UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 21-21277-CIV-ALTONAGA/Damian

KARSEL HOLDINGS, L.L.C.,

Plaintiff,

v.

SCOTTSDALE INSURANCE COMPANY,

Defendant.
_____/

ORDER

THIS CAUSE came before the Court on Defendant, Scottsdale Insurance Company's Motion for Summary Final Judgment [ECF No. 51] and Plaintiff, Karsel Holdings, L.L.C.'s Amended Motion to Compel Compliance with Itemized Appraisal Award Pursuant to This Court's Order [ECF No. 61]. The Court has carefully reviewed the Complaint [ECF No. 1-2], the parties' written submissions,[1] the record, and applicable law. For the following reasons, Plaintiff's Motion is denied, and Defendant's Motion is granted.

I. BACKGROUND

This case involves a property insurance dispute. (*See generally* Compl.). Plaintiff is a Florida corporation. (*See id.* ¶ 2). Defendant, an Ohio corporation with its principal place of business in Arizona, provides property insurance coverage to Florida property owners. (*See* Notice of Removal [ECF No. 1] ¶ 3).

[1] Plaintiff filed a Response to Defendant's Motion [ECF No. 59], Defendant filed a Response to Plaintiff's Motion [ECF No. 69], and the parties filed Replies in support of their respective Motions [ECF Nos. 65, 70]. The parties' factual submissions include Defendant's Statement of Undisputed Material Facts Supporting [Defendant's] Motion for Summary Final Judgment ("Def.'s SOF") [ECF No. 52], Plaintiff's Statement of Undisputed Material Facts in Opposition to Defendant's Motion for Final Judgment ("Pl.'s SOF") [ECF No. 60], and Defendant's Response to [Plaintiff's] Alleged Facts ("Def.'s Resp. Facts") [ECF No. 67].

Defendant issued an all-risks[2] insurance policy (the "Policy") to Plaintiff, covering its property located at 304 80 Street, in Miami Beach, Florida (the "Property"). (*See* Pl.'s SOF ¶¶ 1, 6). The Policy covered the Property from January 16, 2020 through January 16, 2021. (*See* Def.'s SOF, Ex. A, Policy [ECF No. 52-1] 5).[3]

On February 5, 2020, the Property was damaged by a discharge of water from a drain line due to a plumbing failure. (*See* Pl.'s SOF ¶ 2; Def.'s Resp. Facts ¶ 9; Pl.'s Resp. 10).[4] Subsequently, Plaintiff filed a claim with Defendant for the Property damage. (*See* Compl. ¶ 10). On June 2, 2020, Defendant made a claim payment of $12,318.84. (*See* Am. Answer and Aff. Defenses to Compl. [ECF No. 9] ¶ 13; Pl.'s SOF ¶ 3). After that payment, Defendant had the Property inspected by a consultant, who found the damage was caused by a drain line overflow. (*See* Def.'s Opp'n to Pl.'s Mot. to Compel Appraisal [ECF No. 17] ¶ 16). Defendant asserts that damage arising from a drain line is not covered by the Policy. (*See id.*; Pl.'s SOF ¶ 5; Def.'s Resp. Facts ¶ 10).

A. Appraisal

Plaintiff was already dissatisfied with Defendant's initial claim payment, even before Defendant's invocation of the drain line exclusion. (*See* Pl.'s SOF ¶ 4). To resolve this, on October 2, 2020, Plaintiff invoked the Policy's appraisal provision. (*See id.*). That provision states:

> If [Defendant] and [Plaintiff] disagree on the value of the property or the amount of loss, either may make written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraisal. The two appraisers will

[2] "An all-risks policy provides coverage for all losses not resulting from misconduct or fraud unless the policy contains a specific provision expressly excluding the loss from coverage." *Mejia v. Citizens Prop. Ins. Corp.*, 161 So. 3d 576, 578 (Fla. 2d DCA 2014) (quotation marks and citation omitted).

[3] The Court uses the pagination generated by the electronic CM/ECF database, which appears in the headers of all court filings.

[4] Defendant's Response to [Plaintiff's] Alleged Facts starts with paragraph eight because it treats Plaintiff's proposed facts as additional facts to Defendant's seven proposed facts. (*See generally* Def.'s Resp. Facts). For simplicity, the Court refers to the paragraph numbers used by Defendant, starting with paragraph eight.

> select an umpire. If they cannot agree, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the value of the property and amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding.

(Policy 76 (alterations added)).

Defendant responded to Plaintiff's invocation of the Policy's appraisal provision by noting that there were three potential causes of loss: (1) a drain line failure, (2) a shower pan leak, and (3) an A/C system failure leak. (*See* Pl.'s SOF ¶ 5; Def.'s Resp. Facts ¶ 12). Because there were three potential causes of loss, the parties were instructed to complete an itemized appraisal. (*See* May 4, 2022 Order [ECF No. 44] 1–3; Def.'s SOF ¶ 4; Pl.'s SOF ¶ 9).

On June 29, 2022, the appraisal panel — consisting of Plaintiff's appraiser, Santos Leal, and Defendant's appraiser, Edwin Witty — entered an appraisal award (the "Award"). (*See* Def.'s SOF ¶ 5; Status Report, Ex. A, Appraisal Award [ECF No. 48-1] 2). The Award stated that the "appraisers and umpire hereby appraise the amount of loss as follows:"

- Water overflow from drain line: $160,151.73 [replacement cost value] / $152,144.14 [actual cash value]
- Shower pan leak: $0
- Leak from A/C system: $0

(Appraisal Award 2 (alterations added)).

After the Award was entered, Plaintiff's counsel notified Leal that the appraisal panel was to appraise all three potential causes of loss. (*See* Pl.'s Am. Mot., Ex. 1, Leal Decl. ¶ 8). Subsequently, on July 8, 2022, Leal emailed Witty to tell him that while the Award listed three causes of loss, Leal did not know they were "appraising 3 claims" and "we only discuss [sic] the drained [sic]." (Leal Decl. 4). In his declaration, Leal states "[a]s indicated in the appraisal award by drawing the appropriation of $0, damages arising from the shower pan failure or the air conditioner failure were not appraised, or to the extent that they overlapped in part with the

drainage system failure, they were not delineated in the appraisal award." (Leal Decl. ¶ 7 (alteration added)). By contrast, Witty states he considered all three potential causes of loss in determining the award, discussed all three with Leal, and Leal agreed all the damage was caused by a drain line overflow and not the shower pan or A/C system leaks. (*See* Def.'s Resp., Ex. A, Witty Decl. ¶ 4).

After the appraisal comes the question of what is covered by the Policy.

B. Policy

The Policy states that Defendant will pay "for direct physical loss of or damage to [the] Property . . . caused by or resulting from any Covered Cause of Loss." (Policy 67 (alterations added)). "Covered Cause of Loss means direct physical loss [to the Property] unless the loss is excluded or limited [by the] Policy." (*Id.* 100 (alterations added)). Generally, "loss[es] or damage[s] caused by or resulting from . . . [w]ear and tear" or "[r]ust or other corrosion, decay, [or] deterioration" are excluded. (*Id.* 102 (alterations added)). This exclusion contains an exception for losses or damage resulting in a "specified cause of loss." (*Id.* (quotation marks omitted)).

The Policy defines "[s]pecified causes of loss[,]" in part, as "water damage." (*Id.* 109 (alterations added; bold and quotation marks omitted)). "Water damage" is then defined as:

> (1) Accidental discharge or leakage of water or steam as the direct result of the breaking apart or cracking of a plumbing . . . system . . . that is located on the described premises and contains water or steam; and
>
> (2) Accidental discharge or leakage of water or waterborne material as the direct result of the breaking apart or cracking of a water or sewer pipe caused by wear and tear, when the pipe is located off the described premises and is connected to or is part of a potable water supply system or sanitary sewer system operated by a public or private utility service provider pursuant to authority granted by the state or governmental subdivision where the described premises are located.
>
> But water damage does not include loss or damage otherwise excluded

under the terms of the Water Exclusion.[5] . . .

> To the extent that accidental discharge or leakage of water falls within the criteria set forth in [](1) or [](2) of this definition of "specified causes of loss," such water is not subject to the provisions of the Water Exclusion which preclude coverage for surface water or water under the surface of the ground.

(*Id.* (alterations added)).

The Policy's Causes of Loss Special Form delineates the various causes of loss that are excluded from coverage under the Policy. (*See id.* 100). Specifically, the Water Exclusion lists five excluded causes of loss related to water damage:

> 1. [Defendant] 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.
>
> . . . .
>
> g. Water
>
> (1) Flood, surface water, waves (including tidal wave and tsunami), tides, tidal water, overflow of any body of water, or spray from any of these, all whether or not driven by wind (including storm surge);
>
> (2) Mudslide or mudflow;
>
> (3) Water that backs up or overflows or is otherwise discharged from a sewer, drain, sump, sump pump or related equipment;
>
> (4) Water under the ground surface pressing on, or flowing or seeping through:
>
> (a) Foundations, walls, floors or paved surfaces;
>
> (b) Basements, whether paved or not; or
>
> (c) Doors, windows or other openings; or
>
> (5) Waterborne material carried or otherwise moved by any of the water referred to in Paragraph (1), (3) or (4), or material carried or otherwise moved by mudslide or mudflow.

[5] The Policy and this Order refer to Section B.1.g. of the Policy's Causes of Loss Special Form as the "Water Exclusion." (Policy 101).

> This exclusion applies regardless of whether any of the above, in Paragraphs (1) through (5), is caused by an act of nature or is otherwise caused. An example of a situation to which this exclusion applies is the situation where a dam, levee, seawall or other boundary or containment system fails in whole or in part, for any reason, to contain the water.

(*Id.* 100–101 (alterations added; bold omitted)).

Subsection (3) of the Water Exclusion is modified by a Sewer or Drain Definition Endorsement, which defines the terms "sewer" and "drain[.]" (*Id.* 113 (alteration added; quotation marks omitted)). "Sewer" is defined as "any underground pipe, channel or conduit for carrying water, wastewater or sewage on or away from the premises described in the Declarations;" while "[d]rain" is defined as "any pipe, channel or conduit for carrying water, wastewater or sewage on or away from the premises described in the Declarations to a 'sewer.'" (*Id.* (alteration added; quotation marks omitted)).

The Policy contains a separate exclusion pertaining to "'Fungus', Wet Rot, Dry Rot [a]nd Bacteria[,]" which provides that Defendant "will not pay for loss or damage caused directly or indirectly by . . . [p]resence, growth, proliferation, spread or any activity of 'fungus', wet or dry rot or bacteria" unless such loss or damage results in a "specified cause of loss[.]" (*Id.* 102 (alterations added; quotation marks and bold omitted)). The exclusion applies "regardless of any other cause or event that contributes concurrently or in any sequence to the loss" and "whether or not the loss event results in widespread damage or affects a substantial area." (*Id.* 100, 102).

The Policy's "Additional Coverage" section includes limited coverage for "Debris Removal" and "Pollutant Clean-up And Removal" to the extent that they are caused by or result from a "Covered Cause of Loss[.]" (Policy 69–71 (alteration added)). In other words, to obtain additional coverage for debris removal or pollutant clean-up and removal arising from water damage, the water damage would need to be a Covered Cause of Loss.

C. Procedural History

On March 4, 2021, Plaintiff filed its Complaint against Defendant. (*See generally* Compl.). Plaintiff alleged that the Property suffered a loss on February 5, 2020 "due to a sudden and accidental discharge of water and/or otherwise covered loss[.]" (*Id.* ¶ 8 (alteration added)). Plaintiff asserted a single claim for breach of contract requesting "the total amount of the loss, within the Policy limits of liability, less any applicable deductible." (*Id.* ¶¶ 18–27). On April 5, 2021, Defendant removed the case, asserting diversity jurisdiction. (*See generally* Notice of Removal).

Based on Defendant's argument that the drain leak is not covered by the Policy and the appraisal found the drain leak caused all the damage, Defendant now moves for summary judgment against Plaintiff. (*See* Def.'s Mot 1). For its part, Plaintiff argues that the Award was not in compliance with the May 4, 2022 Order and asks the Court to mandate that the appraisers comply with that Order and issue a line itemized appraisal award for all three potential causes of loss. (*See* Pl.'s Am. Mot. 5).

II. LEGAL STANDARDS

Here, the relevant law is Florida law[6] for appraisals and federal law for summary judgment.

A. Appraisal

The Florida Supreme Court instructs that when a party to an insurance contract has invoked the relevant policy's appraisal provision, the appraisal proceeding should be conducted in accordance with the policy and not Florida's Arbitration Code. *See Allstate Ins. Co. v. Suarez*, 833 So. 2d 762, 765 (Fla. 2002) ("Once a trial court has determined that the appraisal provisions of a contract of insurance have been properly invoked, further proceedings should be conducted in

[6] The parties do not raise a conflict-of-laws issue and do not dispute Florida law applies. (*See* Def.'s Mot. 2; Pl.'s Resp. 4).

accord with those provisions[.]" (alteration added; footnote call number omitted)). Yet, Florida courts still apply the procedures provided by the Arbitration Code in an appraisal award's confirmation process, which includes the modification, correction, or clarification of an award. *See Guzman v. Am. Sec. Ins. Co.*, 377 F. Supp. 3d 1362, 1365 (S.D. Fla. 2019) (citation omitted). A motion for a court to vacate, modify, correct, or clarify an award must be made within 90 days of the movant receiving notice of the award. *See* Fla. Stats. §§ 682.10, 682.13–14.

B. Summary Judgment

A federal court must grant summary judgment if the pleadings, discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a), (c). An issue of fact is "material" if it might affect the outcome of the case under the governing law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute of fact is "genuine" if the evidence could lead a reasonable jury to find for the nonmoving party. *See id.*; *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). "The mere existence of a scintilla of evidence in support of the [non-moving party's] position will be insufficient[.]" *Anderson*, 477 U.S. at 252 (alterations added). "A party opposing summary judgment may not rest upon the mere allegations or denials in its pleadings." *Walker v. Darby*, 911 F.2d 1573, 1576–77 (11th Cir. 1990).

If the movant discharges its initial burden, the non-moving party "must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 250 (quotation marks and footnote call number omitted). To make that showing, the non-moving party "must cite to . . . materials in the record or show that the materials cited do not establish the absence or presence of a genuine dispute." *Blackhawk Yachting, L.L.C. v. Tognum Am., Inc.*, No. 12-14208-Civ, 2015 WL 11176299, at *2 (S.D. Fla. June 30, 2015) (alteration added; quotation marks omitted; citing Fed. R. Civ. P. 56(c)(1)).

Courts must draw all reasonable inferences in favor of the party opposing summary judgment. *See Chapman v. AI Transp.*, 229 F.3d 1012, 1023 (11th Cir. 2000). "Summary judgment may be inappropriate even where the parties agree on the basic facts [] but disagree about the inferences that should be drawn from these facts." *Whelan v. Royal Caribbean Cruises Ltd.*, No. 1:12-cv-22481, 2013 WL 5583970, at *2 (S.D. Fla. Aug. 14, 2013) (alteration added; citation omitted). Indeed, "[i]f reasonable minds might differ on the inferences arising from undisputed facts, then the Court should deny summary judgment" and proceed to trial. *Id.* (alteration added; citations omitted).

III. DISCUSSION

Because Defendant's Motion asks for summary judgment based on the damages identified in the Award, the Court begins with Plaintiff's Amended Motion and resolves whether the Award which resulted from the appraisal process is binding. The Court agrees with Defendant that it is.

A. Plaintiff's Amended Motion to Compel Compliance with Itemized Appraisal

Plaintiff requests that the Court mandate the parties to "finalize the appraisal process in a line itemized form, separating the three causes of loss in relation to the shower pan failure, the [A/C] system failure, as well as the drain line failure." (Pl.'s Am. Mot. 2–3 (alteration added)). Plaintiff argues this is necessary because — as Plaintiff's appraiser, Leal declared — the Award's appropriation of $0 in damages to both the shower pan failure and A/C system failure show that those two possible causes of loss were either not appraised, or to the extent they overlapped with the drain line failure, were not delineated. (*See id.* 1; Leal Decl. ¶ 7; Appraisal Award 2). Plaintiff offers further support in the form of emails from Leal to Defendant's appraiser, Witty, stating that Leal was unaware they were supposed to appraise three possible causes of loss and that Leal and Witty only discussed the drain line failure prior to entering the Award. (*See* Leal Decl. ¶ 4; Pl.'s Am. Mot. 3).

According to Defendant, the Award shows all three possible causes of loss were appraised, Willy and Leal discussed all three possible causes of loss before entering the Award, and Plaintiff failed to file a motion to vacate, modify, or clarify the Award within 90 days of notice of the Award. (*See* Def.'s Opp. to [Plaintiff]'s Motion to Reappraise 1).

Defendant's last point would require denial of Plaintiff's Amended Motion as time barred. While Plaintiff does not explicitly ask the Court to vacate, modify, or clarify the Award (*see generally* Pl.'s Am. Motion), such a request is implicit in Plaintiff's request that the Court mandate the parties finalize the appraisal process by appraising the failed shower pan and A/C system (*see generally id.*) — at the very least, this would modify the Award. Relevant here, a motion for a court to vacate, modify, correct, or clarify an award must be made within 90 days of the movant receiving notice of the award. *See* Fla. Stats. §§ 682.10, 682.13–14. Even assuming Plaintiff received notice of the Award on July 8, 2022 when it was filed with the Court — instead of when the Award was signed on June 29, 2022 — the 90-day deadline would have been October 6, 2022. Plaintiff filed its initial Motion to Compel Compliance with Itemized Appraisal Award [ECF No. 53] on October 26, 2022, and its Amended Motion on November 5, 2022. Therefore, Plaintiff's initial Motion and Amended Motion are both time barred. *See Cresthaven-Ashley Master Ass'n, Inc. v. Empire Indem. Ins. Co.*, No. 19-80959-Civ, 2021 WL 8534244, at *3–4 (S.D. Fla. Sept. 30, 2021) (finding that a motion for clarification of an appraisal award was time barred because it was filed over 90 days after notice of the award).

In asking that the Court ignore this procedural hurdle, Plaintiff argues that it did not need to request modification of the Award because the Policy unambiguously provides that a dispute among appraisers is to be resolved by an umpire. (*See* Pl.'s Reply 6–7). But even if the Court ignored the time bar issue, the Policy itself dictates that the Award is final and no further appraisal is warranted. The Court explains.

As an initial matter, the Award appraises all three possible causes of loss as required by the May 4, 2022 Order. (*See* Appraisal Award 2). In addition to allocating a $160,151.73 (replacement cost value) and $152,144.14 (actual cash value) award to the drain line leak, the Award explicitly lists the shower pan and A/C system leaks and allocates a $0 award to each. (*See id.*). While $0 awards may seem odd, it is beyond the Court's authority to second guess the appraisers because the amount of loss is a question for an appraisal panel. *See Mont Claire at Pelican Marsh Condo. Ass'n, Inc. v. Empire Indem. Ins. Co.*, No. 2:19-cv-601, 2021 WL 3476406, at *6 (M.D. Fla. May 24, 2021) (citation omitted), *report and recommendation adopted*, No. 2:19-cv-601, 2021 WL 3205694 (M.D. Fla. July 29, 2021). Furthermore, if the $0 awards for the shower pan and A/C system failures were a mistake, an error does not exceed the authority given to an appraisal panel and a court cannot undo such a mistake. *See id.* (citation omitted; finding that a $0 award would be a mere error of judgment, either of fact or law, that the court cannot undo); *Israel v. Costanzo*, 216 So. 3d 644, 646 (Fla. 4th DCA 2017) ("Absent a timely motion to vacate an arbitration award, a trial court has *no discretion* but to confirm the award as rendered." (alterations adopted; emphasis added; citation and quotation marks omitted).

Thus, even if Leal did not appraise or discuss the shower pan and A/C system failures with Witty — as Plaintiff and Leal claim (*see* Pl.'s Am. Mot. ¶ 5) — that would not invalidate the Award. Simply put, Leal and Witty signed an Award that explicitly listed and allocated amounts to the three possible causes of loss as required by the May 4, 2022 Order.

Given those facts, the Policy's unambiguous language dictates that the Award is binding, and no further appraisal is warranted. Indeed, Plaintiff's own argument confirms this. Plaintiff argues that the Court needs to order further appraisal via an umpire because the Policy has the following language:

> If [Defendant] and [Plaintiff] disagree on the value of the property or the amount of the loss, either may make written demand for an appraisal of the loss. In this

> event, each party will select a competent and impartial appraisal. The two appraisers will select an umpire. If they cannot agree, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the value of the property and amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding.

(Policy 76 (alterations added); *see* Pl.'s Reply 6–7). Plaintiff misinterprets this provision. Notably, the Policy states that if the appraisers "fail to agree, they will submit their differences to an umpire." (Policy 76). Here, both Leal and Witty signed the Award that stated "[t]he above award [explicitly listing the drain line, shower pan leak, and A/C leak] reflects the **agreed** damages and costs associated with all damages claimed for the dwelling and other structures." (Appraisal Award 2 (alterations and emphasis added)); *see Suqin Zhu v. Hakkasan NYC LLC*, 291 F. Supp. 3d 378, 387 (S.D.N.Y. 2017) ("By signing a written instrument, a party creates presumptive evidence of its assent to enter into a binding agreement." (citations omitted)). The Award is binding given that the Policy explicitly states that a "decision **agreed** to by any two [appraisers] will be binding." (Policy 76 (alteration and emphasis added)); *see Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co.*, 913 So. 2d 528, 532 (Fla. 2005) (holding that where a policy provision is clear and unambiguous, it should be enforced based on its terms).

Having found that the Award is binding and no further appraisal is warranted, the Court turns to Defendant's Motion.

B. Defendant's Motion for Summary Judgment

"Under Florida law, insurance contracts are construed according to their plain meaning." *Taurus Holdings, Inc.*, 913 So. 2d at 532 (alteration added). "Ambiguities are construed against the insurer and in favor of coverage." *Id.* "Although ambiguous provisions are construed in favor of coverage, to allow for such a construction the provision must actually be ambiguous." *Id.* "Because they tend to limit or avoid liability, exclusionary clauses are construed more strictly than coverage clauses." *Category 5 Mgmt. Grp., LLC v. Companion Prop. & Cas. Ins. Co.*, 76 So. 3d

20, 23 (Fla. 1st DCA 2011) (citation omitted). But where "a policy provision is clear and unambiguous, it should be enforced according to its terms whether it is a basic policy provision or an exclusionary provision." *Taurus Holdings, Inc.*, 913 So. 2d at 532 (citation and quotation marks omitted); *see also Interline Brands, Inc. v. Chartis Specialty Ins. Co.*, 749 F.3d 962, 965 (11th Cir. 2014) (explaining "courts may not rewrite contracts, add meaning that is not present, or otherwise reach results contrary to the intentions of the parties." (citation and quotation marks omitted)).

Defendant insured the Property on an "all-risks" basis. (*See* Pl.'s SOF ¶ 6). All-risks policies provide coverage for all losses not resulting from misconduct or fraud unless the policies contain a provision expressly excluding the loss from coverage. *Mejia*, 161 So. 3d at 578 (citations omitted). "[A]n 'all-risk' policy is not an 'all loss' policy, and this does not extend coverage for every conceivable loss." *Sebo v. Am. Home Assurance Co.*, 208 So. 3d 694, 696–97 (Fla. 2016) (alteration added; quotation marks and citation omitted).

"A plaintiff seeking to recover under an all-risks policy has the burden of proving that a loss occurred to the insured's property while the policy was in force." *S.O. Beach Corp. v. Great Am. Ins. Co. of N.Y.*, 305 F. Supp. 3d 1359, 1364 (S.D. Fla. 2018) (citation omitted). "The burden then shifts to the insurer to prove that the cause of the loss was excluded from coverage under the policy's terms." *Jones v. Federated Nat'l Ins. Co.*, 235 So. 3d 936, 941 (Fla. 4th DCA 2018) (quotation marks and citations omitted). "In short, in all-risk policies . . . construction is governed by the language of the exclusionary provisions." *Sebo*, 208 So. 3d at 697 (alteration added).

As a reminder, Defendant notes that the Award — signed by both Leal and Witty — states "all of the damage was water damage caused by a drain line overflow and no damage was caused by the potential other causes: leaks from a shower pan or a/c system." (Def.'s Mot. 1). As explained, the Court has found that the Award addresses all three possible causes of loss and allocates all damage to the drain line leak. Consequently, the question is one of coverage:

specifically, is the drain line leak covered by the Policy? Defendant contends it owes no coverage duty to Plaintiff because "it is established that the damage was caused by water overflowing from a drain, and the policy excludes coverage where water overflows from the drain[.]" (Def.'s Mot. 4 (alteration added; citation omitted)). The Court agrees.

To start, the parties do not dispute the Property suffered damage from a "discharge of water from the drain line." (Pl.'s SOF ¶ 2, Def.'s Resp. Facts ¶ 9). As such, the Water Exclusion unambiguously excludes coverage for the damage to the Property. As noted, the Water Exclusion provides Defendant "will not pay for loss or damage caused directly or indirectly by" "[w]ater" or "[w]aterborne material" that "backs up or overflows or is otherwise discharged from a sewer[] [or] drain[.]" (Policy 100–101 (alterations added)). The Policy defines "[d]rain" as "any pipe, channel or conduit for carrying water, wastewater or sewage on or away from the premises . . . to a sewer." (*Id.* 113 (alterations added; quotation marks omitted)). Thus, under the plain language of the Policy, the damage resulted from an excluded cause.

Plaintiff insists that even if all the damages are due to the drain line failure, coverage should still be afforded either because of the "Additional Coverages" section of the Policy or an exception to the Water Exclusion. (*See* Pl.'s Resp. 6–11). The Court evaluates each of Plaintiff's arguments in turn.

i. Additional Coverages

While Plaintiff initially argues the "Additional Coverages" section of the Policy provides coverage even if all the damages are due to the drain line failure (*see* Pl.'s Resp. 6), it then argues that the "Additional Coverages" section applies because the shower pan and A/C system failures are "a specified cause of loss" (*id.* 10). But that is the same reason why the "Additional Coverages" section does not apply to the drain line failure. To obtain additional coverage for debris removal or pollutant clean-up and removal arising from water damage, the water damage would need to be

a Covered Cause of Loss. (*See* Policy 69–71). As explained, water damage from a drain line is excluded under the Policy's plain language. Thus, debris removal or pollutant-clean up and removal arising from such an excluded cause is also excluded.

ii. Exception to Water Exclusion

Next, Plaintiff argues that the Water Exclusion does not apply because of an exception to the Water Exclusion found in the Policy's definition of water damage. (*See* Pl.'s Resp. 11). As a reminder, the Policy defines water damage as follows:

> "Water damage" is then defined as:
>
> (1) Accidental discharge or leakage of water or steam as the direct result of the breaking apart or cracking of a plumbing . . . system . . . that is located on the described premises and contains water or steam; and
>
> (2) Accidental discharge or leakage of water or waterborne material as the direct result of the breaking apart or cracking of a water or sewer pipe caused by wear and tear . . . .
>
> But water damage does not include loss or damage otherwise excluded under the terms of the Water Exclusion. . . .
>
> To the extent that accidental discharge or leakage of water falls within the criteria set forth in [](1) or [](2) of this definition of "specified causes of loss," such water is not subject to the provisions of the Water Exclusion which preclude coverage for surface water or water under the surface of the ground.

(*Id.* 109 (alterations added)).

From the Policy language, Plaintiff argues that the following exception applies: "such water is not subject to the provisions of the Water Exclusion which preclude coverage for surface water or water under the surface of the ground." (*Id.*; Pl.'s Resp. 11). This argument is unavailing.

The Court dealt with this exact issue in *Raffell v. Scottsdale Insurance Co.*, 2021 U.S. Dist. LEXIS 4843 (S.D. Fla. Jan. 8, 2021), and found the same exception to the Water Exclusion does not apply to drain leaks as they appear Subsection (3) of the Water Exclusion. *See id.*, at *17. Just as the plaintiff in that case, Plaintiff here relies on an exception provision that makes clear: "such

water is not subject to the *provisions* of the Water Exclusion which *preclude coverage for surface water or water under the surface of the ground*." (Policy 109 (emphasis added)). In other words, the Water Exclusion's provisions that preclude coverage for either surface water (subsection (1) of the Water Exclusion (*id.* 101)) or water under the surface of the ground (subsection (4) of the Water Exclusion (*id.*)) do not apply to "accidental discharge or leakage of water [that] falls within the criteria set forth in . . . this definition of 'specified causes of loss'" (*id.* 109 (alterations added)). Yet, Defendant invokes subsection (3) of the Water Exclusion, drain leaks, not subsections (1) or (4). As such, the exception to the Water Exclusion does not apply here.

Nonetheless, Plaintiff insists that the exception is applicable. (*See* Pl.'s Resp. 11). In so arguing, it asks the Court to rely on *Spring Glen Apartments LLP v. Arch Specialty Insurance Company*, where the above exception to the Water Exclusion was applied. (*See id.* (citing 307 F. Supp. 3d 975, 977 (D.N.D. 2018)). The Court is not persuaded. Not only did that case involve an interpretation of North Dakota law, but the policy in that case did not have a drain definition for subsection (3) of the Water Exclusion — nor did the court in that case address such a definition. *See Spring Glen Apartments LLP*, 307 F. Supp. 3d at 977–78. As the Court noted in *Raffell*, the added definitions of "drain" and "sewer" to the Water Exclusion are significant and expand its scope. *See* 2021 U.S. Dist. LEXIS 4843, at *17. The Court will not follow a case that applied a different state's law to a different policy with a different exclusion.

In sum, the Award is binding, it addressed all three potential causes of loss, and it allocated all damages to a drain line. The Policy plainly excludes drain line damage and must be enforced. Summary judgment will be entered in Defendant's favor. Accordingly, it is

ORDERED AND ADJUDGED that Defendant, Scottsdale Insurance Company's Motion for Summary Final Judgment **[ECF No. 51]** is **GRANTED**, and Plaintiff, Karsel Holdings, L.L.C.'s Motion to Compel Arbitration **[ECF No. 61]** is **DENIED**. Final judgment will issue by

separate order. The Clerk of Court is directed to **CLOSE** this case.

DONE AND ORDERED in Miami, Florida, this 17th day of January, 2023.

CECILIA M. ALTONAGA
CHIEF UNITED STATES DISTRICT JUDGE

cc: counsel of record