COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2184CV00425

ARBELLA PROTECTION INSURANCE COMPANY[1]

vs.

M. HOLLAND & SONS CONSTRUCTION, INC. & others[2]

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This case arises from water damage to a multi-unit condominium building located at 296 Beacon Street ("296 Beacon") in Boston. 296 Beacon is currently owned by OWH, LLC ("OWH"). Oliver Realty Limited Partnership ("Oliver Realty") is the former owner of 296 Beacon.[3] The Plaintiff, Arbella Protection Insurance Company ("Arbella"), is an insurer who paid claims to the Owners for the water damage.[4] Following the water damage, Plaintiff sued Defendants M. Holland & Sons Construction, Inc. ("Holland"), Damien Fahy ("Damien"), and Fahy Plumbing and Heating, Inc. ("Fahy Plumbing") (collectively "Defendant Contractors"), the contractors who performed construction at 296 Beacon that allegedly caused the water damage. Plaintiffs also sued Acadia Insurance Company ("Acadia") and Union Insurance Company

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[1] As subrogee of (A/S/O) OWH, LLC ("OWH") and Oliver Realty Limited Partnership ("Oliver Realty").

[2] Damien Fahy, Fahy Plumbing and Heating, Inc., Acadia Insurance Company, and Union Insurance Company.

[3] OWH and Oliver Realty will be collectively referred to as the "Owners."

[4] Commerce Insurance Company A/S/O Evangelia Demeter was also a plaintiff to the complaint in this matter. During oral argument on the instant motion for summary judgment, the Defendants stated that they have reached a settlement agreement with Commerce Insurance Company.

("Union"), insurers to the Defendant Contractors.

Presented for decision is the Defendants' Motion for Summary Judgment brought pursuant to Mass. R. Civ. P. 56(c). Defendants contend that they are entitled to summary judgment as a matter of law because the Plaintiff's claims are barred by a contractual subrogation waiver, Defendants have not breached any warranty, and there is no evidence that the Defendant Contractors were negligent. Following a hearing, and for the reasons that follow, the Defendants' Motion for Summary Judgment is **DENIED**.

BACKGROUND

The following facts are undisputed. In 2016, Oliver Realty and Holland executed a construction contract ("the Agreement") to build multi-unit condominiums at 296 Beacon. The Agreement contained AIA Document A201-2007, which included boilerplate contract terms including a subrogation waiver, and Rider "A," a document specifically modifying certain boilerplate terms in the AIA Document A201-2007.[5]

Following the execution of the Agreement, Holland began construction at 296 Beacon. Holland, as the general contractor, subcontracted projects to several subcontractors. Holland subcontracted Damien and Fahy Plumbing to complete plumbing work.

In 2017, Oliver Realty transferred ownership of 296 Beacon Street to OWH. In October 2018, a pipe fitting at 296 Beacon separated, causing substantial water damage. The parties dispute what happened leading up to and following the pipe fitting separation.[6]

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[5] In the Defendants' Statement of Undisputed Material Facts, Defendants do not mention Rider "A." In their memorandum in support of their motion, however, Defendants reference Rider "A." By this, Defendants both concede that Rider "A" exists and that it specifically amended certain provisions of AIA Document A201-2007.

[6] Defendants deny liability for any action causing the pipe fitting separation and subsequent water damage. Defendants contend that following the pipe fitting separation, Owners notified Holland, and one of Holland's employees arrived onsite to shut off the water. Holland's employee replaced the separated fitting the following day.

Following the pipe fitting separation incident, Arbella paid insurance policy proceeds to their insured, OWH. Seeking to recover damages caused by the alleged breach of warranty and negligence of the Defendant Contractors, the Plaintiff filed the instant lawsuit.

DISCUSSION

I. LEGAL STANDARD

Under Mass. R. Civ. P. 56(c), summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Community Nat'l Bank* v. *Dawes*, 369 Mass. 550, 553 (1976). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue. *Pederson* v. *Time, Inc.*, 404 Mass. 14, 17 (1989). The moving party may satisfy this burden by submitting affirmative evidence negating an essential element of the opposing party's case or by demonstrating that the opposing party has no reasonable expectation of proving an essential element of his case at trial. *Flesner* v. *Technical Communications Corp.*, 410 Mass. 805, 809 (1991); *Kourouvacilis* v. *General Motors Corp.*, 410 Mass. 706, 716 (1991). Once the moving party establishes the absence of a triable issue, the party opposing the motion must respond with evidence of specific facts establishing the existence of a genuine dispute. *Pederson*, 404 Mass. at 17. When deciding a motion for summary judgment, the court views the evidence in the light most favorable to the nonmoving party and does not weigh evidence, assess credibility, or find facts. See *Attorney General* v. *Bailey*, 386 Mass. 367, 370-371, cert. denied, 459 U.S. 970 (1982). "Ordinarily,

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By contrast, Plaintiffs contend that Defendants are wholly liable for the water damage caused by the pipe fitting separation. Plaintiffs contend that leading up to the pipe fitting separation, Owners had lodged numerous complaints with Holland. In response to the Owners' complaints, Holland replaced the recirculation pump, but issues persisted. Plaintiffs further contend that Defendant Contractors negligently closed a valve prior to the pipe fitting separation, thereby causing the water damage.

questions of negligence are for the trier of fact; only when no rational view of the evidence would warrant a finding of negligence is the question appropriate for summary judgment." *Bowers* v. *P. Wile's, Inc.*, 475 Mass. 34, 37 (2016).

II. SUBROGATION WAIVER

Here, the parties' dispute centers on whether Rider "A" purports to eliminate the mutual subrogation waiver contained in the AIA Document A201-2007. Defendants argue that Plaintiff's claims are barred by a mutual subrogation waiver found in the Agreement's AIA Document A201-2007. Plaintiff responds that the subrogation waiver does not bar their claims because provisions included in Rider "A" expressly modified the subrogation waiver from a mutual to a single subrogation waiver of any claims brought against the Owners. The court concludes that the terms of the subrogation waiver are ambiguous, and, therefore, the issue is inappropriate for summary judgment.

Pursuant to Massachusetts law, an insurer that has paid for a loss under an insurance policy retains the right of subrogation. *Liberty Mutual Ins. Co.* v. *National Consol. Warehouses, Inc.*, 34 Mass. App. Ct. 293, 296 (1993). Subrogation is the right of the insurer to stand in the shoes of the insured and seek indemnification from third party wrongdoers. *Id.* Subrogation, however, may be waived, thus barring insurers from seeking indemnification against a third party. *Haemonetics Corp.* v. *Brophy & Philips Co., Inc.*, 23 Mass. App. Ct. 254, 257-258 (1986). "A waiver of subrogation is useful in such [construction] projects because it avoids disruption and disputes among the parties to the project. It thus eliminates the need for lawsuits, and yet protects the contracting parties from loss by bringing all property damage under the all risks builder's property insurance." *Id.* at 258.

In order to determine the meaning of the subrogation waiver in the context of Rider "A,"

the court must determine whether the language at issue is ambiguous. Interpretation of the meaning of contract language is ordinarily a question of law. See *EventMonitor, Inc.* v. *Leness*, 473 Mass. 540, 549 (2016). "The determination of ambiguity in a contract is also a question of law." *Balles* v. *Babcock Power Inc.*, 476 Mass. 565, 571 (2017), citing *Eigerman* v. *Putnam Invs.*, Inc., 450 Mass. 281, 287 (2007). "To determine whether the language at issue is ambiguous, [the court must] look both to the contested language and to the text of the contract as a whole." *Balles*, 476 Mass. at 572. See *Eigerman*, 450 Mass. at 287 ("the court must first examine the language of the contract by itself, independent of extrinsic evidence concerning the drafting history or the intention of the parties"). "[W]hen the language of a contract is clear, it alone determines the contract's meaning . . . [and] it must be construed according to its plain meaning." *Balles*, 476 Mass. at 571.

On the other hand, "[c]ontractual language is ambiguous when it 'can support a reasonable difference of opinion as to the meaning of the words employed and the obligations undertaken.'" *Id.*, quoting *Bank* v. *Thermo Elemental Inc.*, 451 Mass. 638, 648 (2008). Cf. *Suffolk Constr. Co.* v. *Lanco Scaffolding Co.*, 47 Mass. App. Ct. 726, 729 (1999) ("[A]n ambiguity is not created simply because a controversy exists between the parties, each favoring an interpretation contrary to the other's" [quotation and citation omitted]). When the terms of a contract are uncertain and ambiguous, any determination of the parties' intent is best left for a jury, and is not an appropriate issue for summary judgment. *Seaco Ins. Co.* v. *Barbosa*, 435 Mass. 772, 779 (2002) ("[i]f a contract . . . is unambiguous, its interpretation is a question of law that is appropriate for a judge to decide on summary judgment . . . Where, however, the contract . . . has terms that are ambiguous, uncertain, or equivocal in meaning, the intent of the parties is a question of fact to be determined at trial" (citations omitted). See *Sugarman & Sugarman, P.C.*

v. *Shapiro*, No. 22-P-850, 2023 WL 4374602 at *3 (Mass. App. Ct. July 7, 2023) ("it was not error for the judge to conclude that it was appropriate for the jury to consider the plaintiff's claim . . . in the absence of a contractual provision addressing those circumstances").

Here, Article 11.3.7 of the AIA Document A201-2007 expressly contained a subrogation waiver barring the Owners' insurers from pursuing claims against the Defendant Contractors. Specifically, Article 11.3.7 states,

> "The Owner[7] and Contractor[8] Waive all rights against (1) each other and any of their . . . agents and employees, each of the other . . . for damages caused by fire or other causes of loss to the extent covered by property insurance . . . . 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 had an insurable interest in the property damaged."

Further, Article 13.1.2 of the AIA Document A201-2007 states, "The Owner and Contractor respectively bind themselves, their partners, successors, assigns and legal representatives to covenants, agreements and obligations contained in the contract Documents."[9]

The plain language of Rider "A" states that it acts as a modifying document to the boilerplate terms contained in AIA Document A201-2007.[10] Rider "A" also contains language specifically related to the subrogation waiver: "Article 10[11] . . . [w]ithout limitation, all insurance

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[7] AIA201-2007 lists the Owner as Oliver Realty.

[8] AIA201-2007 lists the Contractor as Holland.

[9] AIA Document A201-2007 also required the Defendant Contractors to carry insurance. Article 10 "The Contractor shall purchase and maintain insurance . . . set forth in Article 11 of AIA Document A201-2007."

[10] "The following terms are agreed to by and between Oliver Realty Limited Partnership (Owner) and M. Holland & Sons Construction, Inc. (Contractor) to be included as additions and/or modifications to the A101-2007 Agreement (Agreement) . . . To the extent these terms differ from what is set forth in the contract, these terms govern."

[11] Article 10 of AIA Document A201-2007 states "The Contractor shall purchase and maintain insurance and provide bonds as set forth in Article 11 of AIA Document A201-2007."

required or in fact carried by the Contractor and its subcontractors, materialmen and suppliers shall contain a provision, in form and substance satisfactory to the Owner, wherein each such insurer waives any rights of subrogation it may have against the Owner and Architect." [12]

Upon careful review of the language of the Agreement, specifically the AIA Document A201-2007 and the Rider "A," it is unclear from the face of the contract whether Rider "A" altered the subrogation waiver incorporated in AIA 207A-2007 to be a single waiver only in favor of Owners. On one hand, Rider "A" could be read to effectuate a one-way subrogation waiver for the Owners, altering the language of Article 10 of the AIA Document A201-2007 suggesting mutuality of the waiver. On the other hand, it is plausible that the parties did not intend for the mutual subrogation waiver to run only in favor of the Owners by including Rider "A." No part of Rider "A" explicitly purports to change any part of Article 11 of AIA Document A201-2007. There is no explicit mention in Rider "A" of whether the mutual subrogation waiver contained in Article 11 of the AIA Document A201-2007 is no longer in effect or is removed. In other words, the sections can be read conjunctively, with Rider "A" requiring Holland and all subcontractor insurance policies to incorporate a subrogation waiver against the Owners and the AIA Document A207-2007 providing for a mutual subrogation waiver for both Defendant Contractors and Owners. As the provisions of Rider "A" and the boilerplate terms of AIA Document A201-2007 may be reasonably interpreted in more than one way, they are ambiguous. Accordingly, the Defendants' motion for summary judgment on this basis must be denied.[13]

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[12] Rider "A" also states that the Defendant Contractors shall procure and maintain insurance. "Before commencing the Work . . . the Contractor shall procure and maintain in force Workers' Compensation Insurance, Employers' Liability Insurance, Business Automobile Liability Insurance, Business Automobile Liability Insurance, and Commercial General Liability Insurance."

[13] Both parties cite to *Factory Mutual Ins. Co.* v. *Shankska USA Bldg., Inc.*, 464 F. Supp. 3d 4444 (2020), and *MiddleOak Ins. Co.* v. *Tri-State Sprinkler Corp.* 77 Mass. App. Ct. 336 (2010) as squarely resolving the subrogation waiver issue in their favor. The court disagrees. Neither case resolves the specific issues at stake in the instant matter. In *MiddleOak*, the Massachusetts Appeals Court held that a subrogated insurance

III. BREACH OF WARRANTY

Next, Defendants assert that summary judgment must enter in their favor on Plaintiff's claim of breach of warranty because [. . .]. The court disagrees. The record evidence demonstrates that there are issues of material fact in dispute here as to whether Holland satisfied its obligations under the Agreement's limited warranty.[14] Specifically, the record contains evidence demonstrating that OWH made repeated complaints regarding the water temperature and pressure and that Holland failed to address those issues. Although Holland replaced a recirculation pump, issues persisted and later caused the water damage at issue. In viewing the evidence in the light most favorable to the Plaintiff, questions of material fact remain as to Plaintiff's breach of warranty claim. See *New England Power Co.* v. *Riley Stoker Corp.*, 20 Mass. App. Ct. 25, 30-31 (1985) ("[W]hen there are a warranty and promise to repair, the remedy of first resort is the promise to repair. If that promise is not fulfilled, then the cause of action is the underlying breach of warranty"). Accordingly, Defendants' motion for summary judgment on this basis is denied.

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company cannot sue a subcontractor for post-construction property damages because of the subrogation waiver contained in the AIA contract. *MiddleOak*, 77 Mass. App. Ct. at 338. Unlike the instant matter, there were no additional, potentially conflicting provisions with the subrogation waiver in the AIA contract. In *Factory Mutual*, a case not binding on this court, Plaintiff Factory Mutual issued insurance to Novartis, a biomedical research lab. *Factory Mutual*, 464 F. Supp. 3d at 445. In turn, Novartis hired Defendant Shanska to perform construction. *Id.* During construction, there were plumbing issues and water damages occurred. *Id.* Plaintiff Factory Mutual covered the losses and then sued Defendant Shankska for the losses. *Id.* Defendant Shankska argued that the Factory Mutual was barred from seeking subrogation against it because it qualified as an insured. *Id.* at 446. The Massachusetts District Court found that the language of the insurance policy did not apply to Shankska as an insured. *Id.* at 447. Additionally, the court noted that Novartis and Skanska specifically amended their contract to remove a mutual subrogation waiver and replaced that section with a waiver that only waived the right of subrogation in favor of Novartis. *Id.* at 447-448. For this reason, the court found that the Plaintiff insurer maintained the right to subrogation against Skanska. *Id.* These cases are factually distinguishable from the facts of the present matter where here, there are conflicting provisions regarding the subrogation waiver.

[14] The warranty provides that Holland would "cause [covered] defect[s] to be repaired or the defecting item to be replaced, at the choice of the Contractor, at no cost to the Owner." The warranty further provides, "[t]he repair and replacement actions described in this LIMITED WARRANTY shall be the Contractor's sole and complete obligation under this LIMITED WARRANTY and shall be the Owner's sole remedy at law and in equity."

IV. NEGLIGENCE

Lastly, Defendants claim that summary judgment must enter in their favor as to Plaintiff's negligence claims. Again, the court disagrees, where disputes of material fact remain. Defendants contend that based on the evidence presented, there is no way that the valve was closed prior to the pipe fitting separation, as a subcontractor testified that he closed the valve when he responded to the leak, therefore it follows that the valve must have been open prior to the pipe fitting separation. Plaintiff, however, point to the affidavit of their expert, Dave Howard ("Howard"), a professional engineer at Clarity Engineering, who reviewed all witness deposition testimony and documents. Following Howard's review, he opined that one or both valves at issue were closed prior to the pipe fitting separation.

Defendants contend that the Plaintiff may not rely on Howard's opinion in his affidavit because this opinion differs from his initial opinion in his 2020 report, and Plaintiff cannot rely on a last-minute affidavit that contradicts the factual position taken up to that point by the non-moving party. See *O'Brien* v. *Analog Devices, Inc.*, 34 Mass. App. Ct. 905, 906 (1993) ("[A] party cannot create a disputed issue of fact by the expedient of contradicting by affidavit statements previously made under oath at a deposition"). The court is not persuaded. Howard's 2020 report reflects the same conclusion he reached in his 2022 affidavit, namely that "the inlet valve open and outlet valve closed configuration of the circulator pump. . . would cause the restrained water in the pump to overheat and flash to steam. This . . . would have . . . allow[ed] the loss to occur." See *Zaleskas* v. *Brigham & Women's Hosp.*, 97 Mass. App. Ct. 55, 61 (2020) (weighing credibility of witnesses is best suited for jury to determine). For these reasons, Defendants' motion for summary judgment on this basis is denied.

ORDER

For the foregoing reasons, the Defendants' Motion for Summary Judgment is **DENIED**.

/s/Cathleen E. Campbell

Cathleen E. Campbell
Associate Justice of the Superior Court

July 14, 2023