, including all Expansion Facility Common Systems") (Att. O, ¶ 2.A.4; EPC Contract, Art. I Definitions, at p. 16.). All such property insurance policies were required to include a waiver of subrogation in favor of Zachry Industrial and the other Contractors (Att. O, ¶ 2.A.4), and "clauses providing that each underwriter shall waive its rights of recovery, under subrogation or otherwise," against the Contractors (Att. O, ¶ 2.G).

Additionally, in Attachment O, FLNG expressly "waive[d] any and all claims" against Zachry Industrial and the other Contractors to the extent FLNG received "payment for such claims" under any insurance policies "required to be procured by, or on behalf of," FLNG pursuant to the EPC Contract (Att. O, ¶ 2.G). In paragraphs 45 and 52 of their Petition, Plaintiffs plead that FLNG made a claim to them for the alleged loss at issue under various insurance policies in place, that they made payment to FLNG under the policies, and that "as a result of those payments" they "are subrogated to [FLNG's] right of recovery against Defendants and assert this lawsuit in the name of Plaintiff Insurers directly."

As a consequence of FLNG's receipt of insurance payments for the claim at issue, FLNG has waived any negligence claim against Zachry Industrial and the other Contractors. Because Plaintiffs stand in FLNG's shoes and have no greater rights as a matter of law, FLNG's waiver of any and all claims bars Plaintiffs from recovering as well. Thus, Plaintiffs' negligence claim (as subrogees of FLNG) must be dismissed.

II.
BACKGROUND

FLNG, CB&I, CIC, and Zachry Industrial—all highly sophisticated entities represented by able, experienced attorneys—negotiated and entered into the EPC Contract, under which CB&I, CIC, and Zachry Industrial provided engineering, procurement, and construction services for the Project at the Facility. *See* Pl.'s Orig. Pet. [Adv. P. Doc. No. 1-2] ("Pet.") at ¶¶ 23, 30–31. The parties agreed in the EPC Contract to a detailed, comprehensive structure and extensive set of provisions governing their relationship. *See* CB&I'S Mot. To Dismiss, Ex. A ("EPC Contract") (filed under seal).[4] Just as it does for CB&I and CIC, the EPC Contract exclusively defines Zachry Industrial's relationship with FLNG. *See id.*[5]

Attachment O, ¶ 2.A.4, of the EPC Contract imposes obligations on FLNG (as "Owner") to obtain property insurance providing coverage for "physical loss or damage," with the policies to include waivers of subrogation claims:

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[4] Zachry Industrial agrees with CB&I and CIC that the Court can and should consider the EPC Contract in deciding the Motions to Dismiss and this Joinder. *See* CB&I Mot. to Dismiss at 5–6; CIC Mot. to Dismiss at ¶ 14.

[5] *See also* CB&I Mot. to Dismiss at 9–14; CIC Mot. to Dismiss at ¶ 16.

> **Property Insurance.** Property insurance (in amounts determined by Freeport LNG Development, L.P., using its discretion as a reasonable and prudent operator and as necessary to comply with its leases and debt obligations) will provide coverage for physical loss or damage to the Existing Facility. Such property insurance shall also cover portions of the **Expansion Facility** after they have achieved Substantial Completion under this Agreement or substantial completion under the Train 1 EPC Agreement or Train 2 EPC Agreement (or such earlier time as the Owner's builder's risk policy ceases to cover such portion of the Expansion Facility). A ***waiver of subrogation will be provided in the policy in favor of Contractor,*** its Subcontractors and Sub-subcontractors, CB&I, Zachry, Chiyoda and Owner's Lenders.

EPC Contract, Att. O, ¶ 2.A.4, at p. O-9 (emphasis added).

The FLNG Facility has three separate turnkey natural gas liquefaction facilities: the Train 1 Expansion, Train Expansion 2, and Train 3 Expansion, along with common infrastructure and control systems. *See* Pet. at ¶ 27. The Substantial Completion date for each Train occurred prior to its commissioning and the commencement of commercial operations. Train 1 became operational and began exporting LNG in 2019, while Trains 2 and 3 became operational and began exporting in 2020. *Id.*

Attachment O, ¶ 2.G, also includes a waiver of subrogation:

> ***All policies of insurance*** provided by, or on behalf of, Owner pursuant to this Agreement ***shall include clauses providing that each underwriter shall waive its rights of recovery, under subrogation or otherwise,*** against Contractor Indemnified Parties, Subcontractors and Sub-subcontractors, and each of their respective agents, officers, directors and employees, to the extent of the liabilities assumed by Owner under the Agreement.

EPC Contract, Att. O, ¶ 2.G, at p. O-11 (emphasis added).

The insurance requirements in Attachment O, ¶ 2.G, of the EPC Contract also contain a waiver of claims by FLNG against Zachry Industrial and the other Contractors

for claims for which FLNG has received proceeds under a policy required by the contract:

> ***Owner waives any and all claims,*** damages, losses, costs and expenses against Contractor Indemnified Parties, Subcontractors and Sub-subcontractors, and each of their respective agents, officers, directors and employees, ***to the extent Owner*** or its designate ***receives payment for such claims,*** damages, losses, costs and expenses ***under any insurance policies*** (other than delay in startup or marine delay in startup insurance) required to be procured by, or on behalf of, Owner pursuant to this Agreement.

EPC Contract, Att. O, ¶ 2.G, at pp. O-11—O-12 (emphasis added).

This case arises out of an explosion and fire that occurred at the Facility on June 8, 2022. Plaintiffs allege that Defendants negligently designed alarms and instrumentation at the Facility such that FLNG's operators were not timely alerted to an allegedly unsafe buildup of pressure inside a pipe that exploded and caused the fire. *Id.* at ¶¶ 2, 33–43. In paragraph 45 of the Petition, Plaintiffs plead that they have made payment to FLNG for this loss pursuant to insurance policies:

> Pursuant to insurance policies in place with Plaintiff Insurers and payment made to the Insured, Plaintiff Insurers are subrogated to the Insured's rights of recovery against Defendants and assert this lawsuit in the name of Plaintiff Insurers directly.

Pet., at ¶ 45. In paragraph 52 of the Petition, Plaintiffs plead that FLNG made a claim to them for the loss at issue under various insurance policies in place and that they made payment to FLNG for the alleged "damages sustained by" FLNG:

> As a result of the Insured's damages, it made a claim to Plaintiff Insurers pursuant to the various policies of insurance in place, and as a result, Plaintiff Insurers were obligated to pay, and did pay, for the damages sustained by the Insured. As a result of those payments, Plaintiff Insurers are subrogated to the rights of recovery against Defendants and bring this action in their own name pursuant to Texas law.

Id. at ¶ 52.

FLNG has filed a separate action arising from the same events at issue in this case, asserting a negligence claim individually and on behalf of certain of its insurers. *See* Adversary Proceeding No. 3189. A motion to dismiss has been filed by CB&I and CIC in that case based on the same grounds as asserted in this case. Adv. P. 3189 [Doc. Nos. 13, 20, 31].

III.
LEGAL STANDARD

To survive a motion to dismiss, a complaint "must include 'sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" *Lewis v. Danos*, 83 F.4th 948, 953 (5th Cir. 2023) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "Factual allegations must be enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Courts are "required to dismiss, pursuant to [Rule 12(b)(6)], claims based on invalid legal theories, even though they may be otherwise well-pleaded." *Flynn v. State Farm Fire & Cas. Ins. Co. (Tex.)*, 605 F. Supp. 2d 811, 820 (W.D. Tex. 2009) (citing *Neitzke v. Williams*, 490 U.S. 319, 327 (1989)).

IV.
ARGUMENT AND AUTHORITIES

A. The waiver of subrogation and release provisions in the EPC Contract bar any claim by FLNG against Zachry Industrial and the other Contractors

"[S]ophisticated parties represented by counsel in an arm's-length transaction negotiated" the EPC Contract's "clear and broad waiver of [subrogation] and release provisions." *Forest Oil Corp. v. McAllen*, 268 S.W.3d 51, 52 (Tex. 2008). In the waiver of subrogation and release provisions, FLNG "waive[d] any and all claims" to the extent it received payment for the claims under any insurance policies "required to be procured by, or on behalf of, [FLNG] pursuant to" the EPC Contract. EPC Contract, Att. O, ¶¶ 2.A.4, 2.G; *see LaLonde v. Gosnell*, 593 S.W.3d 212, 218–19 (Tex. 2019) ("Waiver is the intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right. Waiver results as a legal consequence from some act or conduct of the party against whom it operates and is essentially unilateral in character, meaning no act of the party in whose favor it is made is necessary to complete it.") (quotations omitted).[6]

The EPC Contract must be enforced "as written." *Forest Oil Corp.*, 268 S.W.3d at 52–53 ("Because that agreement conclusively negates reliance on representations made by either side, any fraudulent-inducement claim, lodged here to avoid an arbitration provision, is contractually barred. We enforce the parties' contract as written."). Because

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[6] *See generally Cornerstone Staffing Sols., Inc. v. Valtech Sols., Inc.*, No. 05-19-00093-CV, 2020 WL 6304993, at *4 (Tex. App.—Dallas Oct. 28, 2020, no pet.) (recognizing that "'pursuant to' merely means 'in compliance with,' 'in accordance with,' 'as authorized by,' or 'in carrying out'") (citing *Pursuant to*, Black's Law Dictionary (8th ed. 2004); *Baty v. Bowen Miclette & Britt, Inc.*, 423 S.W.3d 427, 440 (Tex. App.—Houston [14th Dist.] 2013, no pet.)); *see also Syntax, Inc. v. Hall*, 899 S.W.2d 189, 191–92 (Tex. 1995).

Plaintiffs ***admit*** in their Petition that they made payment to FLNG for the claim at issue under insurance policies that were required to be procured by FLNG (or on FLNG's behalf) pursuant to the EPC Contract, Plaintiffs admit the applicability of the waiver of subrogation and release provisions in the EPC Contract. That is, Plaintiffs admit FLNG has waived any and all claims by FLNG against Zachry Industrial and the other Contractors for the loss at issue.

B. Plaintiffs stand in FLNG's shoes as a matter of law, and so also have no claim against Contractors

"It is axiomatic that an assignee or subrogee walks in the shoes of his assignor." *Burns v. Bishop*, 48 S.W.3d 459, 466 (Tex. App.—Houston [14th Dist.] 2001, no pet.); *see Tex. Health Ins. Risk Pool v. Sigmundik*, 315 S.W.3d 12, 14 (Tex. 2010) (recognizing that "subrogee contractually stood in [insured's] shoes"). "When standing in the insured's shoes as the analogy indicates, the insurer has no greater rights than the insured would have, and for that reason is subject to the same defenses assertable against the insured/subrogor." *Nathan A. Watson Co. v. Employers Mut. Cas. Co.*, 218 S.W.3d 797, 804 (Tex. App.—Fort Worth 2007, no pet.).

Plaintiffs are thus bound by FLNG's waiver based on Plaintiffs' acknowledged payment of insurance proceeds to FLNG for the claim at issue. Because FLNG has waived its negligence claim against Zachry Industrial and the other Contractors, Plaintiffs cannot recover for the claim as a matter of law.

V.
JOINDER

Zachry Industrial adopts and incorporates the factual background and legal arguments in the CB&I and CIC Motions to Dismiss [Adv. P. Doc. Nos. 13, 22, 27] in their entirety, including all asserted bases for dismissal. In particular, the Motions to Dismiss establish that the economic-loss rule bars Plaintiffs' negligence claim (as subrogee of FLNG) against Zachry Industrial, CB&I, and CIC because the EPC Contract defines the Contractors' relationship with FLNG and limits liability in relevant ways, including:

- The parties agreed in Section 3.1 that the "Scope of Work" set out in the EPC Contract "shall include all engineering, procurement, construction, precommissioning, commissioning, start-up, and testing of the Train 3 Expansion …";
- Section 20.1 provides that Contractors "shall not be liable to Owner under this Agreement for cumulative aggregate amounts" in excess of a specified amount;
- Section 20.2 allocates the risk for damage to any part of the Facility during Train 3 Expansion; and
- Section 20.5 contains an enforceable waiver on consequential damages, including damages for "BUSINESS INTERRUPTIONS." (Plaintiffs seek more than $1 billion in business interruption damages.)

EPC Contract, §§ 3.1, 20.1, 20.2, 20.5 (capitalization in original).

VI.
CONCLUSION

For these reasons, and the reasons stated in the CB&I and CIC Motions to Dismiss [Adv. P. Doc. Nos. 13, 22, 27], Zachry Industrial requests dismissal of Plaintiffs'

negligence claim, and that Zachry Industrial be awarded all further relief to which it is entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 9th day of October, 2024, a copy of the foregoing document was filed electronically with the Clerk of the Court using the CM/ECF system. Notice of this filing will be sent to all counsel of record by operation of the court's electronic filing system.

/s/ John B. Thomas
John B. Thomas