STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
Docket No. 108-2-18 Wncv

HARWOOD UNION UNIFIED SCHOOL DISTRICT
Plaintiff

v.

STEWART CONSTRUCTION COMPANY
Defendant

DECISION
Cross-Motions for Summary Judgment

This is an insurance subrogation action brought by Plaintiff Harwood Union Unified School District and its insurer and subrogee Vermont School Board's Insurance Trust (VSBIT) against Defendant–Contractor Stewart Construction Company.[1] Harwood contracted with Stewart for renovations to a school building that included replacement of the roof.[2] In the course of the project, a heavy rainfall penetrated and damaged the building because a roof seam was not properly sealed. VSBIT fully covered Harwood's loss and then filed this subrogation action against Stewart.

The threshold issue is whether a subrogation waiver clause in American Institute of Architects' (AIA) General Conditions of the Contract for Construction (Document A201–2007), which was incorporated into the contract between Harwood and Stewart, bars this action. Stewart argues that the clause bars subrogation entirely. VSBIT argues that the clause only bars subrogation claims for damage to "work" or "project" property, does not bar claims for damage to "non-work" or "non-project" property, and this case involves, largely or exclusively, permitted claims for damage to non-work or non-project property. The parties have filed cross-motions for summary judgment addressing the scope of the subrogation waiver clause.

The project encompassed work on the "building envelope," including replacement of the roof, as well as "HVAC improvements." The loss occurred when "a roof seam on the newly installed but not fully sealed membrane roof came apart in a rainstorm allowing voluminous amounts of water to penetrate three floors in the school." Other than Harwood's deductible, the VSBIT policy covered all damage to the school building, about $250,000. VSBIT, as Harwood's

[1] VSBIT is an Intermunicipal Insurance Agreement Association formed pursuant to 24 V.S.A. § 4941–4947. Neither party suggests that VSBIT's existence as such has any impact on this case.

[2] The construction project contemplated renovations to the Warren Elementary School building. At the time the contract was executed, the Warren Elementary School was part of the Warren School District. The parties anticipated that the Warren Elementary School was about to become part of the Harwood Unified Union School District, which would succeed to the rights and obligations of the Warren School District, and so provided in their contract. Neither party suggests that this issue has any impact on this case.

subrogee, is seeking to recover from Stewart all sums it paid due to this loss. Harwood's own claim in this case is limited to the amount of its deductible in the VSBIT policy.

"Subrogation is the substitution of a person for a creditor to whose rights the substitute succeeds in relation to the debt, and it gives the creditor 'all the rights, priorities, remedies, liens, and securities of the person for whom he or she is substituted.' Subrogation 'enables a secondarily liable party who has been compelled to pay a debt to be made whole by collecting that debt from the primarily liable party, who, in good conscience, should be required to pay.'" *Korda v. Chicago Ins. Co.*, 2006 VT 81, ¶ 22, 180 Vt. 173 (citations omitted).

In this case, VSBIT was secondarily liable to Harwood, due to the VSBIT policy, for the property damage caused by Stewart, the primarily liable party. Ordinarily, after covering an insured's claim, the insurer would become subrogated to the extent of coverage to the insured's claim against the primarily liable party, Stewart in this case. This is what VSBIT is attempting to do here.

There is no dispute that the contract between Harwood and Stewart incorporates the provisions of AIA Document A201–2007, which includes a waiver-of-subrogation clause, and the VSBIT policy expressly respects such contractual subrogation waivers. In other words, VSBIT, according to the terms of the policy, has voluntarily and expressly foregone its right to subrogation to whatever extent subrogation is waived in the contract between Harwood and Stewart.

Subrogation is a "favorite of the law" because it is "highly equitable in character." *Norfolk & Dedham Fire Ins. Co. v. Aetna Cas. & Sur. Co.*, 132 Vt. 341, 346 (1974). Waivers of subrogation are not disfavored, however, at least between parties in fair bargaining positions, as here. Waivers of subrogation represent a forward-looking election by the contracting parties to allocate responsibility to one party for providing insurance covering risks to either. "Such clauses are intended to allow the parties 'to exculpate each other from personal liability in the event of property loss or damage to the work to the extent each party is covered by insurance.'" *Behr v. Hook*, 173 Vt. 122, 127 (2001) (citation omitted). They essentially allocate the risk of loss between the parties in advance by clarifying which party will bear how much cost for how much insurance coverage.

"By shifting the risk of loss to the insurance company regardless of which party is at fault, these clauses seek to avoid 'the prospect of extended litigation which would interfere with construction.'" *Id.* (citation omitted); see also 6 Bruner & O'Connor Construction Law § 19:59 ("The reason these provisions find favor is a recognition that, while exculpatory, they are a normal feature of prudent insurance planning.").

The subrogation waivers at issue in this case appear in section 11.3 of AIA Document A201–2007. Section 11.3 describes the parties' rights and obligations regarding property insurance. The specific provisions relevant to this case are as follows.

> § 11.3.1 Unless otherwise provided, the Owner shall purchase and maintain . . . property insurance written on a builder's risk "all risk" or equivalent policy form

in the amount of the initial Contract Sum, plus value of subsequent Contract Modifications and cost of materials supplied or installed by others, comprising total value for the entire Project at the site on a replacement cost basis without optional deductibles. . . .

. . .

§ 11.3.1.2 If the Owner does not intend to purchase such property insurance required by the Contract and with all of the coverages in the amount described above, the Owner shall so inform the Contractor in writing prior to the commencement of the Work. The contractor may then effect insurance that will protect the interests of the Contractor, Subcontractors and Sub-subcontractors in the Work, and by appropriate Change Order the cost thereof shall be charged to the Owner. If the Contractor is damaged by the failure or neglect of the Owner to purchase or maintain insurance as described above without so notifying the Contractor in writing, then the Owner shall bear all reasonable costs properly attributable thereto.

. . .

§ 11.3.5 If during the Project construction period the Owner insures properties, real or personal or both, at or adjacent to the site by property insurance under policies separate from those insuring the Project, . . . the Owner shall waive all rights in accordance with the terms of Section 11.3.7 for damages caused by fire or other causes of loss covered by this separate property insurance. All separate polices shall provide this waiver of subrogation by endorsement or otherwise.

. . .

§ 11.3.7 **WAIVERS OF SUBROGATION**
The Owner and Contractor waive all rights against (1) each other and any of their subcontractors, sub-subcontractors, agents and employee, each of the other . . . for damages caused by fire or other causes of loss to the extent covered by property insurance obtained pursuant to this Section 11.3 or other property insurance applicable to the Work, except such rights as they have to proceeds of such insurance held by the Owner as fiduciary. The Owner or Contractor, as appropriate, shall require of the Architect, Architect's consultants, separate contractors described in Article 6, if any, and the subcontractors, sub-subcontractors, agents and employees of any of them, by appropriate agreements, written where legally required for validity, similar waivers each in favor of other parties enumerated herein. The policies shall provide such waivers of subrogation by endorsement or otherwise. A waiver of subrogation shall be effective as to a person or entity even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, did not pay the insurance premium directly or indirectly, and whether or not the person or entity had an insurable interest in the property damaged.

"We interpret the contract according to its terms and the parties' intent as expressed in the contract language." *New England P'ship, Inc. v. Rutland City Sch. Dist.*, 173 Vt. 69, 79 (2001) (quoting *Suchoski v. Redshaw*, 163 Vt. 620, 622 (1995)).

The court reads the provisions quoted above to clearly indicate an intent to waive subrogation to the full extent of available coverage in policies obtained by the Owner (Harwood), and there is no dispute in this case that the available coverage extended to the entire loss.

Section 11.3.1 required Harwood to obtain certain property insurance written on a particular coverage form or its equivalent up to a certain value "[u]nless" such coverage would be "otherwise available." Section 11.3.5 plainly contemplates that Harwood may have other property insurance applicable to the site or adjacent sites, and any such policies are swept within the scope of the waiver.

Section 11.3.7 provides that subrogation is waived "for damages . . . to the extent covered by property insurance obtained pursuant to this Section 11.3 or other property insurance applicable to the Work." In context, "applicable to the Work" appears to mean relevant to the Work or not excluded due to the Work. It cannot reasonably be interpreted to impose an overarching limitation on all subrogation waivers, regardless of the policies or their language, such that they may only apply to damage to Work property.

Section 11.3.5 makes clear that subrogation is waived for any coverage available in "[a]ll separate policies." To the extent that any other provisions may be read in conflict with the subrogation waivers, Section 11.3.5 explicitly states, "A waiver of subrogation shall be effective as to a person or entity even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, did not pay the insurance premium directly or indirectly, and whether or not the person or entity had an insurable interest in the property damaged."

VSBIT sees in these provisions a distinction between "Work" and "non-Work" property or "Project" and "non-Project property, and it concludes that the waiver applies only to damage to Work or Project property and not to non-Work or non-Project property. Compare Harwood's Motion for Summary Judgment at 6 (filed May 9, 2019) (distinguishing between Work and non-Work property) with Harwood's Reply at 3 (filed June 28, 2019) (rejecting the distinction between Work and non-Work property and instead distinguishing between Project and non-Project property).

AIA Document A201–2007 defines "Work" as "the construction and services required by the Contract Documents, whether completed or partially completed, and includes all other labor, materials, equipment and services provided or to be provided by the Contractor to fulfill the Contractor's obligations. The work may constitute the whole or a part of the Project." AIA Document A201–2007 § 1.1.3. It defines "Project" as "the total construction of which the Work performed under the Contract Documents may be the whole or a part of which may include construction by the Owner and by separate contractors." *Id.* § 1.1.4. Apparently, most or all of

the damage in this case occurred to non-Work or non-Project property, as the rainwater that came through the faulty roof membrane damaged not only the roof but three floors below.

Plaintiffs' argument appears to be that Harwood was required to provide property insurance covering Work or Project property *only* and therefore the subrogation waiver must be limited to claims arising out of damage to Work or Project property only. The court declines to analyze the precise scope of Harwood's obligation to procure insurance, however, because the subrogation waivers are not limited to the minimum insurance required by the contract of Owner but extend broadly to what coverage was available in fact.

There is no reasonable way to interpret §§ 11.3.5 and 11.3.7 as limiting the scope of the waiver to coverage for Work or Project property only. The waivers are clearly described in terms of the insurance coverage available; they are not limited by any description of the specific property damaged. See 2 Bruner & O'Connor Construction Law § 11:409 ("A common contractual risk allocation in the construction industry is for the owner to waive its subrogation rights against designers and contractors for any loss covered by property insurance.").

The court's reading of these provisions is in keeping with the general purposes of subrogation waivers to allow the parties to allocate responsibility for risks and to avoid litigation. Plaintiffs' reading would not serve these purposes at all. It is entirely foreseeable that a project to replace a roof could result in damage to the rest of a building (non-Work and non-Project property) if the right precautions were not taken and a risk, such as a heavy rainfall, occurred. The roof obviously protects the rest of the building from the rain. Both the roofer and the owner of the building have a shared interest in protection from risks to the rest of the building presented by the roofing job. Plaintiffs offer no rationale arguably consistent with the contract terms for limiting the waiver to claims arising out of damage to Work or Project property (the roof alone, in this case) when damage to non-Work or non-Project property, and ensuing litigation, would be so easily predictable.

Plaintiffs also generally assert that AIA Document A201–2007 is intended to be used in contracts for the construction of an entire building rather than, as here, renovation projects on existing buildings. Presumably, this would mean that the Document's definition of "project" would encompass the entire property potentially subject to claims due to the "work" and thus the subrogation waiver by definition could not reach non-project claims. Plaintiffs cite no authority for this argument and nothing in the terms of AIA Document A201–2007 compels this view of its purpose. In any event, Harwood and Stewart incorporated the AIA Document into their contract and the issue remains how to interpret their intent, having done so, in the circumstances of this case.

Plaintiffs also argue that, because this case deals with a renovation, it is distinguishable from *Behr v. Hook*, 173 Vt. 122 (2001). This may be so to the extent that the "project" at issue in *Behr* was the entire construction of a new building rather than a part of an existing building (if the distinction between project and non-project property mattered at all). The court declines to analyze that issue in depth, however, because the *Behr* Court itself did not analyze the nuances of that matter.

Moreover, the parties generally describe a split of out of state authority as falling into either a majority or minority view. The majority, as they describe it, generally concludes that the subrogation waiver extends to the extent of insurance available (as the court concludes here), while the minority limits the waiver to claims arising from damage to Work property only. While the case law might be classified by *outcomes* into such majority and minority categories, the court's review of the cases reveals no simple split of opinion. Rather, many of the cases are based on disparate analyses, often due to slightly different contract language or different fact patterns (such as what property was damaged or what insurance was available). See, e.g., *Lloyd's Underwriters v. Craig & Rush, Inc.*, 32 Cal.Rptr.2d 144, 146 n.4 (Cal. Ct. App. 1994) (cautioning the reader that "there may have been a different result" if different policy coverage had been available). Ultimately, the issue in this case arises out of the language and context of the contract between Harwood and Stewart.

ORDER

For the foregoing reasons,

Stewart's motion for summary judgment is *granted*, and
Harwood's and VSBIT's motion for summary judgment is *denied*.

Dated at Montpelier, Vermont this 29th day of August 2019.

Mary Miles Teachout

Mary Miles Teachout
Superior Judge