UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

№ 17-CV-2406 (JFB)(AYS)

CATLIN SYNDICATE 2003, AS SUBROGEE OF ANTHONY'S COAL FIRED PIZZA OF BOHEMIA, LLC, D/B/A ANTHONY COAL FIRED PIZZA,

Plaintiff,

VERSUS

TRADITIONAL AIR CONDITIONING, INC., VISIBLE CONSTRUCTION CORP., AND THOMAS WILLIAMS CONSTRUCTION OF NEW YORK, LLC,

Defendants.

MEMORANDUM AND ORDER
June 18, 2018

JOSEPH F. BIANCO, District Judge:

Plaintiff Catlin Syndicate 2003 ("Catlin Syndicate" or "plaintiff"), as subrogee of Anthony's Coal Fired Pizza Bohemia, LLC d/b/a Anthony Coal Fired Pizza ("ACFP"), commenced this action against Traditional Air Conditioning, Inc. ("Traditional Air"), A-H Construction LLC, s/h/a Visible Construction Corp. ("A-H Construction"),[1] and Thomas Williams Construction of New York, LLC ("Thomas Williams," and collectively, "defendants"), seeking to recover insurance proceeds paid to ACFP for damages sustained from a fire at an Anthony's Coal Fired Pizza restaurant in Bohemia, New York (the "ACFP Restaurant"). Plaintiff's complaint asserts causes of action against defendants for negligence, breach of contract, and breach of warranty. Defendants separately assert cross-claims against the respective co-defendants for contribution and/or indemnification, in the event the Court finds them liable to Catlin Syndicate.

Presently before the Court is A-H Construction's motion to compel arbitration and to stay this action or, alternatively, to dismiss this action. For the reasons set forth below, the Court compels arbitration of Catlin Syndicate's claims against A-H Construction and stays the balance of the proceedings pending arbitration.

[1] Although the complaint names Visible Construction Corp. as a defendant, counsel for Visible Construction Corp. refers to itself as A-H Construction in its papers. Accordingly, the Court refers to Visible Construction Corp. as A-H Construction herein and assumes that they are the same entity for purposes of this Memorandum and Order.

I. BACKGROUND[2]

A. Facts

On June 3, 2013, A-H Construction entered into a contract with ACFP regarding the construction of the ACFP Restaurant (the "Construction Contract"). (A-H Constr. Mot. Ex. A.) Pursuant to the Construction Contract, A-H Construction was to schedule, coordinate, and oversee the construction of the ACFP Restaurant. (*See generally id.*)

The Construction Contract includes the following arbitration provision:

> **10.2. Dispute Resolution**
>
> **10.2.1.** If any dispute arises between the parties under the Contract, they shall exercise their best good faith efforts to resolve the dispute promptly and amicably.
>
> **10.2.2.** All claims and disputes arising from or in connection with the Contract, its validity, performance, or breach, and not resolved amicably by the parties shall be submitted to final, binding arbitration under the Construction Industry Arbitration Rules. All hearings shall be held [in] Suffolk County, New York. Any arbitration award may be reduced to judgment and enforced in any court of competent jurisdiction.
>
> **10.2.3.** Either party may consolidate an arbitration of disputes under the Contract with another arbitration to which it is a party if the arbitrations involve substantial common questions of law or fact. Either party may include other persons or entities in the arbitration, by joinder, if the other persons or entities (1) have consented to joinder and (2) are involved in a substantial common question of law or fact, or their participation in the arbitration is required to avoid inconsistent results or to afford complete relief on the parties' dispute.

(*Id.* at 8.) The Construction Contract further provides that "[t]he parties' arbitration agreement . . . is governed by and shall be enforced in accordance with the United States Arbitration Act." (*Id.*)

Thomas Williams was brought on as the general contractor for the construction of the ACFP Restaurant. (*See* Guararra Aff. Ex. D.) Thomas Williams then subcontracted with Traditional Air on October 22, 2013, to perform certain construction work at the ACFP Restaurant, including installation of kitchen exhaust duct and wrap. (*Id.*; Compl. ¶ 10.) The contract between Thomas Williams and Traditional Air neither includes an arbitration provision nor incorporates the dispute resolution provision in the Construction Contract. (*See generally* Guararra Aff. Ex. D.)

[2] This background is drawn from the complaint ("Compl.," ECF No. 1), the exhibits attached A-H Construction's motion to compel arbitration ("A-H Constr. Mot. Ex. _," ECF Nos. 42-1 through 42-3), and the Affirmation of Michael J. Guararra submitted in support of Traditional Air's opposition to A-H Construction's motion to compel arbitration and the exhibits attached thereto ("Guararra Aff.," ECF No. 44). The Court may properly consider documents outside of the pleadings for purposes of deciding a motion to compel arbitration. *See BS Sun Shipping Monrovia v. Citgo Petrol. Corp.*, No. 06 Civ. 839(HB), 2006 WL 2265041, at *3 n.6 (S.D.N.Y. Aug. 8, 2006) ("While it is generally improper to consider documents not appended to the initial pleading or incorporated in that pleading by reference in the context of a Rule 12(b)(6) motion to dismiss, it is proper (and in fact necessary) to consider such extrinsic evidence when faced with a motion to compel arbitration." (citing *Sphere Drake Ins. Ltd. v. Clarendon Nat'l Ins. Co.*, 263 F.3d 26, 32-33 (2d Cir. 2001))).

Construction of the ACFP Restaurant was eventually completed and the ACFP Restaurant opened for business. Thereafter, on the night of January 26, 2015, a fire broke out near the pizza oven and oven exhaust ductwork, causing substantial damage to the ACFP Restaurant and its equipment. (Compl. ¶ 14.) As a result, Catlin Syndicate, property insurer to ACFP, paid ACFP $840,000 for the damages sustained. (*Id.* ¶ 18.) Pursuant to their insurance policy, Catlin Syndicate is subrogated to the rights of ACFP to the extent of its insurance payments. (*Id.* ¶ 19.)

Catlin Syndicate now brings this subrogation action against defendants to recover the insurance payments.

B. Procedural History

Plaintiff commenced this action on April 21, 2017. (ECF No. 1.) Defendants separately answered the complaint, asserted cross-claims, and answered the respective defendants' cross-claims. (ECF Nos. 8, 14, 17, 19, 26, 28, 30.)

On November 2, 2017, A-H Construction demanded arbitration with the American Arbitration Association. (A-H Constr. Mot. Ex. B.) Catlin Syndicate and Thomas Williams objected to A-H Construction's arbitration demand on November 21, 2017 and November 29, 2017, respectively. (*Id.* Ex. C.)

On November 30, 2017, A-H Construction informed the Court that it intended to file a motion to compel arbitration (ECF No. 36), and on December 21, 2017, A-H Construction requested a pre-motion conference with the Court, seeking leave to file the instant motion (ECF No. 37). The Court granted A-H Construction's request and set a briefing schedule.

On March 9, 2018, A-H Construction filed its motion to compel arbitration and to stay this action or, alternatively, to dismiss this action. (ECF No. 42.) Catlin Syndicate and Traditional Air separately opposed A-H Construction's motion on April 6, 2018 (ECF Nos. 45, 48), and Thomas Williams opposed A-H Construction's motion on April 9, 2018 (ECF No. 49). A-H Construction replied on April 23, 2018. (ECF No. 51.) The Court heard oral argument on May 9, 2018.

The Court has fully considered the parties' arguments and submissions.

II. Standard of Review

Motions to compel arbitration are evaluated under a standard similar to the standard for summary judgment motions. *Bensadoun v. Jobe-Riat*, 316 F.3d 171, 175 (2d Cir. 2003) (citing *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co.*, 636 F.2d 51, 54 n.9 (3d Cir. 1980)); *Hines v. Overstock.com, Inc.*, 380 F. App'x 22, 24 (2d Cir. 2010). The court must "consider all relevant, admissible evidence" and "draw all reasonable inferences in favor of the non-moving party." *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 229 (2d Cir. 2016). "If there is an issue of fact as to the making of the agreement for arbitration, then a trial is necessary." *Bensadoun*, 316 F.3d at 175 (citing 9 U.S.C. § 4). If, however, the arbitrability of the dispute can be decided as a matter of law based on the undisputed facts in the record, the court "may rule on the basis of that legal issue and 'avoid the need for further court proceedings.'" *Wachovia Bank, Nat'l Ass'n v. VCG Special Opportunities Master Fund, Ltd.*, 661 F.3d 164, 171 (2d Cir. 2011) (quoting *Bensadoun*, 316 F.3d at 175).

III. Discussion

The Federal Arbitration Act (the "FAA") mandates that arbitration agreements "evidencing a transaction involving [interstate] commerce . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the

revocation of any contract." 9 U.S.C. § 2.[3] This statutory provision "reflect[s] both a 'liberal federal policy favoring arbitration' and the 'fundamental principle that arbitration is a matter of contract.'" *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (citations omitted). Thus, "courts must place arbitration agreements on an equal footing with other contracts and enforce them according to their terms," *id.* (citation omitted), including "terms that 'specify with whom the parties choose to arbitrate their disputes,'" *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013) (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683 (2010)).

In deciding whether to compel arbitration, the Second Circuit has instructed a district court to conduct the following inquiry:

> [F]irst, it must determine whether the parties agreed to arbitrate; second, it must determine the scope of that agreement; third, if federal statutory claims are asserted, it must consider whether Congress intended those claims to be nonarbitrable; and fourth, if the court concludes that some, but not all, of the claims in the case are arbitrable, it must then decide whether to stay the balance of the proceedings pending arbitration.

Guyden v. Aetna, Inc., 544 F.3d 376, 382 (2d Cir. 2008) (quoting *Oldroyd v. Elmira Sav. Bank, FSB*, 134 F.3d 72, 75-76 (2d Cir. 1998), *abrogated on other grounds by Katz v. Cellco P'ship*, 794 F.3d 341 (2d Cir. 2015)).

Here, the parties do not dispute, and the Court likewise concludes, that ACFP and A-H Construction entered into a valid arbitration agreement.[4] The parties' dispute

[3] The FAA generally applies if "(1) the parties have entered into a written arbitration agreement; (2) there exists an independent basis for federal jurisdiction; and (3) the underlying transaction involves interstate commerce." *In re Chung & President Enters. Corp.*, 943 F.2d 225, 229 (2d Cir. 1991) (citing 9 U.S.C. § 2).

Although the parties do not dispute whether the FAA or New York state law applies—A-H Construction asserts that both the FAA and New York state law require the Court to compel arbitration, and the other parties do not discuss which law applies (but Catlin Syndicate cites cases applying the FAA)—the Court concludes that the Construction Contract is governed by the FAA. It is undisputed that the arbitration provision in the Construction Contract constitutes a written arbitration agreement and that the Court has diversity jurisdiction over this action. In addition, the Court concludes that the underlying transaction—the construction of the ACFP Restaurant—involves interstate commerce. The Construction Contract was entered into between A-H Construction, a New York entity, and ACFP, a Florida entity (A-H Constr. Mot. Ex. A at 1), and references other Florida entities working on the project, such as the architect (*id.* at 10). *See Chartis Seguros Mexico, S.A. de C.V. v. HLI Rail & Rigging, LLC*, 967 F. Supp. 2d 756, 762 (S.D.N.Y. 2013) (collecting cases where "[c]ourts have . . . held that contracts between corporations from different states give rise to a finding of interstate commerce"). The Court also notes that the construction of the ACFP Restaurant likely included materials and workers from other states. *See Garten v. Kurth*, 265 F.3d 136, 142 (2d Cir. 2001) (concluding at-issue construction contracts were governed by the FAA when contracting entities were located in different states and construction "undoubtedly involved materials and labor in interstate commerce"). Further, the Construction Contract provides that "[t]he parties' arbitration agreement . . . is governed by and shall be enforced in accordance with the United States Arbitration Act." (A-H Constr. Mot. Ex. A at 8.)

In any event, the Court agrees with A-H Construction that the outcome would be the same under the FAA or New York state law. *See Zambrano v. Strategic Delivery Sols., LLC*, 15 Civ. 8410 (ER), 2016 WL 5339552, at *5-9 (S.D.N.Y. Sept. 22, 2016) (concluding the plaintiffs' claims were subject to arbitration regardless of whether the court applied the FAA or New York state law).

[4] The parties also do not dispute that Catlin Syndicate is subrogated to the rights of ACFP to the extent of its insurance payments.

instead centers on whether: (1) A-H Construction waived its right to arbitrate by participating in this litigation; (2) Catlin Syndicate's negligence claim falls within the scope of the Construction Contract's arbitration provision; and (3) the Court should stay the claims not subject to arbitration—i.e., Catlin Syndicate's claims against Traditional Air and Thomas Williams and defendants' cross-claims.[5] The Court addresses each issue in turn.

A. Waiver

Catlin Syndicate, joined by Thomas Williams, argues that A-H Construction waived its right to arbitration because it failed to assert arbitration as a defense in its answers or affirmative defenses and has unfairly benefited from discovery not available in arbitration. In response, A-H Construction asserts that it did not waive its contractual right because it timely asserted its rights under the arbitration provision and Catlin Syndicate has not been prejudiced by any delay. As set forth below, the Court agrees with A-H Construction.

In determining whether a party has waived its right to arbitration, courts consider "(1) the time elapsed from the commencement of litigation to the request for arbitration, (2) the amount of litigation (including any substantive motions and discovery), and (3) proof of prejudice." *PPG Indus., Inc. v Webster Auto Parts, Inc.*, 128 F.3d 103, 107 (2d Cir. 1997).[6] "There is no rigid formula or bright-line rule for identifying when a party has waived its right to arbitration." *La. Stadium & Exposition Dist. v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 626 F.3d 156, 159 (2d Cir. 2010). However, "[t]he key to a waiver analysis is prejudice. '[W]aiver of the right to compel arbitration due to participation in litigation may be found only when prejudice to the other party is demonstrated.'" *Thyssen, Inc. v. Calypso Shipping Corp., S.A.*, 310 F.3d 102, 105 (2d Cir. 2002) (second alteration in original) (quoting *Rush v. Oppenheimer & Co.*, 779 F.2d 885, 887 (2d Cir. 1985)). The Second Circuit has recognized two types of prejudice: (1) substantive prejudice, "such as when a party loses a motion on the merits and then attempts, in effect, to relitigate the issue by invoking arbitration," *id.* (quoting *Kramer v. Hammond*, 943 F.2d 176, 179 (2d Cir. 1991)), and (2) "prejudice due to excessive cost and time delay," *id.*

Here, none of the factors support waiver. Although approximately six months elapsed from the time A-H Construction was served with the complaint and the time it demanded arbitration, delay alone is insufficient to constitute waiver. *See Brownstone Inv. Grp., LLC v. Levey*, 514 F. Supp. 2d 536, 540 (S.D.N.Y. 2007) (ten-month delay in seeking

[5] To the extent A-H Construction asserted in its moving papers that the Court should compel arbitration of Catlin Syndicate's claims against its co-defendants, it appears to have abandoned this argument in its reply brief and, at oral argument, conceded that it made practical sense to stay the case as to Traditional Air and Thomas Williams given they do not consent to arbitration. The Court also notes that none of the bases for compelling non-signatories Traditional Air and Thomas Williams to arbitrate have been asserted in this case. *See Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995) ("[W]e have recognized five theories for binding nonsignatories to arbitration agreements: 1) incorporation by reference; 2) assumption; 3) agency; 4) veil-piercing/alter ego; and 5) estoppel."). Accordingly, this Memorandum and Order compelling arbitration is limited to Catlin Syndicate's claims against A-H Construction.

[6] Courts may decide questions of waiver where, as here, the "party seeking arbitration has engaged in . . . prior litigation." *Doctor's Assocs., Inc. v. Distajo*, 66 F.3d 438, 456 n.12 (2d Cir. 1995). The Court applies federal law in deciding this issue. *See Allstate Ins. Co. v. Elzanaty*, 929 F. Supp. 2d 199, 208-09 (E.D.N.Y. 2013). The Court also notes that the arbitration provision provides that the FAA governs, and also that plaintiff cites cases applying federal law in support of its waiver argument.

arbitration "insufficient by itself to support a finding of waiver"); *E. Fish Co. v. S. Pac. Shipping Co.*, 105 F. Supp. 2d 234, 240 (S.D.N.Y. 2000) (six-month delay before seeking to enforce arbitration clause "does not in and of itself constitute waiver"); *Am. Express Fin. Advisors, Inc. v. Zito*, 45 F. Supp. 2d 230, 234 (E.D.N.Y. 1999) ("Neither the passage of time, standing alone, nor the incurring of legal expenses inherent in litigation, without more, are sufficient to support a finding of waiver."). The fact that A-H Construction did not raise arbitration in its answers or cross-claims likewise is not dispositive on the issue of waiver. *Rush*, 779 F.2d at 889.

Moreover, at the time A-H Construction exercised its rights under the arbitration provision, the case was only in its initial stages. Defendants had filed their answers and cross-claims and the parties had exchanged limited discovery (Catlin Syndicate, in particular, had produced approximately 500 pages of documents). This is a far cry from the protracted litigation that had taken place in cases where the Second Circuit has found waiver. *See, e.g.*, *La. Stadium & Exposition Dist.*, 626 F.3d at 160-61 (concluding waiver when plaintiff moved to compel arbitration after defendants had filed multiple motions and letter detailing deficiencies in plaintiff's second amended complaint); *Com-Tech Assocs. v. Computer Assocs. Int'l, Inc.*, 938 F.2d 1574, 1576-78 (2d Cir. 1991) (finding waiver when defendants raised arbitration four months before scheduled trial date, after deposing plaintiffs, and in omnibus motion raising other substantive issues to which plaintiffs were obligated to respond).

Finally, and significantly, Catlin Syndicate has not demonstrated that it has been prejudiced by any delay. First, with respect to substantive prejudice, there has been no merits-based motion practice. Therefore, this is not a situation where A-H Construction seeks a second chance in arbitration after receiving adverse rulings in this Court.

Second, A-H Construction's actions did not cause the parties any excessive cost or delay. Counsel for A-H Construction represented that it demanded arbitration when it learned of the Construction Contract, at which time Catlin Syndicate had only produced approximately 500 pages of documents. Although discovery continued while the parties briefed this motion, any such discovery was exchanged pursuant to the Court's scheduling order, and after A-H Construction had made abundantly clear that it was pursuing arbitration. The Court is unwilling to find prejudice where, as here, the moving party took appropriate steps to exercise its right to arbitration, and thereafter participated in discovery in compliance with Court orders. *See Levey*, 514 F. Supp. 2d at 545 (determining no waiver despite engaging in litigation and discovery when party seeking arbitration had not "invoked judicial resources to obtain such discovery and information to later gain an advantage in the arbitration").

Accordingly, for the reasons stated, the Court concludes that A-H Construction did not waive its right to arbitration.

B. Scope of the Arbitration Provision

The arbitration provision states, in relevant part, that "[a]ll claims and disputes arising from or in connection with the Contract, its validity, performance, or breach . . . shall be submitted to final, binding arbitration under the Construction Industry Arbitration Rules." (A-H Constr. Mot. Ex. A at 8.) Traditional Air and Thomas Williams assert that the language "its validity, performance, or breach" reflects an intent to limit arbitration to contractual claims and exclude from arbitration any tort claims,

including Catlin Syndicate's negligence claim. The Court disagrees.

As an initial matter, the Court notes that Catlin Syndicate does not argue that its negligence claim against A-H Construction falls outside of the scope of the arbitration provision. Accordingly, both Catlin Syndicate and A-H Construction seemingly agree that the arbitration provision encompasses all of plaintiff's claims, and this issue is thus not in dispute among the parties subject to the arbitration provision.

In any event, the Court independently concludes that plaintiff's negligence claim against A-H Construction is subject to arbitration.

The Court finds no support for Traditional Air's and Thomas Williams's argument that the arbitration provision reflects an intent to limit arbitration to contractual claims. To the contrary, the arbitration provision is a classic "broad" arbitration clause. *See, e.g.*, *ACE Capital Re Overseas Ltd. v. Cent. United Life Ins. Co.*, 307 F.3d 24, 27, 33-34 (2d Cir. 2002) (finding provision subjecting to arbitration "any dispute [that] shall arise between the parties hereto with reference to the interpretation of this Agreement or their rights with respect to any transaction involved" broad); *Oldroyd*, 134 F.3d at 76 (concluding clause making arbitrable "[a]ny dispute, controversy or claim arising under or in connection with [employment agreement]" represented "the prototypical broad arbitration provision"). In fact, even if the arbitration provision were limited to "all claims and disputes arising from or in connection with the Contract's validity, performance, or breach," as Traditional Air and Thomas William argue it should be read, it would still be considered broad under Second Circuit precedent. *See Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading Inc.*, 252 F.3d 218, 225-26 (2d Cir. 2001) (concluding arbitration provision broad that covered "[a]ny dispute arising from the making, performance or termination" of the agreement).

Where, as here, the arbitration provision is broad, "'there arises a presumption of arbitrability,' and arbitration of even a collateral matter will be ordered if the claim alleged 'implicates issues of contract construction or the parties' rights and obligations under it.'" *Louis Dreyfus Negoce S.A.*, 252 F.3d at 224 (quoting *Collins & Aikman Prods. Co. v. Bldg. Sys., Inc.*, 58 F.3d 16, 23 (2d Cir. 1995)).

With this presumption in mind, the Court concludes that plaintiff's negligence claim against A-H Construction is subject to arbitration. Plaintiff alleges that A-H Construction was negligent in its role in the construction of the ACFP Restaurant—the subject of the Construction Contract. In addition, the Construction Contract explicitly states that A-H Construction shall indemnify ACFP for any losses caused by A-H Construction's negligence, among other things. (A-H Constr. Mot. Ex. A at 7.) Plaintiff's negligence claim thus plainly relates to the Construction Contract and falls within the arbitration provision's scope. *See, e.g.*, *Yee v. Roofing by Classic Restorations*, No. 3:09cv00311 (DJS), 2010 WL 7864919, at *5 (D. Conn. June 8, 2010) (concluding clause compelling arbitration of "any dispute to this Contract" encompassed plaintiff's negligence claim); *Simply Fit of N. Am., Inc. v. Poyner*, 579 F. Supp. 2d 371, 381-82 (E.D.N.Y. 2008) (finding plaintiff's "extra-contractual claims [we]re appropriate for arbitration because they relate to the parties' contractual relationship").

C. Stay of Nonarbitrable Claims

Because the Court compels arbitration of Catlin Syndicate's claims against A-H Construction, it must determine whether to

proceed with the nonarbitrable claims—Catlin Syndicate's claims against Traditional Air and Thomas Williams and defendants' cross-claims—or stay the balance of the proceedings. At oral argument, A-H Construction, Traditional Air, and Thomas Williams agreed that, in the event the Court compelled arbitration of Catlin Syndicate's claims against A-H Construction, the Court should stay the rest of the case pending the arbitration. Catlin Syndicate, however, argues that their claims against Traditional Air and Thomas Williams should proceed in this Court.

"The decision to stay the balance of the proceedings pending arbitration is a matter largely within the district court's discretion to control its docket." *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 856 (2d Cir. 1987). A stay is appropriate when the nonarbitrable claims "involve common issues of fact and law with those subject to arbitration or when the arbitration is likely to dispose of issues common to claims against both arbitrating and non-arbitrating defendants." *Moore v. Interacciones Glob., Inc.*, No. 94 Civ. 4789(RWS), 1995 WL 33650, at *7 (S.D.N.Y. Jan. 27, 1995); *accord Winter Inv'rs, LLC v. Panzer*, No. 14 Civ. 6852(KPF), 2015 WL 5052563, at *11 (S.D.N.Y. Aug. 27, 2015) ("A discretionary stay is particularly appropriate where there is significant factual overlap between the remaining claims and the arbitrated claims[,] . . . in part because the prior litigation or arbitration is likely to have preclusive effect over some or all of the claims not subject to arbitration." (internal citations omitted)).

The Court, in its discretion, stays the nonarbitrable claims. Although Catlin Syndicate argues that its claims against Traditional Air and Thomas Williams will not be impacted by the arbitration because they are premised on different theories of liability—Catlin Syndicate asserts that its claims against A-H Construction are limited to its alleged improper supervision, whereas its claims against Traditional Air and Thomas Williams are based on their alleged negligent construction work—the Court nonetheless determines that there is sufficient factual and legal overlap to warrant a stay. Indeed, plaintiff's complaint alleges the same set of facts and causes of action against each defendant, and defendants' cross-claims for indemnification are predicated on the resolution of plaintiff's claims. It is thus possible that the arbitration of Catlin Syndicate's claims against A-H Construction could resolve plaintiff's claims against the other defendants or, at a minimum, decide relevant legal and factual issues. For example, in determining A-H Construction's liability, the arbitrator could conclude that the fire was not caused by any negligence, potentially disposing of Catlin Syndicate's negligence claims against the other defendants, or at least make factual findings regarding the cause of the fire.[7]

[7] The arbitrator's determinations could have preclusive effective in this action, *see Bear, Stearns & Co. v. 1109580 Ontario, Inc.*, 409 F.3d 87, 91 (2d Cir. 2005) ("An arbitration decision may effect collateral estoppel in a later litigation or arbitration if the proponent can show 'with clarity and certainty' that the same issues were resolved." (citation omitted)), including to the benefit of Traditional Air and Thomas Williams, *see Boguslavsky v. Kaplan*, 159 F.3d 715, 719 n.3 (2d Cir. 1998) ("Collateral estoppel can be raised by a party who was not a party to the prior proceeding from which preclusive effect arises."). Conversely, defendants' counterclaims will not be impacted by the arbitration given that Traditional Air and Thomas Williams cannot be compelled to arbitrate. *See Hartford Accident & Indem. Co. v. Columbia Cas. Co.*, 98 F. Supp. 2d 251, 255 (D. Conn. 2000) (finding "arbitration award only precludes relitigation of those factual or legal issues resolved against a party or one in privity with a party to the arbitration" and concluding no preclusive effect against party that could not be compelled to arbitrate absent its consent).

Accordingly, given the significant overlap among plaintiff's claims, the Court concludes, in its discretion, that a stay is appropriate. *See Katsoris v. WME IMG, LLC*, 237 F. Supp. 3d 92, 110-11 (S.D.N.Y. 2017) (concluding discretionary stay warranted when there was "significant factual overlap between Plaintiffs' claims against [arbitrating defendant] and those against [non-arbitrating defendant]"); *Panzer*, 2015 WL 5052563, at *12 (ordering discretionary stay of claims that "overlap[ped] significantly (if not entirely) with the issues that th[e] Court would need to reach" to adjudicate such claims); *Hikers Indus., Inc. v. William Stuart Indus. (Far East) Ltd.*, 640 F. Supp. 175, 178-79 (S.D.N.Y. 1986) (staying claims not subject to arbitration because "the arbitration [would] provide the court with insight into the issues of law and fact," and any decision by the court on the merits "would thwart the federal policy in favor of arbitration of disputes by rendering the arbitrator's [decision] meaningless").

IV. CONCLUSION

For the foregoing reasons, the Court grants A-H Construction's motion to compel arbitration of plaintiff's claims against A-H Construction and stays this case pending the resolution of the arbitration.

SO ORDERED.

[redacted]

JOSEPH F. BIANCO
United States District Judge

Dated: June 18, 2018
Central Islip, NY

* * *

Plaintiff Catlin Syndicate 2003 is represented by John B. Galligan of Cozen O'Connor P.C., 45 Broadway Atrium, 16th Floor, New York, New York 10006; and Mark Mullen of Cozen O'Connor P.C., 1900 Market Street, Philadelphia, Pennsylvania 19103.

Defendant Traditional Air Conditioning, Inc. is represented by Michael Guararra and Michael M. Zaitz of Guararra & Zaitz LLP, 1185 Avenue of the Americas, 18th Floor, New York, New York 10036. Defendant Visible Construction Corp. is represented by Joseph T. Pareres, Joseph C. Marchese, III, and Rachel H. Poritz of Silverson Pareres & Lombardi LLP, 192 Lexington Avenue, 17th Floor, New York, New York 10016. Defendant Thomas Williams Construction of New York, LLC is represented by Brian C. Harris of Braff, Harris, Sukoneck & Maloof, 570 West Mount Pleasant Avenue, Livingston, New Jersey 07039.