STATE OF SOUTH CAROLINA COUNTY OF HAMPTON DANIEL A. SPEIGHTS, Plaintiff, vs. CHUBB LIMITED d/b/a CHUBB NATIONAL INSURANCE COMPANY; AUTO-OWNERS INSURANCE COMPANY and BANKERS STANDARD INSURANCE COMPANY, Defendants.	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT C/A NO.: 2022-CP-25-00269 **ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGEMENT**

This matter is before the Court upon Defendant, Auto-Owners Insurance Company ("Owners") motion for summary judgment as to all claims asserted by Plaintiff, Daniel A. Speights. A hearing on Owners' motion was held on September 25, 2023, via WebEx before the Honorable George M. McFaddin, Jr. Morgan S. Templeton appeared on behalf of Owners and A. Gibson Solomons, III, on behalf of Plaintiff. After due deliberation and consideration of the materials submitted and arguments of counsel, judgment shall be entered in favor of Owners in accordance with the findings of fact and conclusions of law set forth below.

I. Material Facts

On September 25, 2019, the bookkeeper for Speights & Solomon, L.L.C. (hereinafter, the "Law Firm") was sent an email purportedly from Plaintiff, Daniel A. Speights's (hereinafter, "Plaintiff" or "Speights") email address directing her to wire money to a specified bank account. The email asked for $250,000.00 to be sent by wire transfer to an account with the Bank of China in Hong Kong. See Amended Complaint, ¶ 6. In a reply email, the bookkeeper asked, "Is this DAS Personal?" to ascertain whether it was a personal account from which the funds should be

transferred. Id., ¶ 7. Believing that it was Plaintiff who had sent the email, the bookkeeper requested a wire transfer in the amount of $250,000.00 to be sent out of the Plaintiff's *personal account* with Palmetto State Bank to a bank account in China. Id., ¶ 9 (emphasis added). Unbeknownst to the bookkeeper, the Plaintiff's email account had been hacked by a third party with the purpose of acquiring money. This scam was not discovered until after the money had been successfully transferred.

Owners provided the Law Firm with a policy of insurance bearing policy number 51-639377-00 (hereinafter, the "Policy"). The Policy was issued to the Law Firm as an entity and not to the Plaintiff as an individual. The relevant sections of the policy are as follows:

BUSINESSOWNERS SPECIAL PROPERTY COVERAGE FORM

A. COVERAGE

We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.

2. Property Not Covered
Covered Property does not include:
b. Bullion, money or securities;

3. Covered Causes of Loss

RISKS OF DIRECT PHYSICAL LOSS unless the loss is:
a. Excluded in Section B., Exclusions;

5. Additional Coverages

b. Personal Property Off Premises
You may extend the insurance that applies to Business Personal Property to apply to covered Business Personal Property, other than money and securities, while it is in course of transit or temporarily at a premises you do not own, lease or operate. The most we will pay for loss or damage under this Extension is $1,000.

f. Business Income
We will pay for the actual loss of Business Income you sustained due to the necessary suspension of your "operations" during the "period of

restoration". The suspension must be caused by direct physical loss of or damage to property at the described premises, including personal property in the open (or in a vehicle) within 100 feet, caused by or resulting from any Covered Cause of Loss.

B. EXCLUSIONS

1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

h. False Pretense: Voluntary parting with any property by you or anyone else to whom you have entrusted the property if induced to do so by any fraudulent scheme, trick, device or false pretense.

G. OPTIONAL COVERAGES

If shown as applicable in the Declarations, the following Optional Coverages also apply. These coverages are subject to the terms and conditions applicable to property coverage in this policy, except as provided below.

3. Money and Securities

a. We will pay for loss of money and securities used in your business while at a bank or savings institution, within your living quarters or the living quarters of your partners or any employee having use and custody of the property, at the described premises, or in transit between any of these places, resulting directly from:

(1) Theft, meaning any act of stealing;
(2) Disappearance; or
(3) Destruction.

b. In addition to the Limitations and Exclusions applicable to property coverage, we will not pay for loss:

(1) Resulting from accounting or arithmetical errors or omissions;
(2) Due to the giving or surrendering of property in any exchange or purchase; or
(3) Of property contained in any money operated device unless the amount of money deposited in it is recorded by a continuous recording instrument in the device.

See Policy pgs. 117 – 133. The Policy provided coverage of "direct physical loss of or damage to Covered Property . . . caused by or resulting from any Covered Cause of Loss." Id. at 117. Covered property did not include "bullion, money, or securities." Id. at 118. Additional coverage included

personal property off premises and business income. Personal property off premises compromised "covered Business Personal Property . . . in the course of transit or temporarily at a premises you do not own, lease, or operate" but this excluded money and securities. Id. at 119 – 120. Business income compromised "actual loss . . . sustained due to necessary suspension" caused by "direct physical loss of or damage to property at the described premises." Id. at 120.

The Policy did provide coverage for money and securities, albeit in a limited manner. The loss of money and securities "used in your business" were covered "while at a bank or savings institution" or "in transit between any of these places" as a direct result from "theft, meaning any act of stealing," "[d]isappearance," or "[d]estruction." The Policy further excluded coverage for any loss resulting from "accounting or arithmetical errors or omissions" or "the giving or surrounding or property in any exchange or purchase." Id. at 133.

The Policy has one notable exclusion from coverage: false pretense. Loss due to a false pretense was excluded "regardless of any other cause or event that contributes concurrently or in any sequence to the loss." Id. at 122. The Policy defines a false pretense as "[v]oluntary parting with any property by you or anyone else to whom you have entrusted the property if induced to do so by any fraudulent scheme, trick, device or false pretense." Id at 125.

The Policy did not provide coverage for money or securities nor a loss due to false pretenses and had limited coverage for property off premises. Any loss of business income would be covered only if it were a result of a suspension of operations from a covered cause of loss. An exclusion to coverage in the policy included a loss resulting from false pretenses. Here, Owners denied coverage for the Plaintiff's claim because it was a voluntary parting of funds through false pretenses. Plaintiff brought this suit seeking coverage for his loss from this incident and alleging

breach of contract, negligence, and bad faith or breach of implied covenant of good faith and fair dealing against this Defendant.

II. Summary Judgment Standard

"Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and the conclusions and inferences to be drawn from the facts are undisputed." Etheredge v. Richland Sch. Dist. One, 534 S.E.2d 275, 277 (S.C. 2000); see Rule 56(c), SCRCP. "The party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact." Richardson v. The State Record Co., 499 S.E.2d 822, 824–25 (S.C. Ct. App. 1998). With respect to an issue upon which the nonmoving party bears the burden of proof, this initial responsibility "may be discharged by 'showing'—that is, pointing out to the [trial] court—that there is an absence of evidence to support the nonmoving party's case." Id. at 825.

"Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings." Singleton v. Sherer, 659 S.E.2d 196, 202 (S.C. Ct. App. 2008). The Supreme Court of South Carolina has recently held the "mere scintilla of evidence" standard is inapplicable overruling Hancock v. Mid-South Mgmt. Co., 673 S.E.2d 801, 803 (S.C. 2009). Kitchen Planners, LLC v. Friedman, 2023 WL 5420401 (S.C. August 23, 2023). To withstand summary judgment, there must be a "genuine issue of material fact." Id. "A jury issue is created when there is material evidence tending to establish the issue in the mind of a reasonable juror." Jackson v. Bermuda Sands, Inc., 677 S.E.2d 612, 616 (S.C. Ct. App. 2009). "However, this rule does not authorize submission of speculative, theoretical, and hypothetical views to the jury." Id. "It is not sufficient that one create an inference which is not reasonable or

an issue of fact that is not genuine." Thompkins v. Festival Centre Group, I, 410 S.E.2d 593, 594 (S.C. Ct. App. 1991).

III. Law & Analysis

The Policy was sold to a South Carolina entity through a South Carolina agent; thus, South Carolina law applies to its interpretation. S.C. CODE ANN. § 38-61-10. "Insurance policies are subject to the general rules of contract construction." M and M Corp. of S.C. v. Auto-Owners Ins. Co., 701 S.E.2d 33, 35 (S.C. 2010) (citations omitted). Courts will interpret policy language in accordance with its plain, ordinary, and popular meaning, except with technical language or where the context requires another meaning. Id. "Courts must enforce, not write, contracts of insurance, and their language must be given its plain, ordinary[,] and popular meaning." Sloan Constr. Co. v. Cent. Nat'l Ins. Co. of Omaha, 269 S.C. 183, 185, 236 S.E.2d 818, 819 (1977). When construing the provisions of an insurance policy, the court must examine the policy as a whole and adopt a construction that gives effect to the entire instrument and each of its various parts and provisions. Yarborough v. Phoenix Mut. Life Ins. Co., 266 S.C. 584, 592, 225 S.E.2d 344, 349 (1976). "[T]he meaning of a particular word or phrase is not determined by considering the word or phrase by itself, but by reading the policy as a whole and considering the context and subject matter of the insurance contract." Id. at 593, 225 S.E.2d at 349; see also MGC Mgmt. of Charleston, Inc. v. Kinghorn Ins. Agency, 336 S.C. 542, 548, 520 S.E.2d 820, 823 (Ct. App. 1999) ("[T]he law is clear that, in construing an insurance contract, all of its provisions must be considered together."). The burden of proof is on the insured to show that a claim falls within the coverage of an insurance contract. Gamble v. Travelers Ins. Co., 160 S.E.2d 523, 525 (S.C. 1979). The insurer bears the burden of establishing exclusions to coverage. Sunex Int'l Inc. v. Travelers, 185 F. Supp.2d 614, 617 (D.S.C. 2001).

A. The Insured Issue

The Policy was sold to Speights & Solomons, LLC. The Policy lists Speights & Solomons, LLC as the named insured. The Policy is called a "Businessowners Special Property Coverage Form". It says "[t]hroughout this policy the words 'you' and 'your' refer to the Named Insured shown in the Declarations." That is to mean Speights & Solomons, LLC. Daniel A. Speights is not the Named Insured under the Policy. It is undisputed that the funds lost were from Mr. Speights personal account. Indeed, the Complaint alleges directly in Paragraph 9, that the "bookkeeper . . . requested that a wire transfer in the amount of $250,000 be sent to HK Shining Transport Co Limited out of Plaintiff's **personal account** with Palmetto State Bank. Compl. at ¶ 9 (emphasis added).

Plaintiff argues that Plaintiff qualifies as an insured under the Policy by virtue of his status as a member of Speights & Solomons, LLC. In support of that contention, Plaintiff points to the Limited Liability Company Businessowners Policy. However, this form pertains to the "Businessowners Liability Coverage Form" not the "Businessowners Special Property Coverage Form" which is what the claim has been presented. If this were a liability claim, Plaintiff could qualify as an insured related to the "conduct of your business." Here, a first party property claim for the loss of property/money is presented, not a liability claim. Thus, the Court finds that Plaintiff is not insured under the Policy for purposes of his own personal property. Thus, Owners is entitled to summary judgment on this issue.

B. The Voluntary Parting Exclusion

Alternatively, even if Plaintiff were considered an insured under the Policy for purposes of the property loss claim, the "voluntary parting exclusion" is a bar to his claim applying the plain

and ordinary language of the Policy. The Plaintiff argues that no court in South Carolina has addressed the exclusion and that the Policy should be deemed ambiguous.

As to the first argument, the Court disagrees that the Policy is ambiguous. Sloan Constr., 269 S.C. at 185, 236 S.E.2d at 819. The Court finds the Policy language addressing losses by "False Pretense" unambiguous. It plainly excludes losses from "False Pretense: Voluntary parting with any property by you or anyone else to whom you have entrusted the property if induced to do so by any fraudulent scheme, trick, device or false pretense." Here, that is exactly what occurred. The Law Firm's employee was tricked into wiring Plaintiff's personal funds to a bank in China after receiving an email that was believed to have come from Mr. Speights. It is, however, undisputed that the bookkeeper wired the money of her own volition as opposed to an outside person or entity hacking into an account and taking the money.

As to the second argument, both Plaintiff and Owners concede that no South Carolina court has weighed in on this exclusion, there are several courts that have addressed the matter which are persuasive. In Midlothian Enterprises, Inc. v. Owners Insurance Company, 439 F.Supp.3d 737 (E.D. Va. 2020), a Federal Court in Virginia ruled that there was no coverage because a voluntary parting exclusion barred coverage after a similar email scheme caused an insured to wire money. In Midlothian, an employee mistakenly wired money from a Midlothian company account because of a fraudulent email. The employee believed her employer sent her an email instructing her to do so, but the email was sent by a hacker. The claim was denied due to a voluntary parting exclusion in Midlothian's policy. The Court ruled that, although it was not the actual employer who sent the email and wire request, the scheme did "not change the voluntariness of the transfer itself." Id. at 742 (quoting Martin, Shudt, Wallace, Dilorenzo & Johnson v. Travelers Indem. Co. of Conn., 2014 WL 460045, at *3 (N.D.N.Y. Feb. 5, 2014) (collecting cases and concluding that the fact "[t]hat

[the] [p]laintiff wired the money in reliance on misrepresentations or false pretenses does not alter the voluntariness of that parting"). The Midlothian court went further to describe the voluntariness of the transfer, as the employee "had the authority to make these types of transfers" based on normal business practices and she "freely transferred the money once she believed she had received instructions to do so." Id. That the email was fraudulent did "not negate the voluntariness of the transfer or the authority." Id. at 743. Here, it is undisputed that the bookkeeper had authority to initiate the wire transfer for Plaintiff as per the bookkeeper's testimony.

Like Midlothian, the Law Firm's employee had the authority to transfer money from the Plaintiff's personal account and did so voluntarily. The bookkeeper received an email from the Plaintiff's email address with the Law Firm asking her to make a transfer from his personal account to the account in China. See Amend. Compl. ¶ 6. It was not unusual for the Plaintiff to ask the bookkeeper to wire money from his personal account and to communicate with her solely through email. Depo. of L. Herndon, June 23, 2023, at 18:19-25, 19:1-6, 12-18. Through the email exchange with the Plaintiff's email address with the Law Firm, the bookkeeper "thought he was authorizing it" and at all times believed that she was under Plaintiff's direction to wire the funds. Id. at 37:1-9. Unfortunately, the Plaintiff's Law Firm email address had been hacked and the email was only purportedly from the Plaintiff. See Amend. Compl ¶12. Although the email and request were fraudulent, much like in Midlothian, that does not negate voluntariness of the act nor that the bookkeeper had authority to make such a transfer. The scheme to which the bookkeeper fell victim did not alter the voluntary nature of her actions. The bookkeeper had the authority to make the transfer on the Plaintiff's behalf based on her understanding of the emails. The email exchange and transfer were also a part of the normal business practice within her role at the Law Firm and for the Plaintiff. As the transfer by the bookkeeper was voluntary, it was not covered by Owners

and excluded from the policy. An exclusion in the Policy includes a loss due to a false pretense. The Policy defines a false pretense as a "[v]oluntary parting with any property by you or anyone else to whom you have entrusted the property if induced to do so by any fraudulent scheme, trick, device or false pretense." See Policy at 125. As the bookkeeper had the authority to make the transfer and did so voluntarily due to a fraudulent scheme, trick, or false pretense, the Plaintiff's loss is excluded from coverage under the Policy.

Additionally, and as explained above, the account involved in this incident did not belong to the Firm but was the personal account of the Defendant. After confirming via email that the account to be used was "DAS Personal," the bookkeeper transferred the funds from Plaintiff's personal account to the account in China. See Complaint, ¶¶ 7-9. Although this exchange occurred over the Law Firm's emails, it was not unusual for Plaintiff to email the bookkeeper to ask her to transfer funds from his personal account and for other investments that Plaintiff made. (Depo. of L. Herndon 19:19-25, 20:1-6, 25:16-18). The Policy covered the Law Firm and even though the email exchange was between the bookkeeper and Plaintiff's Law Firm accounts, the nature of the loss being from the Plaintiff's personal account instead of a Law Firm account place it outside the policy's coverage.

There are other cases which have dealt with this same issue. In Schmidt v. Travelers, 101 F. Supp.3d 768 (S.D. Ohio 2015) (applying Ohio law), a law firm sued the carrier for refusing to pay claims where it lost money due to a fraudulent check scheme. The facts are very similar in that the firm wired money following a settlement to the client. Only after the wire occurred did they learn that the cashier's checks were fraudulent. In granting summary judgment to the insurer, the court relied upon the voluntary parting exclusion. That policy excluded "voluntary parting with any property by you or anyone else to whom you have entrusted the property." Plaintiffs

argued that the fraud made exclusion inapplicable because the voluntary decision to part with the money was shrouded in fraud. The court held that while the scheme was fraudulent it "does not alter the voluntariness of the parting" of the money. The court relied heavily on another case involving similar facts, Martin, Shudt, Wallace, DiLorenzo & Johnson v. Travelers, 2014 WL 460045 (N.D.N.Y. 2014) (applying New York law). In Martin, the court held the voluntary parting exclusion unambiguous where the firm wired money to a foreign client only to learn thereafter the cashier's check was fraudulent. As the court explained, "that Plaintiff wired the money in reliance on misrepresentations or false pretenses does not alter the voluntariness of that parting." Id. at *4.

In Washington, a court held that a law firm transferring funds to a client after being provided a fraudulent check was not entitled to coverage because it was a voluntary parting of money. Schweet Linde & Coulson v. Travelers, 2015 WL 3447242 (W.D. Wash 2015) (applying Washington law). The policy holder argued this was tantamount to a theft and should be covered. The court held the exclusion clear and unambiguous and even though the lawyers had an obligation to transfer the funds when demanded, it did not change the voluntary nature of the act.

Based upon the above, I find that Owners did not breach its contract of insurance considering the analysis set forth above. Indeed, Owners had no insurance contract with Plaintiff. "To recover for a breach of contract, the plaintiff must prove: (1) a binding contract entered into by the parties; (2) a breach or unjustifiable failure to perform the contract; and (3) damage suffered by the plaintiff as a direct and proximate result of the breach." Fung Lin Wah Enter. Ltd. v. East Bay Import Co., 465 F. Supp.2d 536, 542 (D.S.C. 2006) (quotations omitted). The contract at issue is between Owners and Speights and Solomons LLC not Plaintiff and Owners. Owners is entitled to summary judgment on both the breach of contract and bad faith/negligence claims because it did not insure the Plaintiff and because no benefits were due and payable under the contract of

insurance and no breach of duty occurred. See Tadlock Painting v. Maryland Cas. Co., 322 S.C. 498, 500-01, 473 S.E.2d 52, 53 (1996) ("The elements of an action for bad faith refusal to pay benefits under an insurance contract include: (1) the existence of a mutually binding contract of insurance *between the plaintiff and the defendant*; (2) refusal by the insurer to pay benefits due under the contract; (3) resulting from the insurer's bad faith or unreasonable action in breach of an implied covenant of good faith and fair dealing arising on the contract; (4) causing damage to the insured.").

Lastly, the Court has considered the Plaintiffs argument that the adjuster who was deposed in this case, Joe McManus, discussed the fact that "optional coverages" were contained in the policy and "could be a forgery or alteration". This does not, however, displace the fact that 1) Plaintiff is not insured under the contract for the loss of property; and 2) the analysis of an unambiguous insurance contract is a question of law for the Court. "An insurance contract is read as a whole document so that 'one may not, by pointing out a single sentence or clause, create an ambiguity.'" Schulmeyer v. State Farm Fire & Cas. Co., 579 S.E.2d 132, 134 (S.C. 2003) (citations omitted). "The meaning of a particular word or phrase is not determined by considering the word or phrase by itself, but by reading the policy as a whole and considering the context and subject matter of the insurance contract." Id. "[P]arties have a right to make their own contract and it is not the function of this Court to rewrite it or torture the meaning of a policy to extend coverage never intended by the parties." Torrington Co. v. Aetna Cas. & Sur. Co., 216 S.E.2d 547, 550 (S.C. 1975). Owners is entitled to summary judgment.

IV. Conclusion

Based upon the above, Owners Insurance Company is granted summary judgment in all respects and this matter is ended as to Owners Insurance Company.

IT IS SO ORDERED.

The Honorable George M. McFaddin, Jr.
Presiding Judge, Fourteenth Judicial Circuit

Dated this ___ day of September 2023.

Sumter, South Carolina

Hampton Common Pleas

Case Caption: Daniel A. Speights VS Chubb Limited , defendant, et al

Case Number: 2022CP2500269

Type: Order/Summary Judgment

So Ordered

S/George M. McFaddin, Jr., #2759