Majority Opinion >

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

LOUISIANA REVITALIZATION FUND LLC and 4401 VETERANS PROPERTY LLC, Plaintiff, -against- STARR SURPLUS LINES INSURANE COMPANY, Defendant.

23-CV-1006 (VSB) (VF)

March 27, 2024, Filed

March 27, 2024, Decided

For Louisiana Revitalization Fund, LLC, Plaintiff: Richard P Voorhies, III, LEAD ATTORNEY, Voorhies Law Firm, New Orleans, LA; William Barousse, The Voorhies Law Firm, New Orleans, LA.

For Starr Surplus Lines Insurance Company, Defendant: Lee Ann Thigpen, LEAD ATTORNEY, Robins Kaplan LLP, Jackson, MS; Ryan MacDonald, LEAD ATTORNEY, Robins Kaplan LLP, Boston, MA; Gabriel Adam Berg, Robins Kaplan LLP, New York, New York, New York, NY; Waleed Abbasi, Robins Kaplan LLP, New York, NY.

VALERIE FIGUEREDO, United States Magistrate Judge.

VALERIE FIGUEREDO

REPORT AND RECOMMENDATION

VALERIE FIGUEREDO, United States Magistrate Judge

TO: THE HONORABLE VERNON S. BRODERICK, United States District Judge

Plaintiffs Louisiana Revitalization Fund LLC and 4401 Veterans Property, LLC commenced this action against Defendant Starr Surplus Lines Insurance Company on April 13, 2022, arising out of Defendant's failure to adequately pay for covered losses under two insurance policies for two properties located in Louisiana. See ECF No. 1-1. Plaintiffs assert Louisiana state-law-claims for breach of contract and bad faith. See ECF No. 20 at ¶¶ 35-66. Before the Court is Plaintiffs' partial motion for summary judgment, which seeks a ruling that Louisiana law applies to this suit. For the reasons set forth below, I recommend that Plaintiffs' motion be **DENIED**.

BACKGROUND

A. Factual Background [1]

This case arises from damage caused by Hurricane Ida to two properties located in Metairie, Louisiana: a property at 4401 Veterans Boulevard (the "4401 Veterans Property") and a property at 3908 Veterans Memorial Boulevard (the "3908 Veterans Property," collectively, the "Properties"). R. 56.*1 Statement* ¶ 1. The Properties are insured by Defendant, a licensed "surplus lines insurer" in Louisiana, under a single policy (Policy SLSTPTY11514621, the "Policy"). Id. ¶¶ 1-2, 4.

As is relevant here, the Policy states: "This insurance policy is delivered as surplus lines coverage under the Insurance Code of the State of Louisiana." Id. ¶ 5. Additionally, the Policy also states:

> Any suit, action, or proceeding against the COMPANY must be brought solely and exclusively in a New York state court or a federal district court sitting within the State of New York. The laws of the State of New York shall solely and exclusively be used and applied in any such suit, action, or proceeding, without regard to choice of law or conflict of law principles.

Id. ¶ 13; see also ECF No. 63-3 at 30.[2]

On December 19, 2021, Plaintiffs presented an estimate to Starr Surplus that the cost to repair the 3908 Veterans Property from damage caused by Hurricane Ida would be $1,643,999.26. R. 56.*1 Statement* ¶ 7. To date, Defendant has not paid anything on that claim. Id. ¶ 8. On November 22, 2021, Plaintiffs presented an estimate to Starr Surplus that the cost to repair the 4401 Veterans Property from damaged caused by Hurricane **[*2]** Ida would be $516,304.38.[3] Id. ¶ 9. Defendant has paid only $288,556.42 on that claim. Id. ¶ 10.

B. Procedural History

Plaintiffs commenced this action on April 13, 2022, in Louisiana state court, in the 24th Judicial District Court for the parish of Jefferson. See ECF No. 1-1. Defendant removed the case to the United States District Court for the Eastern District of Louisiana on May 27, 2022, based on diversity jurisdiction under 28 U.S.C. § 1332 . See ECF No. 1. That same day, Defendant filed its answer to the complaint. See ECF No. 2.

On August 15, 2022, Plaintiffs were granted leave to file an amended complaint, and on that day, filed their first amended complaint. See ECF No. 20. In the amended complaint, Plaintiffs claim that Defendant breached the Policy by not paying all amounts due under it. Id. ¶¶ 68-69. Plaintiffs seek statutory penalties, consequential damages, and attorney's fees awardable under Louisiana Revised Statutes §§ 22:1892 and 22:1973 in the

Louisiana Insurance Code. Id. Defendant filed its answer to the first amended complaint on August 29, 2022. See ECF No. 21.

On October 5, 2022, Defendant filed a motion to transfer the case to this Court pursuant to 28 U.S.C. § 1404 . See ECF No. 25. On January 24, 2023, the Honorable Nannette Jolivette Brown ordered the transfer of the case from the Eastern District of Louisiana to this Court. See ECF No. 50.

On May 24, 2023, Plaintiffs filed a partial motion for summary judgment. Plaintiffs seek a ruling that despite the choice-of-law provision in the Policy, Louisiana law applies to the dispute because Louisiana Revised Statute § 22:868 prohibits insurance policies delivered in Louisiana from having a choice-of-law clause that applies the law of another state. See ECF No. 62; ECF No. 64 ("Pls.' Br."). Defendant filed its opposition on June 7, 2023. See ECF No. 69 ("Def.'s Br."). On June 14, 2023, Plaintiffs filed their reply brief. See ECF No. 70 ("Pls.' Reply Br."). On March 18, 2024, the Court directed further briefing on the motion, see ECF No. 85, and on March 20, 2024, the parties submitted a joint letter brief in response, see ECF No. 86 ("Joint Letter").

DISCUSSION

I. Legal Standard

A. Summary Judgment

Summary judgment is warranted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a) ; Celotex Corp. v. Catrett, 477 U.S. 317 , 322-23 (1986); Gallo v. Prudential Residential Servs., L.P., 22 F.3d 1219 , 1223 (2d Cir. 1994). "[T]he trial court's task at the summary judgment motion . . . is carefully limited to discerning whether there are any genuine issues of material fact to be tried, not to deciding them." Gallo, 22 F.3d at 1224 . A dispute is "'genuine' . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby. Inc., 477 U.S. 242 , 248 (1986). The moving party "is entitled to summary judgment only if we conclude that on the record presented, considered in the light most favorable to the non-movant," no reasonable jury could find in the non-moving party's favor. Williams v. MTA Bus Co., 44 F.4th 115 , 126 (2d Cir. 2022) (cleaned up).

B. Choice of Law Analysis

A choice-of-law issue can properly be considered on a motion for summary judgment. See, e.g., Susana v. NY Waterway, 662 F. Supp. 3d 477 , 487 (S.D.N.Y. 2023) (determining what law governs the dispute at the summary judgment stage); see also Gaetano Assocs. **[*3]** Ltd. v. Artee Collections. Inc., No. 05-CV-3329 (DLC), [2006 BL 23282], 2006 WL 330322 , at *4 (S.D.N.Y. Feb. 14, 2006) (declining to address choice-of-law at the motion to dismiss stage and stating that such issues may be addressed at summary judgment "when a more complete record can be presented to allow a reliable choice-of-law determination to be made"). "When a federal district court sits in diversity, it generally applies the law of the state in which it sits, including that state's choice of law rules."[4] In re Coudert Bros. LLP . 673 F.3d 180 , 186 (2d Cir. 2012); see also Stuart v. Am. Cvanamid Co. . 158 F.3d 622 , 626 (2d Cir. 1998) ("Where jurisdiction rests upon diversity of citizenship, a federal court sitting in New York must apply the New York choice-of-law rules."). New York law "only requires a court to undergo a conflict of laws analysis if there is indeed a conflict." MasterCard Int'l Inc. v. Nike. Inc., 164

F. Supp. 3d 592 , 604 (S.D.N.Y. 2016) (citation omitted). "Laws are in conflict '[w]here the applicable law from each jurisdiction provides different substantive rules.'" Int'l Bus. Machines Corp. v. Liberty Mut. Ins. Co., 363 F.3d 137 , 143 (2d Cir. 2004) (quoting Curley v. AMR Corp., 153 F.3d 5 , 12 (2d Cir. 1998)).

II. Analysis

The parties dispute which state's law governs the interpretation of the Policy. Although it is undisputed that the Policy contains a choice-of-law provision that selects New York law, see R. 56.*1 Statement* ¶ 13; ECF No. 63-3 at 30, Plaintiffs contend that the provision does not apply. Pls.' Br. at 15-18. Plaintiffs argue that the Policy's choice-of-law provision is unenforceable because applying New York law would violate a Louisiana statute, Louisiana Revised Statute § 22:868 , which states that:

> No insurance contract delivered or issued for delivery in [Louisiana] and covering subjects located, resident, or to be performed in [Louisiana] . . . shall contain any condition, stipulation, or agreement . . . [Requiring it to be construed according to the laws of any other state or country . . . .[5]

Pls.' Br. at 15-18. Plaintiffs aver that the Policy was "delivered or issued for delivery" in Louisiana and therefore Louisiana law must apply. Id. Defendant counters that there is a dispute of fact as to whether the Policy was "delivered or issued for delivery" in Louisiana and, in any case, the choice-of-law provision requiring application of New York law is valid and enforceable. Def.'s Br. at 5-10. For the reasons explained below, the choice-of-law provision in the Policy requires application of New York law, and I therefore recommend that Plaintiffs' motion for partial summary judgment on this issue be denied.

A. **The Policy's choice-of-law provision requires application of New York law .**

"Under traditional New York choice-of-law rules, courts looked to common-law principles to determine the law governing a contract, even for a contract containing a choice-of-law clause." See Lehman Bros. Com. Corp. v. Minmetals Int'l Non-Ferrous Metals Trading Co., 179 F. Supp. 2d 118 , 135 (S.D.N.Y. 2000). Under the common law, a court determining whether to limit application of a choice-of-law clause examined whether "there is no reasonable basis for the parties' choice" of law, or whether "the application of the chosen law would violate a fundamental public policy of another, more-interested jurisdiction." Id at 135-36 **[*4]** (citing Restatement (Second) Conflict of Laws § 187(2)). When making a choice of law determination in a contract case, New York courts applied "the law of the jurisdiction having the greatest interest in the litigation, as measured by that jurisdiction's contacts with the litigation." In re Gaston & Snow . 243 F.3d 599 , 607-08 (2d Cir. 2001).

In 1984, however, the New York Legislature enacted General Obligation Law § 5-1401 . Lehman Bros. Com. Corp., 179 F. Supp. 2d at 136 . That statute requires New York courts to enforce the parties' selection of New York law in commercial contracts of $250,000 or more. Id at 136-37 (citing N.Y. Gen. Oblig. Law § 5-1401); see also Usach v. Tikhman, No. 11-CV-954 (DLC), [2011 BL 309237], 2011 WL 6106542 , at *5 (S.D.N.Y. Dec. 7, 2011) (explaining that under New York law, "[i]n the case of certain contracts covering high-value transactions"—*i.e.*, transactions covering at least $250,000—"a choice of law clause selecting New York law will be honored regardless of the contacts between the state and the transaction") (citing N.Y. Gen. Oblig. Law

§ 5-1401(l)).[6] With the enactment of General Obligations Law § 5-1401 , the Legislature sought "to promote and preserve New York's status as a commercial center and to maintain predictability for the parties." IRB-Brasil Resseguros. S.A. v. Inepar Invs., S.A., 20 N.Y.3d 310 , 316 (2012). The statute's legislative history further "indicates that 'public policy favors New York courts retaining lawsuits where New York is the designated forum.'" Supply & Bldg. Co. v. Estee Lauder Int'l. Inc., No. 95-CV-8136 (RCC), *1999 WL 178783* , at *2 (S.D.N.Y. Mar. 31, 1999) (quoting Philips Credit Corp. v. Regent Health Grp., Inc., 953 F. Supp. 482 , 502 (S.D.N.Y. 1997)); see also Solano v. Shearson Lehman Hutton. Inc. . No. 90 CIV. 2122 (JFK), *1990 WL 180174* , at *6 (S.D.N.Y. Nov. 13, 1990) ("With the passage of § 5-1401 , the New York State legislature expressed a strong policy in favor of choice of law provisions.") (citation omitted). Mandating courts "to engage in a conflict-of-laws analysis despite the parties' plainly expressed desire to apply New York law would frustrate the Legislature's purpose of encouraging a predictable contractual choice of New York commercial law and, crucially, of eliminating uncertainty regarding the governing law." IRB-Brasil . 20 N.Y.3d at 316 .

Section 5-1401 thus "supersedes common law conflict principles" and "on its face" the statute requires application of the parties' chosen law without a conflict-of-law analysis in a case involving a commercial contract of $250,000 or more. Lehman Bros. Com. Corp., 179 F. Supp. 2d at 136-37 . This approach has been consistently reaffirmed by the New York Court of Appeals. In Ministers & Missionaries Benefit Board v. Snow, the Court of Appeals stated that "New York courts should not engage in any conflicts analysis where the parties include a choice-of-law provision in their contract." 26 N.Y.3d 466 , 475 (2015). The Court of Appeals reiterated that principle in 2138747 Ontario, Inc. v. Samsung C&T Corp., where the Court held that "the parties' contractual choice of New York's substantive law . . . precluded application of New York's common-law conflict-of-laws principles." 31 N.Y.3d 372 , 379 (2018). And, most recently, in Petróleos de Venezuela S.A. v. MUFG Union Bank, N.A., the Court of Appeals again stated that "[t]he inclusion of a New York choice-of-law clause in a contract demonstrates the parties' intent that 'courts not conduct a conflict-of-laws analysis,' which thereby 'obviates the application **[*5]** of both common-law conflict-of-laws principles and statutory choice-of-law directives,' unless the parties or the legislature clearly express a contrary intent." [2024 BL 53229], 2024 WL 674251 , at *5 (N.Y. Feb. 20, 2024) (quoting Ministers, 26 N.Y.3d at 468).

Pursuant to this "controlling New York rule," I "may not conduct the type of choice-of-law analysis that [Plaintiffs are] proposing when the parties have selected New York law in their contract." CBKZZ Inv. LLC v. Renaissance Re Syndicate 1458 Lloyds, No. 22-CV-10672 (AS), [2024 BL 57598], 2024 WL 728890 , at *1 (S.D.N.Y. Feb. 22, 2024) (citing Capstone Logistics Holdings. Inc. v. Navarrete, No. 17-CV-4819 (GBD), [2018 BL 480255], 2018 WL 6786338 , at *20 (S.D.N.Y. Oct. 25, 2018) ("Since Ministers was handed down, . . . the courts of New York have refused to consider the public policy of foreign states . . . to overturn an otherwise valid contractual choice of law provision.") (collecting cases), aff'd and remanded in part, 796 F. App'x 55 (2d Cir. 2020)). Further, courts in this District have applied Ministers and other Court of Appeals precedent in concluding that a choice-of-law provision in a contract involving $250,000 or more precludes a choice-of-law analysis under common law principles. See, e.g., Usach, [2011 BL 309237], 2011 WL 6106542 , at *6 ; Willis Re Inc. v. Herriott, 550 F. Supp. 3d 68 , 91-96 (S.D.N.Y. 2021); Berkley Assurance Co. v. MacDonald-Miller Facility Sols., Inc., No. 19-CV-7627 (JPO), [2020 BL 123561], 2020 WL 1643866 , at *2 (S.D.N.Y. Apr. 1, 2020); In re LIBOR-Based Fin. Instruments Antitrust Litis., 299 F. Supp. 3d 430 , 603-05 (S.D.N.Y. 2018). And courts have done so even when the contract at issue was, like the Policy here, a contract for insurance. See

Berkley Assurance Co. v. MacDonald-Miller Facility Sols., Inc., No. 19-CV-7627 (JPO), [2019 BL 484608], 2019 WL 6841419 , at *2-3 (S.D.N.Y. Dec. 16, 2019) (applying General Obligations Law § 5-1401 to conclude that choice-of-law clause in insurance policy was enforceable and required application of New York law).

Here, the Properties covered by the Policy are valued in total at $22,037,833. See ECF No. 63-4 at 9-10 (Policy's Statement of Values). The Policy also has a limit of liability of approximately $22 million per occurrence. See ECF No. 63-3 at 6. As such, the Policy is a commercial contract involving $250,000 or more as required for application of General Obligation Law § 5-1401 . The parties do not dispute that the Policy includes a choice-of-law provision mandating application of New York law to a dispute arising under the Policy. Consequently, the Policy's choice-of-law provision governs and precludes a choice-of-law analysis. New York law, as elected by the parties, applies to the dispute.

Plaintiffs argue that because insurance law is "substantive" it "overrides any choice-of-law provision in an insurance contract." Joint Letter at 2. Plaintiffs thus contend that "choice-of-law clauses in insurance policies" are treated differently than "choice-of-law clauses in other contracts." Id. at 1. But Plaintiffs cite to no case directly supporting their contention that General Obligation Law § 5-1401 does not apply to contracts for insurance. The plain text of the statute makes no such distinction. And Plaintiff points to no case where such a distinction was drawn in examining a choice-of-law clause in a contract. Additionally, courts in this District have applied General Obligations Law § 5-1401 to enforce a choice-of-law clause in an insurance policy. See, e.g., Berkley Assurance Co., [2019 BL 484608], 2019 WL 6841419 , at *2-3 (applying General Obligations Law § 5-1401 to conclude that choice-of-law clause in insurance policy was enforceable **[*6]** and required application of New York law); Indian Harbor Ins. Co. v. City of San Diego, 972 F. Supp. 2d 634 , 651-52 (S.D.N.Y. 2013) (same), aff'd, 586 F. App'x 726 (2d Cir. 2014).

What's more, the Court of Appeals recent decision in Petróleos de Venezuela S.A. v. MUFG Union Bank, N. A. defeats Plaintiffs' argument. Petróleos de Venezuela involved a dispute as to whether "substantive" Venezuelan law or "substantive" New York law should apply to decide whether a security was validly issued pursuant to the relevant agreements in that case. See [2024 BL 53229], 2024 WL 674251 , at *4, *6 (N.Y. Feb. 20, 2024). There, despite "substantive" law being at issue, the Court of Appeals "reaffirm[ed] the principle of IRB-Brasil and Ministers that when the parties have chosen New York law, a court may not contravene that choice through a common-law conflicts analysis." Id. at *6 . Plaintiffs' argument that substantive insurance law would "override[ ] any choice-of-law provision" is contrary to Petróleos de Venezuela, as the Court of Appeals there enforced a choice-of-law provision without a conflict-of-laws analysis, where the dispute concerned what jurisdiction's substantive law should apply.

Plaintiffs also argue that the Court should follow North American Elite Ins. Co. v. Space Needle, LLC, 200 A.D.3d 425-26 (1st Dep't 2021), where the Appellate Division, First Department upheld a conclusion that a choice-of-law clause in an insurance policy was void in light of a statutory prohibition against such clauses in Washington insurance law—a prohibition similar to the statutory Louisiana bar here. See Pis.' Br. at 11-12; Joint Letter at 2-3. That case, however, predates Petróleos de Venezuela and does not even cite to Ministers or any of the other binding Court of Appeals decisions (2138747 Ontario, Inc. or IRB-Brasil) that make clear that the parties' inclusion of a choice-of-law clause obviates a choice-of-law analysis.[7] Likewise, Plaintiffs' reliance (see Joint Letter at 1-3) on Dukes Bridge, LLC v. Sec. Life of Denver Ins. Co., [2020 BL 148945], 2020

WL 1908557 (E.D.N.Y. Apr. 17, 2020), is also misplaced as that case did not concern a contract with a choice-of-law provision as is the case here. Id. at 35-36 (examining the parties' "choices and behavior" to conclude that the parties "intended" New Jersey law to govern "in the absence of a choice-of-law provision in the" insurance policy). Further, Dukes Bridge predates the Court of Appeals' decision in Petróleos de Venezuela, a case where the Court examined which jurisdiction's substantive law should apply where the relevant agreements contained a choice-of-law clause.

Prior to the New York Court of Appeals' recent decision in Petróleos de Venezuela. courts in this District distinguished the Court's decision in Ministers, engaging in a choice-of-law analysis despite the inclusion of a choice-of-law provision, on the grounds that the parties in Ministers did not contest the applicability of the choice-of-law provision in that case. See, e.g., Medtronic, Inc. v. Walland, No. 21-CV-2908 (ER), [2021 BL 342933], 2021 WL 4131657 , at *4-6 (S.D.N.Y. Sept. 10, 2022); Cambridge Cap. LLC v. Ruby Has LLC, 675 F. Supp. 3d 363 , 417-24 (S.D.N.Y. 2023); Fleetwood Servs., LLC v. Ram Cap. Funding, LLC, No. 20-CV-5120 (LJL), [2022 BL 194877], 2022 WL 1997207 , at *15 (S.D.N. Y. June 6, 2022). Even if Ministers left open the possibility that a court could engage in a conflict-of-law **[*7]** analysis in circumstances such as those that exist here, Petróleos de Venezuela forecloses such an analysis. However, given the recency of the Petróleos de Venezuela decision, neither the Second Circuit nor other courts in this District have had an opportunity to apply it. Accordingly, for the sake of completeness, I conduct a choice-of-law analysis below. Under such an analysis, Louisiana law would apply to the parties' dispute. Nevertheless, as stated, the parties' election of New York law in the Policy is enforceable and requires application of New York law.

B. **Conflict-of-Laws Analysis**

The first inquiry in the choice-of-law analysis in New York examines "whether there is an actual conflict of laws on the issues presented." Fed. Ins. Co. v. Am. Home Assur. Co., 639 F.3d 557 , 566 (2d Cir. 2011) (citing Fieger v. Pitnev Bowes Credit Corp., 251 F.3d 386 , 393 (2d Cir. 2001)). Plaintiffs seek damages under Louisiana statutes that permit the recovery of statutory penalties, general damages, and an award of attorney's fees. See La. Stat. Ann. §§ 22:1892 , 22:1973 (2023); see also ECF No. 20 (Plaintiffs' amended complaint seeking penalties delineated in Louisiana Revised Statutes §§ 22:1892 , 22:1973). In contrast, New York law only allows for the recovery of reasonably foreseeable and contemplated damages by the parties. See Bracken v. MH Pillars Inc., 290 F. Supp. 3d 258 , 266 (S.D.N.Y. 2017) (explaining that to recover consequential damages under New York law, the damages must be foreseeable to the parties) (citation omitted). Additionally, New York law allows punitive damages in insurance cases only where the conduct "may be characterized as 'gross' and 'morally reprehensible,' and of 'such wanton dishonesty as to imply a criminal indifference to civil obligations.'" N.Y. Univ. v. Cont'l Ins. Co., 87 N.Y.2d 308 , 315-16 (1995) (citation omitted). A conflict thus exists between Louisiana law and New York law on the damages Plaintiffs could recover should they succeed on their claims.

The second step in the choice-of-law analysis examines whether "(1) the parties' choice has no reasonable basis or (2) application of the chosen law would violate a fundamental public policy of another jurisdiction with materially greater interests in the dispute." Beatie & Osborn LLP v. Patriot Sci. Corp., 431 F. Supp. 2d 367 , 378 (S.D.N.Y. 2006). Courts have concluded that application of New York law has a reasonable basis where, for instance, a party maintains its principal place of business in New York. See, e.g., id. And courts in this

Circuit have deemed one party's incorporation in the state of the parties' chosen law sufficient for purposes of the "reasonable relationship" test. See EMA Fin., LLC v. NFusz. Inc., 444 F. Supp. 3d 530 , 541 (S.D.N. Y. 2020) (citing cases). But, when the *only* contact of the relevant transaction with the state selected in the contract is that one party was incorporated there, courts have found no reasonable relationship. See, e.g., E. Cap. Invs. Corp. v. GenTech Holdings, Inc., 590 F. Supp. 3d 668 , 678 (S.D.N.Y. 2022); Power Up Lending Grp., Ltd. v. Cardinal Energy Grp., Inc., No. 16-CV-1545 (DRH) (GRB), [2019 BL 118785], 2019 WL 1473090 , at *3 (E.D.N.Y. Apr. 3, 2019). While courts also consider the number of contacts the parties and the relevant transaction have with the state of the chosen law, see Medicrea USA. Inc. v. K2M Spine, Inc.., No. 17-CV-8677 (AT), [2018 BL 235614], 2018 WL 3407702 , at *9 (S.D.N.Y. Feb. 7, 2018), the relevant inquiry is not "whether **[*8]** the selected state is the state with the greatest number of connections to the parties or the transaction; rather, it is whether the relationship to the selected state is 'reasonable.'" EMA Fin., 444 F. Supp. 3d at 541 .

The inquiry into whether application of New York law would violate a fundamental public policy of another jurisdiction has two steps: "The Court first must determine whether [another jurisdiction's] law would govern this dispute in the absence of the parties' contractual choice-of-law provision; and, if so, the Court must decide whether the application of New York law would violate a fundamental public policy of [that other jurisdiction]." Beatie & Osborn, 431 F. Supp. 2d at 378 . The Court considers whether "the policy in question is of such 'overriding concern to the public policy of another jurisdiction as to override the intent of the parties and the interest of [New York] in enforcing its own policies.'" Int'l Bus. Machines Corp. v. Mueller, No. 14-CV-9221 (KMK), [2017 BL 343693], 2017 WL 4326114 , at *4 (S.D.N.Y. 2017) (quoting Estee Lauder Cos. Inc. v. Batra, 430 F. Supp. 2d 158 , 170 (S.D.N.Y. 2006)) (alterations in the original); see also Medicrea, [2018 BL 235614], 2018 WL 3407702 , at *9-10 (applying California law where the application of New York law would violate California's strong public policy against the enforcement of non-compete agreements).

In contract cases, New York courts apply a "center of gravity" or "grouping of contacts" approach to decide choice-of-law questions. See Lazard Freres & Co. v. Protective Life Ins. Co., 108 F.3d 1531 , 1539 (2d Cir. 1997) (citing Babcock v. Jackson, 12 N.Y.2d 473 (1963)). Using this approach, "courts may consider a spectrum of significant contacts, including the place of contracting, the places of negotiation and performance, the location of the subject matter, and the domicile or place of business of the contracting parties." Id. (citing Stolarz, 81 N.Y.2d at 227); see also GlobalNet Financial.com, Inc. v. Frank Crystal & Co., Inc., 449 F.3d 377 , 383 (2d Cir. 2006) (citing Restatement (Second) of Conflict of Laws § 188(2)).

First, New York does not bear a reasonable relationship to the parties or the transaction. Although Defendant is domiciled in New York, it is organized under the laws of Texas, and it is a licensed surplus insurer in Louisiana. See ECF No. 21 (Defendant's answer to the second amended complaint) ¶ 2; R. 56.*1 Statement* ¶ 2. Plaintiffs are both organized under the laws of Louisiana. See ECF No. 20 ¶ 1. Moreover, the insured Properties are located in Louisiana. R. 56.*1 Statement* ¶ 1. And the Policy at issue states that it was "delivered as surplus lines coverage under the Insurance Code of the State of Louisiana." Id. ¶¶ 4-5. Beyond Defendant being domiciled in New York, there is nothing in the record otherwise connecting the parties, the Properties, or the Policy to New York, such that there is a reasonable basis for the selection of New York law. See TGG Ultimate Holdings, Inc. v. Hollett, No. 16-CV-6289 (VM), [2017 BL 76785], 2017 WL 1019506 , at *4 (S.D.N.Y. Feb. 24, 2017) (determining that one party being based in New York was not a reasonable basis for choosing New York law where the other party's connections to New York were almost non-existent).

Second, Louisiana undoubtedly has a materially greater interest in this matter than New York. "[T]o determine the interests that each state has, New York courts examine **[*9]** . . . the place of contracting, negotiation, and performance; the location of the subject matter of the contract; and the domicile of the contract parties." Medtronic, [2021 BL 342933], 2021 WL 4131657 , at *7 (citing GlobalNet Financial.com, 449 F.3d at 383). As noted, the only connection to New York is Defendant's domicile here. By contrast, Louisiana is the state where the insured Properties are located, where Plaintiffs are located, and the Policy states that it was delivered under Louisiana's insurance code. R. 56.*1 Statement* ¶¶ 1, 4-5. In the absence of a choice-of-law provision, Louisiana law would apply to Plaintiffs' claim. See La. Stat. Ann. § 22:868 (2023) ("No insurance contract delivered or issued for delivery in this state and covering subjects located, resident, or to be performed in this state . . . shall contain any condition, stipulation, or agreement . . . [Requiring it to be construed according to the laws of any other state or country.").

Finally, application of New York law would violate a fundamental public policy of Louisiana. "In Louisiana, 'legislation is a solemn expression of legislative will;'" and as such, Louisiana Revised Statute 22:868 evinces a clear intent by the Louisiana legislature that Louisiana law apply to insurance contracts concerning property located in the state. Bickerstaff v. Bickerstaff, 226 F. Supp. 3d 652 , 656 (E.D. La. 2016) (quoting La. C.C. art 2 , alterations omitted); see also Volvo Const. Equip. N. Am., Inc. v. CLM Equip. Co., Inc., 386 F.3d 581 , 618 (4th Cir. 2004) ([T]the Louisiana state statute must be viewed as the fundamental public policy of that State."). Further, "Louisiana also has an interest in regulating parties," like Defendant, "who enter into contracts with Louisiana companies doing business in Louisiana." Deloach Spray Foam Insulation, LLC v. Briggs & Stratton, Corp., 645 F. Supp. 3d 563 , 573 (W.D. La. 2022) (citation and internal quotation marks omitted). And, Louisiana, like any other state, has a manifest interest in regulating the insurers doing business in its state. See, e.g., Dickerson v. Progressive Exp. Ins. Co., No. 07-CV-8153 (LMA), *2009 WL 117006* , at *3 (E.D. La. Jan. 14, 2009) (explaining that the Louisiana Supreme Court has recognized the interest of a state "in regulating its insurance industry and contractual obligations that are inherent parts thereof) (citation and internal quotation marks omitted); see also Osuna v. Gov't Emps. Ins. Co., 623 F. App'x 3 , 5 (2d Cir. 2015) ("New York has a legitimate interest in regulating its insurance industry."); Hollybrook Cottonseed Processing LLC v. Carver Inc., No. 09-CV-750 (EEF), *2011 WL 13162046* , at *4 (W.D. La. Jan. 25, 2011) ("Georgia has a legitimate interest in regulating insurance policies issued within its state, particularly when such policies are issued to insure the activities and assets of a Georgia business.").

Defendant argues that summary judgment is inappropriate because there is a dispute of fact as to whether the Policy was "delivered or issued for delivery" in Louisiana, which is a prerequisite for application of La. Stat. Ann. § 22:868 . See Def.'s Br. at 5-10; ECF No. 69 (Defendant Counter-56.1 Statement) ¶ 4. Defendant contends that the Policy at issue was delivered in Texas because the employees at CRC Group, who communicated with Defendant on behalf of Plaintiffs in obtaining the Policy, are located in Texas and Defendant delivered the Policy via e-mail to those **[*10]** employees in Texas. Def.'s Br. at 2-3.

Under New York law, "'issued for delivery' means where the risk to be insured was located, not where the policy document itself was actually handed over or mailed to the insured." Carlson v. Am. Int'l Grp., Inc., 30 N.Y.3d 288 , 289 (2017). A policy is "issued for delivery" under New York law "if it covers both insureds and risks located in this state." See Preserver Ins. Co. v. Ryba, 10 N.Y.3d 635 , 642 (2008). There is no dispute that the Properties are located in Louisiana. See R. 56.1 Statement ¶ 1. Nor is there any dispute that Plaintiffs

are located in Louisiana. ECF No. 63-3 at 6 (listing Plaintiffs' mailing address in Louisiana); ECF No. 20 at ¶ 1 (stating that Plaintiffs are corporations organized under the laws of Louisiana). Thus, both the insured and the risks are located in Louisiana. Defendant's argument that there is a factual dispute as to where the Policy was "delivered or issued for delivery" because communications occurred via e-mail with individuals in Texas wrongly assumes that a determination as to where a policy was issued or delivered requires application of Louisiana, rather than New York, law. See Def's Br. at 7-10.

In sum, under a choice-of-law analysis, the applicable law would be Louisiana. However, as discussed above, New York Court of Appeals precedent requires application of New York law given the parties' choice-of-law provision in the Policy.

CONCLUSION

For the foregoing reasons, I respectfully recommend that Plaintiffs' motion for partial summary judgment be **DENIED**.

DATED: New York, New York

March 27, 2024

Respectfully submitted,

/s/ Valerie Figueredo

VALERIE FIGUEREDO

United States Magistrate Judge

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fn 1

Unless otherwise noted, the facts recounted herein reflect the undisputed, material facts contained in Plaintiffs' Local Civil Rule 56.1 Statements of Facts . See ECF No. 65 ("R 56.1 Statement").

fn 2

In their Rule 56.1 Statement, Plaintiffs do not include the entire clause. See R. 56.1 Statement ¶ 13 (including the choice-of-venue portion of this clause, but not the choice-of-law portion). For the sake of completeness, and because the instant dispute concerns the Policy's choice-of-law provision, the Court has included the entire provision here. While the Court is "not required to consider what the parties fail to point out" on a motion for summary judgment, it "has discretion to conduct an assiduous review of the record" and rely on facts contained therein. Orbetta v. Dairyland USA Corp., No. 20-CV-9000 (JPC), [2023 BL 347077], 2023 WL 6386921 , at *7 (S.D.N.Y. Sept. 30, 2023) (citation and internal quotation marks omitted). There is no dispute between the parties that the Policy contains the choice-of-law provision.

fn 3

The Rule 56.1 Statement mistakenly includes the same address for the damage amount to the 3908 Veterans Property and the 4401 Veterans Property. See R. 56.1 Statement ¶¶ 9-10. The Court compared the damage amounts in those paragraphs to the damage amounts listed in the amended complaint and updated the facts to ensure that the correct damage amount was listed for each Property.

fn 4

"An exception to this standard mandates that a transferee court use the choice-of-law rules of the transferor court's state following a change of venue effected under section 1404(a) ." J&R Multifamily Grp., Ltd. v. U.S. Bank Nat'l Ass'n, No. 19-CV-1878 (PKC), [2019 BL 465365], 2019 WL 6619329 , at *2 (S.D.N.Y. Dec. 5, 2019) (citing Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas, 571 U.S. 49 , 65 (2013)).

However, "when a party bound by a forum-selection clause flouts its contractual obligation and files suit in a different forum, a § 1404(a) transfer of venue will not carry with it the original venue's choice-of-law rules." J&R Multifamily Grp., [2019 BL 465365], 2019 WL 6619329 , at *2 (quoting Atl. Marine Const. Co., 571 U.S. at 64); see also Monterey Bay Mil. Hous., LLC v. Ambac Assurance Corp., 531 F. Supp. 3d 673 , 704 (S.D.N.Y. 2021). Given Judge Brown's determination that Plaintiffs' claims were not properly brought in Louisiana because of the forum-selection clause in the Policy, see ECF No. 50, the choice-of-law rules of New York apply. Although Defendant argued in its opposition brief that the choice-of-law rules of Louisiana applied, see Def.'s Br. at 5, Defendant acknowledged that the argument was incorrect in its subsequent briefing, see Joint Letter at 3 n.2.

fn 5

This statute also prohibits an insurance contract covering residents or properties within Louisiana from containing language "[d]epriving the courts of [Louisiana] of the jurisdiction or venue of action against the insurer." La. Stat. Ann. § 22:868 (2023). The statute, however, provides that this bar does not "prohibit a forum or venue selection clause in a policy form that is not subject to approval by the Department of Insurance." In her order granting Defendant's motion to transfer the action to this Court (and thus concluding that the Policy's forum-selection clause was enforceable), Judge Brown determined that a surplus lines insurance contract (the type of insurance contract at issue here) is not subject to such approval. See ECF No. 50 at 11-14. Consequently, the only issue here is the enforceability of the Policy's choice-of-law provision.

fn 6

General Obligation Law 5-1401(1) provides: "The parties to any contract, agreement or undertaking, contingent or otherwise, in consideration of, or relating to any obligation arising out of a transaction covering in the aggregate not less than two hundred fifty thousand dollars, including a transaction otherwise covered

by subsection (a) of section 1-301 of the uniform commercial code, may agree that the law of this state shall govern their rights and duties in whole or in part, whether or not such contract, agreement or undertaking bears a reasonable relation to this state." N.Y. Gen. Oblig. Law § 5-1401(1) .

fn 7

Federal courts in New York are bound "by the law of New York as interpreted by the New York Court of Appeals." Licci ex rel. Licci v. Lebanese Canadian Bank, SAL, 739 F.3d 45 , 48 (2d Cir. 2013) (citation omitted).