

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JAMES JARDINE,)	Case Nos. 10-3318 SC,
)	10-3319 SC
Plaintiff,)	
)	Related Cases: 10-3335 SC,
v.)	10-3336 SC
)	
MARYLAND CASUALTY COMPANY,)	
)	
Defendant.)	ORDER GRANTING MARYLAND'S
)	<u>MOTIONS FOR SUMMARY JUDGMENT</u>

JAMES JARDINE,)
)
Plaintiff,)
)
v.)
)
ONEBEACON INSURANCE COMPANY,)
)
Defendant.)

I. INTRODUCTION

Before the Court are four related actions in which Plaintiff James Jardine ("Jardine") brings claims against insurance companies Maryland Casualty Company ("Maryland") and OneBeacon Insurance Company ("OneBeacon"). Case Number 10-3318 ("10-3318") involves Maryland's refusal to pay the policy amount after a wall in Plaintiff's property was allegedly damaged. Case Number 10-3319 ("10-3319") involves Maryland's refusal to pay after a fire damaged the same property. Case Numbers 10-3335 and 10-3336 concern

1 OneBeacon's refusal to pay out on a policy after the same wall and
2 fire damage allegedly occurred. Now Maryland moves for summary
3 judgment in both 10-3318 and 10-3319; these Motions are fully
4 briefed. ECF Nos. 35, ("10-3319 Mot."), 36 ("10-3318 Mot."), 39
5 ("10-3319 Opp'n"),¹ 41 ("10-3318 Opp'n"), 43 ("10-3319 Reply"), 44
6 ("10-3318 Reply").² Because these motions involve the same
7 parties, the same legal standard, and many of the same facts, the
8 Court addresses them jointly in this Order. For the following
9 reasons, the Court GRANTS Maryland's Motions for Summary Judgment
10 in 10-3318 and 10-3319.

11
12 **II. BACKGROUND**

13 Unless otherwise noted, the following facts are not in dispute
14 between Jardine and Maryland.³ Jardine owned a multi-unit
15 commercial building located at 24800-24808 Mission Boulevard in
16 Hayward, California ("the Property"). Maryland RJN Ex. A ("Tent.
17 Decision") at 2.⁴ The Property was insured by Maryland under

18 _____
19 ¹ Maryland urges the Court to ignore the arguments in Jardine's 10-
20 3319 Opposition because the brief was filed a day late under the
21 deadlines set forth in the Civil Local Rules. 10-3319 Reply at 1.
22 Jardine filed a Request for Extension of Time to File Opposition,
23 but this request did not conform to Civil Local Rules 6-2 and 6-3.
24 While the Court does not condone such violations of the Local
25 Rules, ignoring Jardine's Opposition would not further the
26 interests of justice.

27 ² Maryland inadvertently filed its 10-3319 Motion and supporting
28 papers in 10-3318. ECF No. 48. Jardine also filed his 10-3319
Opposition in 10-3318. The Court construes these filings as
pertaining to 10-3319. Unless otherwise noted, all ECF numbers
refer to filings in the docket for 10-3318.

³ The Court GRANTS the unopposed requests for judicial notice
submitted by Maryland and Jardine. ECF. Nos. 37 ("Maryland RJN");
42-2 ("Jardine RJN").

⁴ Jardine filed a California State court action against Chavez and
Serna for the wall damage, Jardine v. Chavez, et al., Alameda

1 Precision Portfolio Policy Number PAS 41569410. 10-3319 Gross
2 Decl. Ex. K (the "Policy").⁵ Jardine is an insurance agent and
3 sold the Policy to himself. Id. Ex. A at 20, 25. In May 2005,
4 Plaintiff leased a portion of the Property to Martha Chavez
5 ("Chavez") and Luz Serna ("Serna"), who used it to operate a
6 business, Bridal & Beyond. Ten. Decision at 2. The lease ran from
7 May 15, 2005 to May 14, 2007. Id.

8 To improve the Property's appearance, Chavez and Serna applied
9 a plaster treatment to its walls, which were composed of painted
10 cinder blocks. Id. The parties agree that the plaster treatment
11 interacted negatively with the cinder, causing damage to the wall.
12 10-3318 Mot. at 10; 10-3318 Opp'n at 5-6.

13 On October 28, 2006, Chavez and Serna sold their business and
14 assigned their lease to Raquel Pardo ("Pardo"). Ten. Decision at
15 3. Around this time, Jardine and Pardo became aware of the wall
16 damage. Id. Jardine testified that he never removed the plaster
17 or repaired the wall. 10-3318 Gross Decl. Ex A at 218-219. In
18 spite of the wall damage, Pardo entered into a new lease with
19 Jardine on April 25, 2007. Id. Ex. B.

20 The Property sustained additional damage on June 13, 2007 when
21 a halogen light fixture in Pardo's unit set fire to some of her
22 dresses. 10-3319 Gross Decl. Ex. B at 104-105; 10-3319 Opp'n at 4-
23 5. Maryland contends that the damage from the fire was minor,

24
25 County Superior Court Case No. HG08-36624. A copy of the court's
26 Tentative Decision ("Ten. Decision") in that action was attached as
Exhibit A to Maryland's RJN.

27 ⁵ Jonathan Gross ("Gross"), counsel for Maryland, filed
28 declarations in support of Maryland's 10-3318 and 10-3319 motions
and replies. ECF No. 35-1 ("10-3319 Gross Decl."); 36-15 ("10-3318
Gross Decl."), 38 ("10-3318 Gross Supp. Decl."); 43-1 ("10-3319
Gross Reply Decl."); 44-1 ("10-3318 Gross Reply Decl.").

1 causing only a silver-dollar-sized burn mark on the carpet. 10-
2 3319 Mot. at 6. Jardine disagrees, contending that the fire
3 resulted in substantial fire and smoke damage. 10-3319 Opp'n at 5.
4 Jardine testified that, due to the fire, he replaced some of the
5 ceiling tile, vacuumed and wiped down the Property, and ran a fan
6 to alleviate the "smoke smell," but did not keep track of his
7 expenses. 10-3319 Gross Decl. Ex. A at 109-110.

8 Jardine has testified that Pardo stopped paying rent in
9 September or October of 2007 and moved out around that time. 10-
10 3119 Gross Decl. Ex. A at 116. It is unclear whether the fire or
11 plaster damage was a factor in Pardo's decision. Id. at 116-117.

12 On April 2, 2008, Jardine entered into a Policyholders
13 Settlement and Release Agreement with OneBeacon, Pardo's insurer,
14 concerning the fire damage. 10-3335 ECF No. 30, Cook Decl. Ex. F
15 ("Settlement Agreement"). Under the Settlement Agreement, Jardine
16 was "paid for fire damage repairs that may exceed the reasonable
17 and necessary cost of repair." Id. at 1.

18 Two weeks later, Jardine notified Maryland of his claims for
19 the plaster and fire damage. 10-3318 Gross Decl. Ex. D;
20 10-3319 Gross Decl. Ex. E ("Jardine RFA Response") at 2.⁶ With

21 _____
22 ⁶ Pursuant to Rule 36(a)(3) of the Federal Rules of Civil
23 Procedure, Maryland contends that its Requests for Admissions
24 ("RFA") in 10-3319 and 10-3318 should be deemed admitted as
25 undisputed facts because Jardine failed to provide timely
26 responses. 10-3318 Mot. at 12; 10-3319 Mot. at 8. Jardine's
27 attorney claims that the RFAs in 10-3318 were not properly served
28 and that the parties reached an undocumented agreement to extend
the response deadline for the RFAs in 10-3319. ECF Nos. 42-1 ¶ 3,
40 ¶ 4. The Court is reluctant to deem Maryland's RFAs admitted as
there is a dispute concerning service and the existence of an
agreement extending the response deadline. Further, the default
admissions would contradict the positions Jardine has taken
throughout this litigation. Accordingly, the Court declines to
deem admitted Maryland's RFAs.

1 respect to the plaster damage, a structural engineer hired by
2 Maryland concluded that the damage was caused by a sulfate attack
3 on the wall, resulting from a combination of moist conditions, the
4 application of the wrong type of plaster, and inadequate wall
5 preparation. 10-3318 Gross Decl. Ex. E. at 4. An engineer hired
6 by Jardine, William Jones ("Jones"), agreed. Id. Ex. G. Maryland
7 ultimately paid Jardine \$46,225 for the plaster damage -- \$25,000
8 as the actual cash value of the structure, \$2,500 to repair
9 residual damage from the extraction of core samples from the walls,
10 \$4,175 for Jones' engineering services, and a \$14,550 advance for
11 business income loss coverage. Id. Exs. N, O, P at 110-11.

12 With respect to the fire damage, on August 28, 2008, an
13 independent adjustor prepared a repair estimate at Maryland's
14 request. 10-3319 Gross Decl. Ex. H. The estimate concluded that
15 fire damage repairs on the Property would cost \$10,727.97. Id. On
16 November 8, 2008, Maryland paid Jardine \$10,227.97 (the amount of
17 the repair estimate less Jardine's \$500 deductible). Id. Ex. I.
18 Maryland and Jardine also agreed to hire VP Construction to prepare
19 another repair estimate. 10-3319 Opp'n at 5. In a letter dated
20 December 3, 2008, VP Construction estimated that the repairs for
21 the fire damage would cost \$34,423.20 and would take 60 days to
22 complete, as long as building code upgrades were not required. 10-
23 3319 Gross Decl. Ex. F. Jardine declares that code upgrades would
24 have cost an additional \$59,446, but has presented no evidence
25 supporting this estimate. 10-3319 Jardine Decl. ¶ 7.⁷ Maryland
26 contends that such upgrades were unnecessary. 10-3319 Reply at 7.

27
28 ⁷ Jardine submitted declarations in opposition to Maryland's
Motions. ECF Nos. 40 ("10-3319 Jardine Decl."), 50 ("10-3318
Jardine Decl.").

1 In any event, it is undisputed that Jardine never performed the
2 code upgrades or any other major repairs. 10-3319 Mot. at 13; 10-
3 3319 Opp'n at 9.

4 On September 10, 2009, the City of Hayward purchased the
5 Property from Jardine for approximately \$1.3 million. 10-3318
6 Gross Decl. Ex. S. The Property is to be used for the construction
7 of the Route 238 Corridor Improvement Project. Id.

8 On February 10, 2010, Jardine filed his 10-3318 action against
9 Maryland for payments allegedly due for the plaster damage in the
10 Superior Court of California for Alameda County ("Superior Court").
11 ECF No. 1-1. On March 9, 2010 he filed an amended complaint in the
12 10-3318 action as well as a complaint in his 10-3319 action for
13 payments allegedly due for the fire damage, both in Superior Court.
14 ECF No. 1-2 ("10-3318 Compl."); 10-3319 ECF No. 1 Ex. A ("10-3319
15 Compl."). Maryland removed both actions to federal court on July
16 29, 2010 on diversity grounds. ECF No. 1; 10-3319 ECF No. 1.

17 Both complaints allege three causes of action: (1) breach of
18 contract; (2) breach of implied covenant of good faith and fair
19 dealing; and (3) violations of the Fair Claims Settlement Act as
20 set forth in California Insurance Code § 790.03 et seq. and
21 California Code of Regulations § 2695.1 et seq. 10-3318 Complaint;
22 10-3319 Complaint.

23 In its 10-3318 Motion, Maryland argues that summary judgment
24 is appropriate because (1) no private right of action exists for
25 the statutory violation alleged in Jardine's third cause of action
26 (2) Jardine's plaster claim is barred under the Policy's
27 exclusions, (3) Jardine is not entitled to any further payments
28 under the Policy, and (4) Jardine is not entitled to any additional

1 coverages under the policy. 10-3318 Motion at 8-9. With respect
2 to its 10-3319 Motion, Maryland argues that summary judgment is
3 appropriate because (1) no private right of action exists for the
4 alleged statutory violations, (2) Jardine has been fully
5 compensated for his fire loss, (3) Jardine is not entitled to
6 coverage for code upgrades, and (4) Jardine is not entitled to
7 Business Income coverage. 10-3319 Motion at 5-6.

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9 **III. LEGAL STANDARD**

10 Entry of summary judgment is proper "if the movant shows that
11 there is no genuine dispute as to any material fact and the movant
12 is entitled to judgment as a matter of law." Fed. R. Civ. P.
13 56(a). Summary judgment should be granted if the evidence would
14 require a directed verdict for the moving party. Anderson v.
15 Liberty Lobby, Inc., 477 U.S. 242, 251 (1986). Thus, "Rule 56[]
16 mandates the entry of summary judgment . . . against a party who
17 fails to make a showing sufficient to establish the existence of an
18 element essential to that party's case, and on which that party
19 will bear the burden of proof at trial." Celotex Corp. v. Catrett,
20 477 U.S. 317, 322 (1986). "The evidence of the nonmovant is to be
21 believed, and all justifiable inferences are to be drawn in his
22 favor." Anderson, 477 U.S. at 255. However, "[t]he mere existence
23 of a scintilla of evidence in support of the plaintiff's position
24 will be insufficient; there must be evidence on which the jury
25 could reasonably find for the plaintiff." Id. at 252. "When
26 opposing parties tell two different stories, one of which is
27 blatantly contradicted by the record, so that no reasonable jury
28 could believe it, a court should not adopt that version of the

1 facts for purposes of ruling on a motion for summary judgment."
2 Scott v. Harris, 550 U.S. 372, 380 (2007).

3 **IV. DISCUSSION**

4 **A. Maryland's 10-3318 Motion**

5 **1. Fair Claims Settlement Practices Act**

6 Maryland moves for summary judgment on the third cause of
7 action in 10-3318 on the grounds that no private right of action
8 exists under California Insurance Code Section 790.03 et seq. and
9 California Code of Regulations Section 2695.1 et seq. 10-3318 Mot.
10 at 25. Jardine does not object to the dismissal of his third cause
11 of action. 10-3319 Opp'n at 22-23. Accordingly, the Court GRANTS
12 Maryland's 10-3318 Motion as to Jardine's third cause of action for
13 violation of the Fair Claims Settlement Practices Act.

14 **2. Policy Exclusions**

15 Maryland argues that Jardine's remaining claims for plaster
16 damage are barred by two policy exclusions: (1) the exclusion for
17 faulty, inadequate, or defective renovation or remodeling under
18 section II.A.3 of the Policy ("renovation/ remodeling exclusion");
19 and (2) the exclusion for loss or damage resulting from rust,
20 corrosion, or deterioration under section II.A.2 ("deterioration
21 exclusion"). 10-3318 Mot. at 15-17. Specifically, the Policy
22 provides:

23 **II. COVERED CAUSES OF LOSS**

24 **RISKS OF DIRECT PHYSICAL LOSS OR DAMAGE unless loss**
25 **or damage is excluded or limited as described below:**

26 **A. EXCLUSIONS**

27 . . .

28 2. We will not pay for loss or damage caused
by or resulting from any of the following:

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c.(2)Rust, corrosion, fungus, decay,
deterioration, hidden or latent
defect or any quality in property
that causes it to damage or destroy
itself.

But if an excluded cause of loss that is
listed in 2.c.(1) through (6) results in .
. . . a "specified cause of loss," we will
pay for . . . the loss or damage caused by
that specified cause of loss.

. . .

3. We will not pay for loss or damage caused
by or resulting from any of the following.
But if an excluded Cause of Loss that is
listed in 3.a. through 3.c. results in a
Covered Cause of Loss, we will pay for the
loss or damage caused by that Covered
Cause of Loss.

. . .

c. Faulty, inadequate or defective:

. . .

(2) Design, specifications, workmanship,
repair, construction, renovation,
remodeling, grading, compaction;

(3) Materials used in repair,
construction, renovation or
remodeling;

Or part or all of any property on or away
from the "described premises".

Policy at 7-8, 10 (emphasis added).

Maryland argues that the renovation/remodeling exclusion
applies here because Chavez and Serna applied plaster to the walls
to renovate and remodel the Property. 10-3318 Mot. at 16.
Maryland contends the plaster application amounted to faulty,
inadequate, or defective renovation or remodeling because the walls
began to peel and blister after it was applied. Id. Maryland

1 further argues that the deterioration exclusion applies because the
2 plaster application resulted in a "sulfate attack" which caused
3 Jardine's walls to deteriorate. Id. at 16-17.

4 Jardine responds that neither exclusion applies. Jardine
5 points out that, while the Policy does exclude loss or damage
6 resulting from defective renovation or remodeling, it also states:
7 "if an excluded Cause of Loss . . . results in a Covered Cause of
8 Loss, we will pay for the loss or damage caused by that Covered
9 Cause of Loss." 10-3318 Opp'n at 11. Jardine argues that because
10 the plaster application resulted in a covered cause of loss, he is
11 entitled to compensation. 10-3318 Opp'n at 11. Jardine also
12 argues that the deterioration exclusion does not apply because the
13 damage to his wall was the result of a "specific event" that caused
14 the wall to degrade within a short period of time, not the result
15 of a "gradual decline." Id. at 12. Finally, Jardine contends that
16 the earlier determination by Maryland's claims adjustors that this
17 was a covered claim should be binding on Maryland. Id.

18 Jardine is correct that the remodeling/renovation exclusion
19 bars only the replacement of the plaster, not the loss resulting
20 from its application.⁸ Therefore, the key question is whether the
21 deterioration exclusion bars Jardine from recovering for the
22 resulting loss. California courts have found that deterioration
23 includes "slow-moving disintegration or corrosion of the [insured
24 material] because of external forces." Brodkin v. State Farm Fire
25 & Cas. Co., 217 Cal. App. 3d 210, 265 (Cal. Ct. App. 1989). The
26 Ninth Circuit applied this principle in Berry v. Commercial Union
27 Ins. Co., 87 F.3d 387 (9th Cir. 1996). In Berry, the question

28 _____
⁸ Maryland concedes as much in its Reply. See 10-3318 Reply at 3.

1 before the court was whether damage to an insured's irrigation
2 pipes caused by a liquid fungicide was barred by an insurance
3 policy's "deterioration" exclusion. Id. at 388. The insured had
4 flushed the fungicide through her pipes to combat potato and carrot
5 blight and discovered the damage two years later. Id. The Ninth
6 Circuit held that "a degradation that takes two years to manifest"
7 was "slow-moving" and therefore constituted "deterioration."⁹ Id.
8 at 389 n.3.

9 The Court finds that the deterioration exclusion bars
10 Jardine's claim. Jardine concedes that the damage to his wall
11 "occurred over an approximate year and a half time," 10-3318 Opp'n
12 at 12, just short of the two-year timeframe at issue in Berry.
13 Such "slow-moving disintegration or corrosion" constitutes
14 deterioration. The Court rejects Jardine's contention that the
15 deterioration exclusion does not apply because the plaster damage
16 was caused by the specific act of his tenants. Jardine cites no
17 authority supporting his position, and the Ninth Circuit reached a
18 contrary conclusion in Berry. In that case, a specific act -- the
19 use of liquid fungicide -- caused the deterioration.¹⁰

20 _____
21 ⁹ The Ninth Circuit ultimately found in favor of the insured
22 because the fungicide manufacturer's failure to warn about the
23 corrosive effects of its product was the "proximate efficient
24 cause" of the damage. Berry, 387 F.3d at 393. The court found
25 that this constituted a peril covered by the insured's policy. Id.
26 Jardine has not argued that Chavez and Serna's negligence was the
27 proximate efficient cause of his loss. Even if that issue was
28 before the Court, the Policy's renovation/remodeling exclusion
would bar Jardine from recovering for faulty, inadequate or
defective renovation or remodeling.

10 ¹⁰ The Court also rejects Jardine's contention that the "policy
states that even if this were simple deterioration, the claim is
covered under the policy if it is a Covered Cause of Loss." 10-
3318 Opp'n at 12. The Policy actually states: "if an excluded
cause of loss [including deterioration] results in . . . a
'specified cause of loss,' we will pay for . . . the loss or damage

1 The Court also rejects Jardine's contention that earlier
2 determinations by Maryland's adjustors that Jardine's claim was
3 covered should be binding on Maryland. Jardine points to language
4 from a November 6, 2008 letter from Maryland adjustor Mitch Hammond
5 ("Hammond") stating that "the investigation into the cause and the
6 review of the policy does not show that the loss is excluded." 10-
7 3318 Opp'n at 12, 13; 10-3318 Peck Decl. Ex E ("Olson Dep.") at 69-
8 70.¹¹ Jardine offers no authority suggesting that the preliminary
9 findings of an insurance adjustor are binding on the insurance
10 company. Further, nothing in Hammond's statement indicates that he
11 intended to bind Maryland or offer a final determination on
12 Jardine's claim. In fact, Maryland repeatedly reserved its rights
13 under the Policy throughout its handling of the claim. 10-3318
14 Gross Decl. Ex. E at 12; 10-3318 Gross Supp. Decl. Ex. AA at 3.
15 The Hammond letter is also insufficient to raise a genuine dispute
16 of material fact because there is no indication of what facts
17 Hammond based his findings on and whether those facts contradict
18 the current record.¹²

19
20 caused by the 'specified cause of loss.'" Policy at 8-9. The
21 Policy defines "specified cause of loss" to mean fire, lightning,
22 explosion, and a variety of other things. *Id.* at 26. The wall
23 damage claimed by Jardine does not fall within any of the
24 categories set forth by the Policy. See id.

25 ¹¹ Ronald G. Peck ("Peck"), Jardine's attorney, submitted
26 declarations in support of Jardine's Opposition to Maryland's
27 Motions in 10-3318 and 10-3319. ECF Nos. 51 ("10-3318 Peck
28 Decl."); 10-3319 ECF No. 28 ("10-3319 Peck Decl."). Attached as
29 Exhibit E to the 10-3318 Peck Declaration is a portion of the
30 deposition transcript of John Olson ("Olson"), Maryland's executive
31 general adjuster on Jardine's claim.

32 ¹² Jardine has not submitted a copy of the Hammond letter to the
33 Court. Instead, he relies on portions of the Olson deposition in
34 which Olson testifies about the contents of the Hammond letter.
35 Olson's testimony does not describe how Maryland reached its
36 preliminary determination on Jardine's claim.

1 The Court finds that Jardine's 10-3318 claim is barred by the
2 Policy's deterioration exclusion. Accordingly, the Court GRANTS
3 Maryland's Motion as to Jardine's claims for breach of contract and
4 breach of the implied covenant of good faith and fair dealing.¹³

5 **B. Maryland's 10-3319 Motion**

6 **1. Fair Claims Settlement Practices Act**

7 As in 10-3318, Jardine does not object to the dismissal of his
8 third cause of action in 10-3319 for violations of the Unfair
9 Insurance Practices Act. Accordingly, the Court GRANTS Maryland's
10 10-3319 Motion as to Jardine's third cause of action.

11 **2. Fire Loss Coverage**

12 Maryland contends that Jardine has been fully compensated for
13 the property damage resulting from the fire. 10-3319 Mot. at 10-
14 12. Specifically, Maryland argues that Jardine has already
15 received \$41,099.22 in insurance proceeds -- \$30,781.25 from
16 OneBeacon¹⁴ and \$10,227.97 from Maryland -- to repair \$34,423.20 in
17 fire damage. 10-3319 Reply at 4. Maryland states that the
18 \$30,781.25 payment was part of the Settlement Agreement between
19 Jardine and OneBeacon concerning the fire damage and that
20 Maryland's \$10,227.97 payment was specifically intended to settle
21 Jardine's fire claim. Id. at 1-3.

22
23 ¹³ Because the Court finds that Jardine's 10-3318 claim is barred
24 by the Policy's exclusions, it need not address Maryland's
25 arguments that Jardine is not entitled to any further payments or
any additional coverages under the Policy.

26 ¹⁴ In its Motion, Maryland contended that OneBeacon paid Jardine
27 \$39,781.25 for fire damage repairs. 10-3319 Mot. at 11. In its
28 Reply, Maryland concedes that only \$30,781.25 of OneBeacon's
payment was for fire damage, and the remainder was for loss of
rent. 10-3319 Reply at 3. Maryland claims that it changed its
figure after discovering new evidence. Id.

1 Jardine concedes that the estimated cost to repair the fire
2 damage was \$34,423.20, plus the cost of code upgrades.¹⁵ 10-3319
3 Opp'n at 7. However, he contends that there is a dispute about the
4 purpose of the payments from OneBeacon and Maryland. 10-3319 Opp'n
5 at 7. Jardine declares that the OneBeacon payment was not for fire
6 repairs but "was paid as part of [an] effort to obtain a release
7 from me for many other things."¹⁶ 10-3319 Jardine Decl. ¶ 5.
8 Jardine further declares that he "never was fully clear what
9 [Maryland's \$10,227.97] payment was for," but he understood it to
10 be an advance towards his claim for the plaster damage and lost
11 rent. Id. ¶ 10.

12 Jardine's threadbare and self-serving declaration is blatantly
13 contradicted by the record. The OneBeacon Settlement Agreement,
14 which Jardine signed, states that Jardine was "being paid for
15 damage repairs that may exceed the reasonable and necessary cost of
16 repair of the fire and damage and also constitutes a replacement
17 cost payment before said fire damage repair work is completed."
18 Settlement Agreement ¶ 2. Further, correspondence between Jardine
19 and one of OneBeacon's adjustors concerning the settlement, which
20 included an itemized list of the components of the Settlement
21 Agreement, shows that Jardine could have no reason to believe that

22 ¹⁵ The issue of whether Jardine was entitled to payment for the
23 cost of code upgrades under his Building Ordinance or Law Coverage
is addressed below.

24 ¹⁶ Jardine also contends that the Court has already found that
25 there was a substantial conflict in evidence concerning the purpose
26 of this payment. 10-3319 Opp'n at 7. The Court rejects this
27 argument. The Court previously held that there was a genuine
28 dispute of material fact concerning whether the Settlement
Agreement barred Jardine's 10-3335 action against OneBeacon;
however, the Court did not make any findings about the purpose of
the payments made pursuant to the Settlement Agreement. See 10-3335
ECF No. 42.

1 the \$30,781.25 was for anything but fire damage repairs. See 10-
2 3319 Gross Decl. Ex F. Accordingly, no reasonable juror could find
3 that the purpose of the OneBeacon payment was for anything other
4 than compensation for the fire damage.

5 Nor is there a genuine dispute of material fact as to the
6 purpose of Maryland's \$10,227.97 payment. Jardine's declaration
7 that the payment was an advance towards his plaster claim and lost
8 rent is directly contradicted by the record. Maryland's August 28,
9 2008 repair estimate found fire damage of \$10,727.97 on the
10 Property. 10-3319 Gross Decl. Ex. H. The estimate called for
11 "replacing the suspended ceiling tile in the main area, cleaning
12 the grid, painting the wall, replacing the carpet and a few
13 fluorescent light fixtures." Id. Other documentation provided by
14 Maryland shows that the company later paid Jardine \$10,227.97, the
15 cost of repairs less Jardine's \$500 deductible, for his June 13,
16 2007 fire loss.¹⁷ 10-3319 Gross Decl. Ex. I. Jardine has offered
17 no evidence to rebut these documents other than his own
18 declaration, which is devoid of any specific factual allegations.
19 Jardine's declaration is insufficient to create a genuine dispute
20 of material fact concerning the purpose of Maryland's \$10,227.97
21 payment.

22 Accordingly, the Court finds that Jardine was more than fully
23 compensated for the \$34,423.20 repair costs resulting from his fire
24 loss.

25 ///

26 ///

27 ¹⁷ Additionally, a July 28, 2009 letter to Jardine from an adjustor
28 writing on behalf of Maryland, states that "Maryland Casualty has
previously paid you \$10,727.97 [less your deductible] to repair
damage from the fire." 10-3319 Gross Reply Decl. Ex. E at 9.

1 **3. Building Ordinance or Law Coverage**

2 In addition to repair costs, Jardine claims that he is
3 entitled to at least \$59,446 for code upgrades under the Building
4 Ordinance or Law provisions of the Policy. 10-3319 Opp'n at 7.
5 The Building Ordinance or Law coverage pays for increased costs to
6 repair, reconstruct, and/or remodel damaged and undamaged portions
7 of a property "when the increased cost is the consequence of
8 enforcement of building, zoning or land use ordinance law." Policy
9 at 15. Jardine's policy states: "If you do not repair or replace
10 the damaged building, we will pay only to demolish and clear the
11 site of the undamaged portions of the building." Id.

12 Maryland argues that Jardine is not entitled to Building
13 Ordinance or Law coverage for two independent reasons. 10-3319
14 Mot. at 12-13. First, Jardine never repaired the fire damage and
15 the express terms of the policy bar windfall payments in such
16 situations. Id. Second, Maryland contends that there never was an
17 enforcement of an ordinance or law affecting Jardine's repairs.
18 Maryland points to Jardine's interrogatory response that he "was
19 required to do some of the repairs without formal determination by
20 the building department what the legally required up-grades might
21 be." Mot. at 13.

22 In his Opposition, Jardine responds to both points. First, he
23 argues that he intended to repair the fire damage but failed to do
24 so because he lacked the funds and Maryland refused to advance the
25 cost of repairs. 10-3319 Opp'n at 10; 10-3319 Jardine Decl. ¶ 13.
26 Jardine declares that his contractor could not know what code up-
27 grades were required until it applied for a building permit, but it
28 was later determined that the upgrades would cost approximately

1 \$59,446. 10-3319 Jardine Decl. ¶¶ 6-7. Jardine argues that he
2 should not be punished for Maryland's refusal to pay for repairs.
3 10-3319 Opp'n at 10. Second, Jardine argues that the City of
4 Hayward never enforced the building codes and required code
5 upgrades because Maryland refused to pay Jardine's contractor and,
6 consequently, the contractor did not apply for the building permit
7 to do the work. Id. Again, Jardine maintains that Maryland should
8 not be permitted to take advantage of its refusal to pay for
9 repairs. Id.

10 The Court agrees with Maryland. Jardine's policy states that
11 Maryland will pay "only to demolish and clear the site of the
12 undamaged portions of the building" where repairs are not
13 performed. Policy at 15. Jardine does not dispute that he never
14 performed any code upgrades after the fire. Jardine Decl. at 12-
15 13. Further, as the property has been sold to the City of Hayward,
16 Jardine never will perform any code upgrades on the Property.
17 Jardine's argument that he would have performed the repairs had
18 Maryland advanced him the money is unpersuasive. His policy does
19 not require Maryland to advance money for speculative upgrades, and
20 Jardine points to no authority which would require Maryland to
21 provide such an advance. Awarding Jardine funds for repairs that
22 will never be performed would amount to the kind of windfall
23 payment that is expressly foreclosed by his policy.

24 Moreover, it is unclear whether code upgrades were even
25 necessary. Jardine declares that "code up-grades would cost
26 approximately \$59,446," but fails to provide any evidence to
27 support that figure. See Jardine Decl. ¶ 7. Jardine also submits
28 deposition testimony of his contractor, Gary Fair ("Fair"),

1 purportedly showing that code upgrades were required due to the
2 fire damage. 10-3319 Peck Decl. Ex. B. However, Fair's testimony
3 is so vague that it is unclear whether he believed upgrades were
4 required at all. Id. Fair testified: "When you get a permit to
5 do substantial upgrades to any building . . . , the new codes kick
6 in and comply and require that you bring up the building to code
7 standard." Id. Fair does not say whether Jardine needed to do
8 "substantial upgrades." Further, it is unclear from the testimony
9 whether Fair is referring to upgrades resulting from Jardine's fire
10 or plaster damage. Id.

11 For these reasons, the Court finds that Jardine is not
12 entitled to Building Ordinance or Law coverage.

13 4. Business Income Coverage

14 Jardine also claims that he is entitled to Business Income
15 coverage because his tenant moved out as a result of the fire. 10-
16 3319 Opp'n at 11-12. Jardine's policy provides: "We will pay for
17 the actual loss of 'business income' you sustain due to the
18 necessary suspension of 'operations' during the 'period of
19 restoration,' but not to exceed 12 consecutive months." Policy at
20 13. The policy defines operations as "your business activities
21 occurring at the described premises." Id. The "period of
22 restoration" commences on "the date of direct physical loss or
23 damage caused by or resulting from any Covered Cause of Loss." Id.
24 The period ends on the earlier of "the date when the property at
25 the 'described premises' should be repaired, rebuilt or replaced
26 with reasonable speed or similar quality" or "[t]he date when
27 business is resumed at the new location." Id.

28 Maryland argues that Jardine is not entitled to Business

1 Income coverage because he did not cease his operations as landlord
2 during the period of restoration. 10-3319 Mot. at 14. Maryland
3 contends that the period of restoration commenced on June 13, 2007,
4 when the fire occurred, and ended sixty days later since the VP
5 Construction estimate stated that repairs could be completed in
6 sixty days. 10-3319 Mot. at 14. Maryland argues that Jardine did
7 not suspend business operations during this time because Jardine
8 continued to rent the premises to Pardo for four months after the
9 fire. 10-3319 Mot. at 14-15; 10-3319 Reply at 10.

10 Jardine responds that the estimate provided by VP Construction
11 indicated that fire repair work would take sixty days only if no
12 building code upgrades were required. 10-3319 Opp'n at 11.
13 Jardine contends that because code upgrades were required, the
14 period of restoration should be longer than sixty days, though he
15 does not specify how much longer. Id. Jardine also argues that he
16 is entitled to recover lost income because Pardo moved out as a
17 result of the fire damage, which would have been repaired earlier
18 if Maryland had not refused to pay the repair costs. Id. at 11-12.

19 The Court finds that Jardine has failed to make a showing
20 sufficient to establish that he is entitled to Business Income
21 coverage under the Policy. Jardine has testified that Pardo
22 stopped paying rent in September or October 2007, three to four
23 months after the fire. See 10-3119 Gross Decl. Ex. A at 116.
24 Thus, at trial, Jardine would bear the burden of proving that the
25 period of recovery, i.e., the time it would have taken to repair
26 the Property with reasonable speed or similar quality, exceeded
27 three to four months. The VP Construction estimate -- the only
28 evidence before the Court bearing on the period of recovery --

1 indicates that Jardine's repairs would have taken approximately
2 sixty days. 10-3319 Gross Decl. Ex. F.

3 The evidence does not support Jardine's contention that code
4 upgrades would have extended the period of recovery past the date
5 when Pardo ceased paying rent. First, as discussed above, it is
6 unclear whether code upgrades were necessary. Second, even if code
7 upgrades were necessary, Jardine has failed to offer any evidence
8 that they would have taken more than three to four months to
9 complete. Jardine points to language in the VP Construction
10 estimate stating that "Building Code compliance and Upgrades may
11 result in project exceeding 60 days." Id. At trial, Jardine would
12 bear the burden of proving that upgrades were required and that
13 completing the upgrades would have required at least three to four
14 months. Given, the paucity of the evidence offered by Jardine on
15 both of these points, no reasonable jury could conclude that he is
16 entitled to Business Income coverage.¹⁸

17 The Court also rejects Jardine's contention that he is
18 entitled to Business Income coverage because repairs were delayed
19 due to Maryland's refusal to pay and, as a result, Pardo moved out
20 before repairs could be started. The Policy expressly provides
21 that the period of recovery starts to run on the date of the loss,
22 not on the date when repairs could have or should have commenced.
23 Policy at 13. Moreover, Jardine did not tender his claim for
24 repairs to Maryland until April 16, 2008, approximately six to
25 seven months after Pardo stopped paying rent and ten months after

26 ¹⁸ Moreover, Jardine has failed to offer any evidence concerning
27 how much income he would have lost during the period of recovery.
28 Without such evidence, the court cannot determine whether the
amount in controversy for his sole remaining claim for Business
Income coverage would exceed the jurisdictional minimum of \$75,000.
See 28 U.S.C. § 1332(a).

1 the fire. Jardine RFA Response at 2.

2 The Court finds that Jardine has failed to raise a genuine
3 dispute of material fact concerning whether he is entitled to any
4 further compensation under the Policy. Accordingly, the Court
5 GRANTS Maryland's 10-3319 Motion.

6

7 **V. CONCLUSION**

8 For the forgoing reasons, the Court GRANTS Defendant Maryland
9 Casualty Company's Motions for Summary Judgment against Plaintiff
10 James Jardine in Case Numbers 10-3318 and 10-3319.

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IT IS SO ORDERED.

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Dated: October 4, 2011

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UNITED STATES DISTRICT JUDGE

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