IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

WARHORSE LLC,	*	
	*	
Plaintiff,	*	
	*	
v.	*	1:21-CV-01239-ELR
	*	
DONEGAL MUTUAL INSURANCE COMPANY,	*	
	*	
Defendant.	*	
	*	

O R D E R

Presently before the Court is Defendant Donegal Mutual Insurance Company's "Motion for Summary Judgment." [Doc. 26]. For the reasons set forth below, the Court grants Defendant's motion.

I. Background[1]

This declaratory judgment action stems from a dispute regarding insurance coverage. See generally Compl. [Doc. 1-1]. Plaintiff WarHorse, LLC ("WarHorse")

[1] The facts discussed herein are undisputed unless noted otherwise. Having reviewed the Parties' submissions, the Court excludes proposed facts that are immaterial, includes facts drawn from its own review of the record, and considers all proposed facts in light of the standard for summary judgment. See LR 56.1(B)(2)(a)(2)(iii), NDGa.; see also FED. R. CIV. P. 56(c)(3) ("The court need consider only the cited materials, but it may consider other materials in the record."); Tomasini v. Mt. Sinai Med. Ctr. of Fla., 315 F. Supp. 2d 1252, 1260 n.11 (S.D. Fla. 2004) (explaining that a district court is not obligated to "scour the record" to determine whether triable issues exist).

is a construction-related business based in Conyers, Georgia, and owned by its sole member, Mr. Randall Marable. See Deposition of Randall Marable ("Marable Dep.") at 11:20–13:5 [Doc. 26-2]. Mr. Marable is also the sole member of another business entity called KMD Management ("KMD"). See id. at 10:1–7. KMD obtains contracts from clients for "demolition work [as well as] asbestos, lead, [and] mold remediation[,]" and, after obtaining these types of construction-related contracts, KMD "sub[contracts] out [work] to War[H]orse."[2] Id. at 11:8–9, 13:20–23.

Defendant is an insurance company which issued a commercial general insurance policy (the "Policy") to WarHorse, effective December 27, 2017. See Defendant's Statement of Material Facts ("Def.'s SOMF") ¶ 1 [Doc. 26-4 at 2–5]. Contained within the Policy is a Commercial General Liability Coverage Form ("CGL Form") which sets forth the Policy's provisions regarding coverage for damages arising from property damage. See id. ¶ 3; [see also Doc. 26-1 at 111–23]. The Policy also contains an endorsement titled "Amendments to Policy Definitions" (the "Form CGD") which provides amended definitions related to the Policy's coverage for property damage claims. [See Doc. 26-1 at 149].

[2] KMD does not actually complete any work itself; it only "subcontracts to other companies or individuals." Marable Dep. at 13:24–14:4. Thus, although Mr. Marable owns both KMD and WarHorse, KMD acts like a general contractor that subcontracts work to WarHorse. See id. at 11:10–17.

The underlying loss for which WarHorse sought insurance coverage from Defendant occurred on May 1, 2020 (the "Loss"). [See id. at 151]. During April of 2020, KMD entered into an agreement with Balfour Beatty Construction ("Balfour") for KMD to complete demolition work in the Atlanta, Georgia AmericasMart Building (the "Project"). See Declaration of Randall Marable ("Marable Decl.") ¶¶ 7–8 [Doc. 27-3]. KMD was one of several companies hired to do construction and demolition work on the Project; for example, Balfour separately hired a (non-party) company, J.R. Nichols, to handle mechanical, electrical, and plumbing aspects of the Project. See Marable Dep. at 19:3–21:4.

After Balfour hired KMD for the Project, KMD subcontracted part of the work to WarHorse. See Marable Decl. ¶¶ 8, 10. Specifically, KMD made WarHorse responsible for haul[ing] off" certain "discarded materials" from the Project worksite. See id. There was never a written contract between KMD and WarHorse related to the Project—instead, Mr. Marable provided an oral explanation of the scope of the work to a foreman for WarHorse, Mr. Luis Cuellar. See id. ¶¶ 9–10; see also Marable Dep. at 16:4–23. At the Project site, Mr. Marable explained to Mr. Cuellar that workers from J.R. Nichols were going to "cut and drop" mechanical, electrical, and plumbing materials onto the floor of the Project worksite, which WarHorse's workers would then be responsible for demolishing and removing. See Marable Dep. at 19:3–21:4. The J.R. Nichols workers were supposed to determine

what materials should be saved (rather than destroyed and removed by WarHorse's workers) and place these materials aside in the separate "reuse area" in the corner of the Project worksite. See id. at 20:2–15, 34:15.

On the day of the Loss, the J.R. Nichols workers took down at least eight (8) HVAC units and moved them to the "reuse area."[3] See id. at 29:22–30:3, 36:2–4; see also Def.'s SOMF ¶¶ 10–11. Due to a "misunderstanding" with the foreman for J.R. Nichols, Mr. Cuellar mistakenly believed that the HVAC units were meant to be destroyed and discarded by WarHorse even though they were in the "reuse area" that was exclusively for materials that were to be saved. See Marable Dep. at 29:4–11, 30:4–11, 38:14–19. Thus, WarHorse's workers destroyed eight (8) HVAC units. See Def.'s SOMF ¶ 11.

Later that day, Mr. Marable learned of the Loss when a representative for Balfour called him (as Mr. Marable was not onsite at the time). See id. at 36:21–37:8. Thereafter, WarHorse paid approximately $131,000 to replace the destroyed HVAC units and submitted a claim to Defendant for coverage pursuant to the Policy. See Marable Dep. at 47:24–48:1; [see also Doc. 26-1 at 151, 154]. Defendant denied WarHorse's claim based on the below language from the Policy:

[3] Plaintiff disputes Defendant's proposed fact No. 10, however, upon review, the Court finds that Plaintiff's citation to the record does not support its objection. See Plaintiff's Response to Defendant's Statement of Material Facts ("Pl.'s Resp. to Def.'s SOMF") ¶ 10 [Doc. 27-2 at 2–3].

SECTION I – COVERAGES

COVERAGE A [–] BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

    a. We will pay those sums that the insured becomes legally obligated to pay as damages because of . . . "property damage" to which the insurance applies[.]

. . . .

    b. This insurance applies to . . . "property damage" only if:

        (1) The . . . "property damage" is caused by an "occurrence[.]"

. . . .

2. Exclusions

    This insurance does not apply to:

    a. Expected Or Intended Injury

        . . . "[P]roperty damage" expected or intended from the standpoint of the insured[.]

. . . .

SECTION V – DEFINITIONS

. . . .

13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same or general harmful conditions.

. . . .

> 17. "Property damage" means:
>
> > a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss shall be deemed to occur at the time of the physical injury that caused it[.]

[See Doc. 26-1 at 111, 120, 122–23, 151–53]; see also Def.'s SOMF ¶¶ 4–7, 9.

Additionally, the Policy's Form CGD provides the following amended definitions of "property damage" and "occurrence":

> I. The definition of an "occurrence" as found in SECTION V – DEFINITIONS is replaced by the following:
>
> > 13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same or general harmful conditions. "Occurrence" also means an accident involving:
> >
> > > a. "Property damage" to "your work" if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor and the "property damage" is included within the "products-completed operations hazard"; or
> > >
> > > b. "Property damage" to other than "your work" that arises from "your work."
>
> II. The following is added to Paragraph 17[,] "Property Damage" as found in SECTION V – DEFINITIONS:
>
> > c. "Property damage" does not include any loss, cost or expense to correct any defective, faulty or incorrect work performed by you or by any contractors or subcontractors working directly or indirectly on your behalf.

[See Doc. 26-1 at 149]; see also Def.'s SOMF ¶¶ 5, 8. Pursuant to the above Policy language, Defendant maintained (as it does now) that the Loss does not fall within the purview of "property damage caused by an occurrence" because WarHorse's destruction of the HVAC units was not an "accident." [See Doc. 26-1 at 153] (emphasis omitted).

Consequently, on February 22, 2021, WarHorse initiated this action in the Superior Court of Fulton County, Georgia, asserting claims for declaratory judgment, breach of contract, and damages and attorneys' fees pursuant to O.C.G.A. § 33-4-6. See generally Compl. Defendant timely removed the action to this Court on March 26, 2021. See Notice of Removal [Doc. 1]. Following the close of discovery on January 21, 2022, Defendant submitted its instant "Motion for Summary Judgment" on February 21, 2022, which WarHorse opposes. [See Docs. 26, 27]. Having been fully briefed, Defendant's motion is ripe for the Court's review. The Court begins by setting forth the relevant legal standard.

II. Legal Standard

The Court may grant summary judgment only if the record shows "that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). A factual dispute is genuine if there is sufficient evidence for a reasonable jury to return a verdict in favor of the non-moving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

A factual dispute is material if resolving the factual issue might change the suit's outcome pursuant to the governing law. See id.

When ruling on a motion for summary judgment, the Court must view all evidence in the record in the light most favorable to the non-moving party and resolve all factual disputes in the non-moving party's favor. See Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000). The moving party need not positively disprove the opponent's case; rather, the moving party must show the lack of evidentiary support for the non-moving party's position. See Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

If the moving party meets this initial burden, the non-moving party must then present competent evidence beyond the pleadings to show that there is a genuine issue for trial in order to survive summary judgment. See id. at 324–26. The essential question is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 251–52. "The mere existence of a scintilla of evidence" supporting the non-movant's case is insufficient to defeat a motion for summary judgment. Id. at 252. There must be evidence on which the jury could reasonably find for the non-moving party. See id.

III. Discussion

Having set forth the relevant legal standard, the Court now addresses the substance of the Parties' arguments. [See Docs. 26-3, 27-1, 28]. The Parties do not dispute the relevant facts.[4] See generally Def.'s SOMF; Pl.'s Resp. to Def.'s SOMF. Rather, the Parties dispute whether the Loss qualifies as an "occurrence" leading to "property damage" so as to invoke coverage pursuant to the Policy. [See Docs. 26-3 at 9–12; 27-1 at 7–10; 28 at 2–9]. Defendant argues that there was no "accident" within the meaning of the Policy because "[Plaintiff's] erroneous[] belief that the HVAC units were to be destroyed does not change the fact that [Plaintiff's] employee[s] acted intentionally in destroying them." [Doc. 26-3 at 12].

In response, Plaintiff contends that even though the HVAC units were intentionally destroyed, the Loss still qualifies as an "occurrence" pursuant to the Policy because "it was the result of faulty work performed by [Plaintiff's] workers" and that "[t]his faulty work, caused by [Plaintiff's] performance of work outside . . . its scope of work, caused unforeseen and unexpected damage[.]" [See Doc. 27-1 at

[4] Neither do the Parties contest that Georgia law governs the Policy at issue. [See, e.g., Doc. 26-1 at 13, 17]. The Court agrees that Georgia law governs the instant Policy pursuant to "Georgia's *lex loci contractus* choice of law rule governing contracts," which provides that "an insurance policy is governed by the law of the state where the policy was issued and delivered to the named insured unless that other state's law is contrary to Georgia public policy." Mt. Hawley Ins. Co. v. E. Perimeter Pointe Apartments, LP, 409 F. Supp. 3d 1319, 1326 (N.D. Ga. 2019) (citing Travelers Indemn. Co. of Conn. v. Paschal, Civil Action No. 4:17-CV-00066-HLM, 2017 WL 8950392, at *5 (N.D. Ga. 2017)). Here, an insurance agency based in Dunwoody, Georgia issued the Policy to Plaintiff, and Plaintiff is based in Conyers, Georgia. [See Doc. 26-1 at 13]; see also Marable Dep. at 12:20–25.

8]. In support, Plaintiff relies on a 2011 opinion from the Georgia Supreme Court in American Empire Surplus Lines Insurance Co. v. Hathaway Development Co., 707 S.E.2d 369 (Ga. 2011). [See Doc. 27-1 at 8–10].

In Hathaway, a general contractor sought to recover damages from a plumbing subcontractor's insurance company after the plumbing subcontractor's faulty workmanship necessitated repairs at multiple worksites. See 707 S.E.2d at 370. The general contractor sought to recover the costs of repairing both the worksites themselves and damage to surrounding properties (also caused by the plumbing subcontractor's faulty work). See id. The plumbing subcontractor's insurer initially denied the general contractor's claim "because it did not arise out of an 'occurrence,' defined under the policy as 'an accident, including continuous or repeated exposure to substantially the same, general harmful conditions.'"[5] Id. In considering the proper construction of the term "occurrence" in the commercial general liability insurance context, the Georgia Supreme Court observed: "[i]t is commonly accepted that, when used in an insurance policy, an 'accident' is deemed to be . . . ['an unexpected happening without intention or design.'" Id. at 371. Further, the Georgia Supreme Court held:

> an occurrence can arise where faulty workmanship causes unforeseen or unexpected damage to other property. In reaching this holding, we reject out of hand the assertion that the acts of [the subcontractor] could

[5] The definition of "occurrence" in the Policy at issue here is identical to the definition of "occurrence" in Hathaway. [Compare Doc. 26-1 at 122], with Hathaway, 707 S.E.2d at 370.

> not be deemed an occurrence or accident under the [insurance] policy because they were performed intentionally. "[A] deliberate act, performed negligently, is an accident if the effect is not the intended or expected result; that is, the result would have been different had the deliberate act been performed correctly." Lamar Homes v. Mid-Continent Cas. Co., 242 S.W.3d 1, 16 (Tex. 2007).

Id. at 372.

Plaintiff's reliance on Hathaway, however, is inapposite and ignores the Eleventh Circuit's subsequent treatment of that case. In 2019, the Eleventh Circuit probed the meaning of "accident" in the context of commercial general liability insurance. See G.M. Sign, Inc. v. St. Paul Fire & Marine INS. Co., 768 F. App'x 982, 985 (11th Cir. 2019). In that case, the panel considered whether an insurance company was required to indemnify its insured for property damage liability incurred when the insured intentionally "fax[ed] advertisements to recipients it mistakenly thought had consented to receipt." Id. at 983. The insurance policy at issue provided coverage for property damage caused by "an event," which the policy defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."[6] Id. at 983–84.

The panel in G.M. Sign provided an extensive overview of cases on this topic applying Georgia law, including the binding principle the Eleventh Circuit

[6] The Policy in the matter at bar defines "an occurrence" in the exact same way as the policy from G.M. Sign defined "an event." [Compare Doc. 26-1 at 122], with G.M. Sign, 768 F. App'x at 983–84.

established in Mindis Metals, Inc. v. Transportation Insurance Co., 209 F.3d 1296 (11th Cir. 2000) that "intentional conduct premised on erroneous information" is "not an accident" according to Georgia law. See 768 F. App'x at 985 (internal quotation marks omitted) (quoting Mindis Metals, 209 F.3d at 1297); see also Macon Iron & Paper Stock Co. v. Transcon. Ins. Co., 93 F.Supp.2d 1370, 1371–75 (M.D. Ga. 1999) (holding that where an insured plaintiff in the business of scrap recycling intentionally cut up rail cars it did not own "due to a mistake as to ownership," no accident occurred pursuant to Georgia law and the defendant insurer possessed no duty to defend the plaintiff against claims brought by the rightful owner of the railcars). Ultimately, the panel held that "no accident occurred when [the insured] intentionally sent faxes with the mistaken belief that the recipients had consented to receive them[,]" and because no accident occurred, the insurance policy did not cover the insured's claim for the cost of the property damage. G.M. Sign, 768 F. App'x at 989.

In the same opinion, the Eleventh Circuit expressly rejected the plaintiff's contention "that Mindis Metals no longer controls" based on the Georgia Supreme Court's decision in Hathaway. Id. at 985.

> Hathaway does not change or clarify the state law premise of Mindis Metals. The state law premise of Mindis Metals is that "an 'accident' does not include damage to persons or property when that damage is intentionally inflicted, even where that intentional conduct is caused by erroneous information." Mindis Metals, 209 F.3d at 300. Because the effect of the subcontractor's negligence on the neighboring property

> was neither intended nor expected, Hathaway *does not at all address the question whether an accident occurs when an insured intentionally inflicts property damage based on erroneous information*.

Id. at 988 (emphasis added).

Here, it is undisputed that Plaintiff's employees intentionally destroyed the HVAC units, albeit based on erroneous information or a "misunderstanding." See Marable Dep. at 29:4–11, 30:4–11, 36:21–37:8, 38:14–19; see also Def.'s SOMF ¶¶ 10–11; [Doc. 27-1 at 10] ("It is undisputed that [Plaintiff's] work caused damage to a third party's property."). Thus, the Court finds that the Eleventh Circuit's guidance from G.M. Sign directly applies, and no "accident" took place, as is necessary for there to be an "occurrence" pursuant to the Policy. See G.M. Sign, 768 F. App'x at 988–89; [see also Doc. 26-1 at 122] ("'[o]ccurrence' means an accident"). Because the Policy only provides coverage for "'property damage' . . . caused by an 'occurrence[,]'" the Court finds Plaintiff is not entitled to coverage from Defendant on its claim related to the Loss.[7] [See Doc. 26-1 at 123]. For that reason, each of Plaintiff's three (3) claims necessarily fails. See Compl. ¶ 44 (Plaintiff noting that, by its declaratory judgment claim, it seeks "a declaration that the Policy covers the Loss and Claim"); id. ¶ 49 (Plaintiff noting that its claim for breach of contract is premised on Defendant's "breach[of] its obligations under the Policy"; OneBeacon

[7] Defendant also contends that the Loss is not eligible for coverage due to the Policy's exclusion provision. [See Docs. 26-1 at 111; 26-3 at 12–13]. However, in light of the Court's above finding, the Court declines to further discuss the Policy's exclusion provision or Defendant's argument regarding the same.

Am. Ins. Co. v. Catholic Diocese of Savannah, 477 F. App'x. 665, 673 (11th Cir. 2012) ("Under Georgia law, there can be no recovery for bad faith [pursuant to O.C.G.A. § 33-4-6] when there is no coverage."). Accordingly, because Plaintiff is not entitled to coverage pursuant to the Policy, the Court grants summary judgment in favor of Defendant.

IV. Conclusion

For the foregoing reasons, the Court **GRANTS** Defendant's "Motion for Summary Judgment." [Doc. 26]. Accordingly, the Court **DIRECTS** the Clerk to **ENTER JUDGMENT** in favor of Defendant and to **CLOSE** this case.

SO ORDERED, this 28th day of November, 2022.

Eleanor L. Ross

Eleanor L. Ross
United States District Judge
Northern District of Georgia