

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

COMPETITIVE SERVICES)
INTERNATIONAL, INC.,)
Plaintiff,)
v.)
MIDWEST FAMILY MUTUAL)
INSURANCE COMPANY,)
Defendant.)
Case No. 19-CV-00395-SRB

ORDER

Before the Court is Defendant Midwest Family Mutual Insurance Company's Motion for Summary Judgment on Count II of Plaintiff's Complaint. (Doc. #49.) For the reasons discussed below, the motion is denied.

I. BACKGROUND

This insurance-coverage dispute arises pursuant to a business owners insurance policy (“the Policy”) issued by Defendant Midwest Family Mutual Insurance Company (“Midwest”) to Plaintiff Competitive Services International, Inc. (“Competitive Services”). For purposes of resolving the pending motion, the Court finds the following facts to be undisputed.¹

Competitive Services owns a commercial building located at 110 East 16th Ave., Kansas City, Missouri (“the Property”), used to store and sell inventory. Competitive Services contends that on or around May 17, 2017, a windstorm caused damage to the Property’s roof, followed by a severe thunderstorm on May 18, 2017.² Specifically, Competitive Services claims that high

¹ The relevant facts are taken from the record, including the parties' briefs and exhibits. Only those facts necessary to resolve the pending motion are discussed below, and those facts are simplified to the extent possible.

² Midwest disputes whether the weather-related events of May 17–18, 2017, damaged the Property's roof.

windspeeds from the windstorm lifted portions of the Property’s roof, thereby allowing water to penetrate the roofing system during the following thunderstorm, causing interior water damage. On May 30, 2017, Competitive Services filed a claim (the “Claim”) with Midwest seeking coverage under the Policy for the Property’s sustained damage. The Policy provides, in relevant part, that Midwest “will pay for direct physical loss of or damage to Covered Property . . . caused by or resulting from any Covered Cause of Loss.” (Doc. #1-1, p. 13.)³ The Policy also contains various exclusions for damage caused by “wear and tear,” “rust or other corrosion,” “continuous or repeated seepage or leakage of water,” and “negligent work.” (Doc. #1-1, pp. 27, 30–31; Doc. #57-2, pp. 1–2.)

Midwest, upon receiving notice of the Claim’s filing, assigned the Claim to Mark Faerber (“Faerber”), a claims representative. Faerber subsequently hired an independent adjusting firm, Syndicate Claims (“Syndicate”), to inspect the Property. Syndicate then assigned the Claim to Michelle Hutchinson (“Hutchinson”), an adjuster, who investigated the Claim and inspected the roof of the Property on June 5, 2017. On June 8, 2017, Hutchinson contacted Faerber by phone to report her findings. During that call, Hutchinson “confirmed there is storm damage” and Faerber “advised her to write [an] estimate based on full replacement . . . in her report.” (Doc. #57-1, p. 1.)

Hutchinson subsequently prepared a written report of her inspection for Faerber, which included photos of the Property, the roof damage, as well as cost-of-repair estimates from local contractors. That report, submitted June 23, 2017, identified the cause of loss as “wind damage” and stated the “damage warrants full replacement” at an estimated cost of \$405,424.09. (Doc. #63-1, pp. 1–2.) Of the four different contractors Hutchinson contacted during the course of her

³ All page numbers refer to the pagination automatically generated by CM/ECF.

investigation, three concluded the Property's roof could not be repaired and needed to be fully replaced.

After Faerber received and reviewed Hutchinson's report, he entered a claim note into the Claim file indicating the adjuster's estimate "was over \$405,000.00," an estimate "much higher than expected." (Doc. #57-1, p. 2.) Faerber decided that additional investigation into the Claim was necessary to ascertain if the claimed damage was caused by the windstorm and, if so, the scope of repair and/or replacement. Faerber then hired Donan Engineering ("Donan") to perform an additional on-site inspection. Donan inspected the Property on July 12, 2017, and prepared a report of its findings. Donan's report stated that the Property's damaged roof membrane had not been damaged by wind, but rather long-term moisture exposure which caused the roof's decking and insulation to swell.

Faerber ultimately determined the Claim was not a covered loss under the Policy and sent a denial of coverage letter to Competitive Services on August 7, 2017. The denial letter stated the damage observed by Donan was attributable to causes that fell under the Policy's coverage limitations and exclusions. Based on Midwest's denial of coverage, Competitive Services filed suit claiming breach of contract (Count I) for Midwest's refusal to pay for a complete repair of the Property's roof. Competitive Services also raised a vexatious refusal to pay cause of action (Count II) for Midwest's alleged failure to thoroughly and properly investigate the Claim. In the instant motion, Midwest seeks summary judgment only on the vexatious refusal to pay claim.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 56(a) requires a court to grant a motion for summary judgment if (1) the moving party "shows that there is no genuine dispute of material fact" and (2) the moving party is "entitled to judgment as a matter of law." A nonmoving party survives a

summary judgment motion if the evidence, viewed in the light most favorable to the nonmoving party, is “such that a reasonable jury could return a verdict for the nonmoving party.” *Stuart C. Irby Co. v. Tipton*, 796 F.3d 918, 922 (8th Cir. 2015) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

“When, as here, federal jurisdiction is based on diversity of citizenship, state law governs the interpretation of insurance policies.” *Burger v. Allied Prop. & Cas. Ins. Co.*, 822 F.3d 445, 447 (8th Cir. 2016) (cleaned up). The parties do not dispute that Missouri law governs this case. Thus, the Court is “bound by the Supreme Court of Missouri’s decisions.” *Olga Despotis Tr. v. Cincinnati Ins. Co.*, 867 F.3d 1054, 1059 (8th Cir. 2017) (citing *W. Heritage Ins. Co. v. Asphalt Wizards*, 795 F.3d 832, 837 (8th Cir. 2015)).

III. DISCUSSION

In seeking summary judgment on Count II, Midwest contends Competitive Services fails to produce evidence indicating that Midwest’s handling of the Claim was unreasonable and thus vexatious.⁴ Competitive Services argues it produces sufficient evidence from which a reasonable person could find that Midwest unreasonably ignored credible evidence that the Property’s roof suffered wind damage, thus precluding summary judgment.

Under Missouri law, an insured party may recover damages and attorney’s fees when an insurance company refuses to pay for a “loss under a policy” if the company “has refused to pay such loss without reasonable cause or excuse.” MO. REV. STAT. § 375.420. When an insured party alleges its insurer vexatiously refused to pay an insurance claim, the insured must prove:

⁴ In its reply, Midwest argues for the first time that Competitive Services should be barred from seeking relief for vexatious refusal because evidence exists of “unclean hands.” (Doc. #69, pp. 1–2.) Courts are not required to consider an argument raised for the first time in a reply brief. *See Jones v. Aetna Life Ins. Co.*, 856 F.3d 541, 549 (8th Cir. 2017) (The “court generally does not consider arguments raised for the first time in a reply brief[.]”); *accord Simon v. Liberty Mut. Fire Ins. Co.*, No. 17-CV-0152-DGK, 2017 WL 6276187, at *2 (W.D. Mo. Dec. 8, 2017). The Court thus declines to consider this argument.

(1) the existence of an insurance policy with the insurer; (2) that the insurer refused to pay the insured's losses; and (3) the insurer's refusal was without reasonable cause or excuse. *Qureshi v. Am. Family Mut. Ins. Co.*, 604 S.W.3d 721, 727 (Mo. App. E.D. 2020). Only the reasonableness of Midwest's refusal to pay is at issue here.

"[W]hether an insurer's refusal to pay is vexatious or not must be determined by the situation as presented to the insurer at the time it was called on to pay." *Russell v. Farmers & Merchs. Ins. Co.*, 834 S.W.2d 209, 221 (Mo. App. S.D. 1992) (citation omitted). "Generally, whether an insurer acted reasonably is a question of fact for the jury, and thus is improper for a court to determine in granting a summary judgment." *Welsh v. Nationwide Affinity Ins. Co. of Am.*, No. 17-CV-00090, 2017 WL 7037744, at *5 (W.D. Mo. Dec. 6, 2017) (citing *May & May Trucking, LLC v. Progressive Nw. Ins. Co.*, 429 S.W.3d 511, 516 (Mo. App. W.D. 2014)). The statutes governing vexatious refusal are "penal in nature and narrowly construed; their purpose is to deter the insurer from vexatiously refusing to pay after becoming aware it has no meritorious defense to the insured's claim." *State of Mo. ex rel. Pemiscot Cty. v. W. Sur. Co.*, 51 F.3d 170, 174 (8th Cir. 1995) (citation and quotation marks omitted).

Upon review of the evidentiary record, relevant caselaw, and the parties' arguments, the Court finds that disputed facts preclude the Court from deciding the vexatious refusal claim as a matter of law. Competitive Services puts forth sufficient evidence from which a reasonable jury may conclude that Midwest's refusal to pay was vexatious. Specifically, Competitive Services notes Hutchinson initially reported the Property's damage was caused by wind and required total replacement, an assessment which did not trouble or concern Faerber at the time. It was not until Faerber received Hutchinson's estimated cost of repairs, which he noted were "much higher than expected," that Faerber began to question the source of the damage and decided that additional

investigation was needed. Vexatious refusal claims have been upheld by Missouri courts where an insured's "refusal is based upon a suspicion, rather than a reasonable inference of established facts." *Laster v. State Farm Fire & Cas. Co.*, 693 S.W.2d 195, 197 (Mo. App. E.D. 1985); *see also Welsh*, 2017 WL 7037744, at *5. Based on the disputed facts, a reasonable jury could find that Midwest exhibited a "recalcitrant" and "vexatious" attitude at the time it denied coverage. *Watters v. Travel Guard Int'l*, 136 S.W.3d 100, 110 (Mo. App. E.D. 2004) (citing *Wood v. Safeco Ins. Co. of Am.*, 980 S.W.2d 43, 55 (Mo. App. E.D. 1998)).

Furthermore, under Missouri law "direct and specific evidence to show vexatious refusal is not required," and a jury "may find vexatious delay upon a general survey and a consideration of the whole testimony and all the facts and circumstances in connection with the case." *DeWitt v. Am. Family Mut. Ins. Co.*, 667 S.W.2d 700, 710 (Mo. banc 1984) (citation omitted). In this case, Competitive Services presents evidence showing Donan, prior to preparing its own report on its investigation of the Property, contacted Faerber to ask what information should be included in that report. After Donan presented an initial draft version of that report to Faerber, Donan later revised the report to state that "the roof membrane had not been damaged by wind." (Doc. #63-12, p. 2.) Midwest characterizes the changes made to Donan's final report as non-substantive in nature and argues the report is a reasonable assessment, made by experts, upon which an insurer may rely when denying coverage. Such credibility determinations belong to a jury and not this Court. *See Torgerson v. City of Rochester*, 643 F.3d 1031, 1042 (8th Cir. 2011) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge."). Viewed in the light most favorable to Competitive Services, the disputed facts support a reasonable inference that Faerber

had concluded the Claim should be denied and he retained Donan, and later adopted Donan's report, to provide a basis for Midwest's denial rather than pay a claim in excess of \$400,000.

Faerber also testified in his deposition that he did not review Midwest's underwriting file on Competitive Services when determining if the Claim should be denied, even though that file contained reports of prior inspections at the Property—including an inspection performed only a month prior to the date of loss—stating the roof was in “good condition” and showed no signs of existing water intrusion. (Doc. #63-6, pp. 7–8; Doc. #63-7, pp. 4, 8.) Midwest, in its motion as well as its reply, asserts arguments regarding the reliability of the engineering reports submitted by Donan and Faerber's justified reliance on them. Whether Faerber solely relied on the Donan report despite the existence of other evidence indicating the Property may have sustained a loss covered by the Policy, and whether such reliance was unreasonable, remains a disputed factual issue. “When there is evidence that the insurer's reliance on the results of an investigation is not reasonable, the question is for the jury.” *Russell*, 834 S.W.2d. at 221 (citation omitted). In turn, Midwest's motion for summary judgment is denied.

IV. CONCLUSION

Accordingly, it is **ORDERED** that Defendant's Motion for Summary Judgment on Count II of Plaintiff's Complaint (Doc. #49) is **DENIED**.

IT IS SO ORDERED.

Dated: June 1, 2021

/s/ Stephen R. Bough
STEPHEN R. BOUGH
UNITED STATES DISTRICT JUDGE