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

PRINCIPLE SOLUTIONS GROUP, LLC,	:	
Plaintiff,	:	
	:	CIVIL ACTION NO.
v.	:	1:15-CV-4130-RWS
IRONSHORE INDEMNITY, INC.,	:	
Defendant.	:	

ORDER

This matter is before the Court on Defendant's Motion to Review Taxation of Costs [58], Defendant's Motion for Reconsideration [60], and Plaintiff's Motion for Leave to File Response [70]. After a review of the briefs and the record, the Court enters the following Order.

I. Factual and Procedural Background

This is an insurance dispute in which Plaintiff Principle Solutions Group ("Principle") seeks payment of $1.717 million from its insurer, Defendant Ironshore Indemnity ("Ironshore").

Principle's controller received an email from a person purporting to be

Josh Nazarian, a managing director for Principle, on July 8, 2015 [Doc. No. 22-7, ¶ 2, admitted; Doc. No. 22-3, p. 6]. The email had the appearance of being sent from Mr. Nazarian's corporate email address, and referenced a company acquisition with the instruction to the controller to "treat the matter with the utmost discretion" [Doc. No. 22-7, ¶ 3, admitted; Doc. No. 22-3, p. 6]. The email further instructed the controller to work with an attorney, Mark Leach, to "ensure that the wire goes out today" [Id.]. Mr. Nazarian was not in the office on the day of the fraudulent email, and he did not send the email [Doc. No. 22-7, ¶¶4-5, admitted].

The controller did receive an email from a "Mark Leach," who held himself out to be a partner at the law firm Alston & Bird, that stated he was reaching out at Mr. Nazarian's request, and included wiring instructions to a bank located in China [Doc. No. 22-7, ¶ 6, admitted; Doc. No. 22-3, pp. 9, 11]. Mr. Leach called the controller to emphasize that the wire needed to be completed that day, and that he had full approval to execute the wire from Mr. Nazarian [Doc. No. 22-7, ¶ 8, admitted].

Because the financial institution would not accept a forwarded email as authorization to wire the funds, the controller used the company's online

account to initiate the wire and verify the capability of wiring funds internationally in different forms of currency [Doc. No. 22-7, ¶¶ 9-10, admitted]. Following a confirmation phone call with Mr. Leach, the controller instructed another employee to create the wire instructions, and then approved the wire [Doc. No. 22-7, ¶¶ 11-12, admitted].

The financial institution's fraud prevention unit called and emailed the controller to verify the wire, and requested that the controller verify how Mr. Leach had received the wire instructions [Doc. No. 22-7, ¶¶ 13-14, admitted]. After Mr. Leach told the controller that he verbally received the wire instructions from Mr. Nazarian, the controller relayed the information to the financial institution, which then released the wire [Doc. No. 22-7, ¶¶ 15-16]. The next day, when the controller informed the real Mr. Nazarian that the wire had been made per his instructions, Mr. Nazarian informed the controller that he had no knowledge of the emails, Mr. Leach, or the wire instructions [Doc. No. 22-7, ¶¶ 17-18, admitted]. Mr. Nazarian immediately called the financial institutions's fraud department to report the fraudulent email, but neither the financial institution nor law enforcement were able to recover the funds [Doc. No. 22-7, ¶¶ 18-19, admitted]. As a result, Principle suffered a $1.717 million

loss [Doc. No. 22-7, ¶ 20, admitted].

Principle is the named insured under Commercial Crime Policy No. 001512502 ("Policy") for the policy period of December 20, 2014 to December 20, 2015, and Principle had paid the premium for the Policy [Doc. No. 22-7, ¶¶ 21-22, admitted]. The Policy provides coverage for specifically-designed categories of crimes, one of which is "Computer and Funds Transfer Fraud," with a "Limit of Insurance" of $5,000,000 per occurrence and a $25,000 deductible per occurrence [Doc. No. 22-7, ¶ 23, admitted]. In the relevant portions of the Policy, it states in Section A.6:

> a. We will pay for:
> (2) Loss resulting directly from a "fraudulent instruction" directing a "financial institution" to debit your "transfer account" and transfer, pay or deliver "money" or "securities" from that account.

[Doc. No. 22-4, p. 7].[1] The Policy also provides numerous definitions in Section F, which include the following relevant definitions:

> 12. "Fraudulent instruction" means:
> a. With regard to Insuring Agreement A.6.a.(2):
> (3) A computer, telegraphic, cable, teletype, telefacsimile, telephone or other electronic or written instruction initially received by you, which instruction purports to have been

[1] For the complete Policy coverage and definitions, see Plaintiff's Amended Complaint [Doc. No. 9-1].

> issued by an "employee", but which in fact was fraudulently issued by someone else without your or the "employee's" knowledge or consent.

[Doc. No. 22-4, pp. 16-19].

Consistent with the terms of the Policy, Principle notified Ironshore of its claim, submitted a Sworn Proof of Loss to Ironshore under the Policy, later amended, and sought coverage under the Policy [Doc. No. 22-7, ¶¶ 26-27, admitted]. Ironshore denied coverage for the claim on July 24, 2015 [Doc. No. 22-7, ¶ 29, admitted]. Principle filed this action in Superior Court of Fulton County, Georgia, on October 20, 2015, and the action was removed to this Court on November 25, 2015, based on this Court's diversity jurisdiction [1-2]. The Amended Complaint, filed December 21, 2015, alleged claims for breach of contract and bad faith failure to pay pursuant to O.C.G.A. § 33-4-6 [9]. After Ironshore submitted its Answer on January 4, 2016 [14], Principle filed a Motion for Partial Summary Judgment [22] as it related to the breach of contract claim only, while maintaining its demand for a jury trial on the bad faith claim [22]. On February 9, 2016, Ironshore filed a Motion to Stay Discovery [27], to which Principle filed a Response in Opposition [29] on February 11, 2016. Ironshore then filed a Motion for Summary Judgment on

both the claim for breach of contract and the bad faith claim on February 15, 2016 [32]. Over Principle's Opposition, the Court granted Ironshore's Motion to Stay Discovery [27] in its March 22, 2016 Order [47].

After the Parties had fully briefed their Motions, the Court issued its August 30, 2016 Order [55] which granted Principle's Motion for Partial Summary Judgment [22] on the breach of contract claim, denied Ironshore's Motion for Summary Judgment [32] on the breach of contract claim as moot, and granted Ironshore's Motion for Summary Judgment [32] on the bad faith claim. The Court further directed the Clerk to enter judgment and close this action [55].

Principle then filed a Bill of Costs on September 14, 2016, seeking, among other fees, two *pro hac vice* appearance fees totaling $300 and $300 in copying fees [57]. Ironshore then filed a Motion to Review Taxation of Costs on September 21, 2016 [58], asserting that the Court's August 30, 2016 Order [55] was not a final judgment, so taxation of costs was improper, and further, that if the Court's Order was a final judgment, Ironshore objected to Principle's taxation of *pro hac vice* fees and copying fees.

Ironshore then filed a Motion for Reconsideration [60] on September 27,

2016, requesting that the Court vacate the entry of final judgment because damages were yet to be adjudicated, and alternatively, asking the Court to enter findings under 28 U.S.C. § 1292(b) so that Ironshore could apply to the Eleventh Circuit for leave to pursue an interlocutory appeal [Id., p. 2]. On October 31, 2016, Ironshore filed a Motion for Leave to File Supplemental Brief [64] to support its Motion for Reconsideration [60], citing a change in law in the Fifth Circuit. Finally, on March 10, 2017, Ironshore filed a Notice of Supplemental Authority [66] to support its Motion for Reconsideration [60], citing a decision of the Ninth Circuit. On March 16, 2017, the Court entered an Order [72] granting Ironshore's Motion for Leave to File Supplemental Brief [64] and granting the relief to Principle that Principle requested in its Motion for Leave to File Response [70]. Thus, Principle's Motion [70] is **GRANTED**. Ironshore filed its Supplemental Brief to Support its Motion for Reconsideration [73] on March 21, 2017, and Principle filed its Response [74] on March 23, 2017.

II. Motion for Reconsideration

Ironshore seeks reconsideration as to several issues. First, Ironshore alleges the Court failed to fully consider all of its previous arguments and cites

decisions of the Fifth and Ninth Circuits. Second, Ironshore alleges that the Court entered judgment prematurely. Third, Ironshore has requested an interlocutory appeal. The Court will address these arguments in turn.

A. Legal Standard

Under the Local Rules of this Court, "[m]otions for reconsideration shall not be filed as a matter of routine practice[,]" but rather, only when "absolutely necessary." LR 7.2(E), N.D.Ga. Such absolute necessity arises where there is "(1) newly discovered evidence; (2) an intervening development or change in controlling law; or (3) a need to correct a clear error of law or fact." Bryan v. Murphy, 246 F. Supp. 2d 1256, 1258–59 (N.D. Ga. 2003). A motion for reconsideration may not be used "to present the court with arguments already heard and dismissed or to repackage familiar arguments to test whether the court will change its mind." Id. at 1259. Nor may it be used "to offer new legal theories or evidence that could have been presented in conjunction with the previously filed motion or response, unless a reason is given for failing to raise the issue at an earlier state in the litigation." Adler v. Wallace Computer Servs., Inc., 202 F.R.D. 666, 675 (N.D. Ga. 2001). Finally, "[a] motion for

reconsideration is not an opportunity for the moving party . . . to instruct the court on how the court 'could have done it better' the first time." Pres. Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Eng'rs, 916 F. Supp. 1557, 1560 (N.D. Ga. 1995), aff'd, 87 F.3d 1242 (llth Cir. 1996).

B. Analysis

The Court has considered Ironshore's request for reconsideration of its August 30, 2016 Order. The Court has also considered the additional arguments of the Parties relating to the Fifth Circuit decision in *Apache Corporation v. Great American Insurance Company*, Civil Action No. 4:14-CV-237, 2015 WL 7709584 (S.D. Texas Aug. 7, 2015), and the Ninth Circuit decision in *Taylor & Lieberman v. Federal Insurance Company*, 2017 WL 929211 (9th Cir. March 9, 2017) which are discussed below.

i. "Fraudulent Instruction" Argument

Ironshore alleges the Court failed to fully consider all of its previous arguments [Doc. No. 60, p. 1]. Specifically, Ironshore asserts that the Court overlooked its "primary contention that there was 'no fraudulent instruction'. . . that was directed to the bank" [Id. at 2]. The Court acknowledges that Ironshore has continuously made this argument throughout this action: in its

Answer [Doc. No. 14, ¶¶ 3, 43–44, 51–53, 57, 75], its Summary Judgment briefing [Doc. No. 30, pp. 4–5, 9–19; Doc. No. 32-1, pp. 4–5, 9–19; Doc. No. 46, pp. 1–2; Doc. No. 48, pp. 3–8, 11–14; Doc. No. 50, pp. 3–8, 11–14], its Response to Plaintiff's Statement of Undisputed Material Facts [Doc. No. 31, ¶ 3], and its Reply Brief in support of its Motion to Stay Discovery [Doc. No. 35, pp. 5, 7]. As to this contention, Ironshore has not submitted new evidence, has not presented an intervening change in controlling law, and does not allege clear error. Instead, Ironshore has reiterated the same argument that the Court has rejected. The Court did not overlook Ironshore's primary contention as to its interpretation of the Policy language. The Court simply disagreed with it.

In Georgia, when "construing an insurance contract, a court must consider it as a whole, give effect to each provision, and interpret each provision to harmonize with each other." York Ins. Co. v. Williams Seafood of Albany, Inc., 544 S.E.2d 156, 157 (Ga. 2001) (citing Boardman Petroleum, Inc. v. Federated Mut. Ins. Co., 498 S.E.2d 492, 494 (Ga. 1998)). An insurance policy "should be read as a layman would read it." Nationwide Mut. Fire Ins. Co. v. Collins, 222 S.E.2d 828, 831 (Ga. Ct. App. 1975). Further, when reading as a layman, "[t]he test is not what the insurer intended its words to

mean, but what a reasonable person in the position of the insured would understand them to mean." Id. The court should not attempt to analyze the policy "as it might be analyzed by an insurance expert or an attorney." Id.

Where there are ambiguities in an insurance contract, in Georgia, "[a]ny ambiguities in the contract are strictly construed against the insurer as drafter of the document." Richards v. Hanover Ins. Co., 299 S.E.2d 561, 563 (Ga. 1983) (citing Hulsey v. Interstate Life & Accident Ins. Co., 60 S.E.2d 353, 354 (Ga. 1950)). Where the insurer seeks to invoke exclusions, "any exclusion from coverage sought to be invoked by the insurer is likewise strictly construed." Richards, 299 S.E.2d at 563 (citing Travelers Indem. Co. v. Whalley Const. Co., 287 S.E.2d 226 (Ga. Ct. App. 1981)). Further, any "[e]xceptions and exclusions also must always be taken most strongly against the insurer." Ga. Farm Bureau Mut. Ins. Co. v. Coleman, 174 S.E.2d 351, 352 (Ga. Ct. App. 1970) (citing Ins. Co. of N. Am. v. Samuels, 120 S.E. 444 (Ga. Ct. App. 1923)).

Where there are reasonable doubts as to uncertain language, "[a]ny reasonable doubt as to uncertain language will be resolved against the insurer." Collins, 222 S.E.2d at 832. Where an insurance policy is susceptible to two

interpretations, "if an insurance contract is capable of being construed in two ways, it will be construed against the insurance company and in favor of the insured." Claussen v. Aetna Cas. & Sur. Co., 380 S.E.2d 686, 688 (Ga. 1989) (citing, among others, Mass. Benefit Life Ass'n v. Robinson, 30 S.E. 918 (Ga. 1898)). Georgia law favors finding coverage, because "the [insurance] policy must be construed strictly in favor of the insured and against the insurer." Collins, 222 S.E.2d at 832 (citing Sovereign Camp, W. O. W. v. Heflin, 3 S.E.2d 559 (Ga. 1939)).

In its August 30, 2016 Order [55], the Court found ambiguities in certain of the Policy's provisions. Specifically, the Court found it was reasonable for Principle "to interpret the language of the [Policy] to provide coverage even if there were intervening events between the fraud and the loss," and Ironshore's "interpretation, which would require an immediate link between the injury and its cause, [was] also reasonable." [Doc. No. 55, p. 12]. The Court found it "must construe the [Policy] in the light most favorable to [Principle] and provide coverage," following binding precedent in *Western Pacific Mutual Insurance Company v. Davies*. 601 S.E.2d 363, 369 (Ga. Ct. App. 2004). [Doc. No. 55, p. 12] (quoting Davies, "[w]hen the language of an insurance contract

is ambiguous and subject to more than one reasonable construction, the policy must be construed in the light most favorable to the insured, which provides him with coverage.").

In its Motion for Leave to File Supplemental Brief [64], Ironshore alleged a material change in the law relied upon by the Court in reaching its August 30, 2016 Order [55], specifically the Court's discussion of the Southern District of Texas case, *Apache Corporation v. Great American Insurance Company*, Civil Action No. 4:14-CV-237, 2015 WL 7709584 (S.D. Texas Aug. 7, 2015). After the Court issued its August 30, 2016 Order [55], the Fifth Circuit reversed the district court on October 18, 2016. Apache Corp. v. Great Am. Ins. Co., No. 15-20499, 2016 WL 6090901 (5th Cir. Oct. 18, 2016).

The Fifth Circuit noted several issues in its opinion reversing the district court. First, "Apache elected to pay legitimate invoices . . . [but] sent the payments to the wrong bank account" because the fraudfeasors had convinced Apache to change a vendor's accounts payable bank account routing information. Id. at *7. The Fifth Circuit found the *invoices* were the reason for the fraudulent transfer, not the email initiating the fraud. Id. Second, the Fifth Circuit faulted Apache for failing to investigate the new information the

fraudfeasors provided. Id.

In addition to those distinctions, Ironshore's Motion for Leave to File Supplemental Brief [64] and its Supplemental Brief [73] both fail to note that the Fifth Circuit explicitly stated that the opinion was unpublished and not precedential. Apache, 2016 WL 6090901 at *n (Principle's Response to Ironshore's Supplemental Brief also highlights the unpublished nature of the opinion. See Doc. No. 74, p. 3). The court repeatedly reiterated that it reached its decision by "applying Texas law in making this *Erie* guess," referring to the case being brought under diversity jurisdiction, and referenced the Texas law of insurance policy interpretation throughout. Id. at **1–3, 7 (noting, at *3 "the Texas Supreme Court has stressed its policy preference for 'uniformity when identical provisions will necessarily be interpreted in various jurisdictions'" (citation omitted)).

Georgia law of insurance policy interpretation, as discussed *supra* II(B)(1), is different than Texas law. Even assuming that the law in Georgia was identical to that of Texas, the Fifth Circuit's opinion is not binding on this Court, and there are distinctions in the facts of the cases. The Fifth Circuit's reversal does not change the Court's interpretation of the policy language.

In its Supplemental Brief [73], Ironshore also discussed a recently decided case in the Ninth Circuit, *Taylor & Lieberman v. Federal Insurance Company*, 2017 WL 929211 (9th Cir. March 9, 2017), which Ironshore cites to support its position that Principle's loss did not result directly from a fraudulent instruction. The district court held for the insurer on the grounds that the policy in question was an indemnity policy, which would not provide third-party coverage, rather than a liability policy, which would provide third-party coverage. Taylor & Lieberman v. Fed. Ins. Co., No. CV 14-3608 RSWL, 2015 WL 3824130, *4 (C.D. Cal. June 18, 2015). The Ninth Circuit affirmed the district court on other grounds, without discussion of the district court's analysis. The Ninth Circuit provided three alternate reasons for affirming.

First, the Ninth Circuit found the loss in question was not covered by the policy's forgery coverage. Taylor & Lieberman, 2017 WL 929211, at *1. That coverage protected against loss "resulting from Forgery or alteration of a Financial Instrument by a Third Party." Id. Second, the court found the loss was not covered by the policy's computer fraud coverage. Id. at *2. That coverage protected against loss caused by "unauthorized (1) 'entry into' [insureds] computer system, and (2) 'introduction of instructions' that

'propogate[d] themselves' through [the insureds] computer system." Id. at *1 (second alteration in original). Such a loss would be the result of a computer virus. Id. at *2. Finally, the court found the loss was not covered by the policy's funds transfer fraud coverage. Id. That coverage would be triggered when an instruction was issued to a financial institution to transfer funds without the knowledge of the insured.

The question presented here is not a question of forgery. The question presented here is not one of "malicious computer code." Id. Ironshore asserts the question is not one of knowledge of the instruction, but rather a question of whether the loss resulted directly from an instruction that Ironshore admits was fraudulent. Such an instruction is covered under the Policy. The Court finds that neither the district court nor the Ninth Circuit's decision is applicable here.

ii. Premature Judgment

Ironshore also asserts that the Court prematurely entered final judgment in this matter because damages have not been determined for the breach of contract claim. First, the Court will address the question of outstanding damages. Second, the Court will address Ironshore's request for alternative relief under 1292(b).

The Court's August 30, 2016 Order granted Principle's Motion for Partial Summary Judgment [22] on its breach of contract claim, leaving an active bad faith claim. However, the Court granted Ironshore's Motion for Summary Judgment [32] on the bad faith claim. Thus, the August 30, 2016 Order resolved the only two claims before the Court.

The Court had to determine the amount of damages owed on the breach of contract claim; the amount of damages on the breach of contract claim has never been controverted. In fact, Ironshore has previously asserted that additional discovery would only be needed "[i]f Principle succeed[ed] on its motion, then—*and only then*—might there be a reason to conduct discovery *on the question of bad faith* . . . " [Id.] (emphasis added). In its Reply Brief for the Motion to Stay Discovery, Ironshore asserted "both parties agree that Principle has presented evidence that its employee received an email purportedly from her boss that led to communications resulting in the transfer of $1.7 million from Principle's bank account" [Doc. No. 35, p. 4]. Based on Ironshore's representations and over Principle's opposition, the Court stayed discovery [47].

Ironshore has even admitted the loss amount its Response to Principle's

Statement of Material Facts. [Dkt. No. 31, ¶ 20.] Ironshore now appears to want a chance to argue damages since it has lost on the issue of coverage. However, Principle and the Court have relied upon Ironshore's previous arguments, and Ironshore cannot now litigate an issue it previously conceded.

iii. Interlocutory Appeal

Based on the Court's findings in (i) and (ii), above, Ironshore's request for leave to file an interlocutory appeal is moot.

C. Conclusion

For the reasons discussed above, the Court **DENIES** Ironshore's Motion for Reconsideration [60].

III. Taxation of Costs

In its Motion to Review Taxation of Costs, Ironshore objects to Principle's taxation of *pro hac vice* fees totaling $300 and copying fees totaling $300 [Doc. No. 58, p. 2]. In the Eleventh Circuit, taxation of costs, such as "fees of the clerk" are permitted under 28 U.S.C. § 1920. The fees of the clerk are further defined in 28 U.S.C. § 1914. *Pro hac vice* fees are not included in the list of fees permitted under § 1914. The Court **GRANTS** Ironshore's Motion to Review Taxation of Costs as to the *pro hac vice* fees. Under § 1920,

copying expenses are taxable. Given the large volume of filings in this case, the amount requested by Principle is reasonable. The Court **DENIES** Ironshore's Motion to Reivew Taxation of Costs as to copying costs. Accordingly, the taxable costs are reduced to $644.71.

Conclusion

For the foregoing reasons, Ironshore's Motion for Reconsideration [60] is **DENIED** and Ironshore's Motion to Review Taxation of Costs [58] is **GRANTED** as to the taxation of *pro hac vice* fees and **DENIED** as to copying costs. Costs are taxed against Ironshore in the sum of $644.71. Plaintiff's Motion for Leave to File Response [70] is **GRANTED**, *nunc pro tunc* to March 16, 2017.

SO ORDERED, this 29th day of March, 2017.

RICHARD W. STORY
UNITED STATES DISTRICT JUDGE