

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. 10-3335 SC,
)	10-3336 SC
Plaintiff,)	
)	Related Cases: 10-3318 SC,
v.)	10-3319 SC
)	
MARYLAND CASUALTY COMPANY, and)	
DOES 1 through 50,)	
)	ORDER GRANTING DEFENDANT'S
Defendants.)	<u>MOTIONS FOR SUMMARY JUDGMENT</u>

JAMES JARDINE,)
)
Plaintiff,)
)
v.)
)
EMPLOYERS FIRE INSURANCE)
COMPANY, and DOES 1 through 50,)
)
Defendants.)

I. INTRODUCTION

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

1 involves Employers' refusal to pay after a wall on the same
2 property was damaged. Case Numbers 10-3318 ("10-3318") and 10-3319
3 ("10-3319") concern Maryland's refusal to pay out on a policy after
4 the same fire and wall damage occurred.

5 In March 2011, OneBeacon Insurance Company ("OneBeacon"),
6 Employers' predecessor in interest, moved for summary judgment in
7 both 10-3335 and 10-3336.¹ 10-3335 ECF No. 30; 10-3336 ECF No. 23.
8 The Court denied both motions in April 2011. 10-3336 ECF No. 39
9 ("OneBeacon MSJ Order"). Maryland subsequently moved for summary
10 judgment in 10-3318 and 10-3319 on the grounds that Jardine had
11 been fully compensated for his fire damage and Jardine's wall claim
12 was barred under his policy. 10-3318 ECF Nos. 35, 36. The Court
13 granted Maryland's motions and entered judgment for Maryland in
14 both 10-3318 and 10-3319. 10-3318 ECF Nos. 54 ("Maryland MSJ
15 Order"); 55 ("Maryland Judgment").

16 Now Employers moves for summary judgment in 10-3335 and 10-
17 3336 for a second time; these Motions are fully briefed. 10-3335
18 ECF Nos. 51 ("Fire MSJ"), 56 ("Fire Opp'n"), 62 ("Fire Reply"); 10-
19 3336 ECF Nos. ("Wall MSJ"), 55 ("Wall Opp'n"), 63 ("Wall Reply").
20 Employers argues that Jardine may not continue to prosecute his
21 claims against Employers in light of the Court's Order granting
22 Maryland's motions for summary judgment. Because the instant
23 motions involve the same parties, the same legal standard, and many

24 ¹ OneBeacon Insurance Company ("OneBeacon") was originally named as
25 a defendant in the 10-3335 and 10-3336 actions and moved for
26 summary judgment in April 2011. Employers was later substituted as
27 a party to the actions in place of OneBeacon because the policy
28 underlying the disputes was neither issued nor underwritten by
OneBeacon, but rather by Employers acting under the trade name "One
Beacon Insurance." See 10-3336 ECF No. 41 ("Stip. And Order
Substituting Party"). The Court now refers to OneBeacon and
Employers interchangeably.

1 of the same facts, the Court addresses them jointly in this Order.
2 For the following reasons, the Court GRANTS Employers' Motions for
3 Summary Judgment in 10-3335 and 10-3336.

4
5 **II. BACKGROUND**

6 The Court has already recounted the relevant facts in its two
7 prior orders on OneBeacon and Maryland's motions for summary
8 judgment. See OneBeacon MSJ Order at 2-6; Maryland MSJ Order at 2-
9 7. During the relevant time period, Jardine was an insurance agent
10 and owned a commercial building located at 24800-24808 Mission
11 Boulevard in Hayward, California ("the Property"). Maryland MSJ
12 Order at 3; OneBeacon MSJ Order at 2. In May 2005, Jardine leased
13 a portion of the Property to Martha Chavez ("Chavez") and Luz Serna
14 ("Serna"), who used it to operate a business, Bridal & Beyond.
15 OneBeacon MSJ Order at 2. The lease ran from May 15, 2005 to May
16 14, 2007. Id. at 2-3. During their occupancy of the Property,
17 Chavez and Serna applied a plaster treatment to the Property's
18 walls to improve the Property's appearance. Id. at 3. This
19 treatment interacted negatively with the cement block walls,
20 causing damage. Id. An engineer hired by Jardine, William Jones
21 ("Jones"), concluded that the damage was caused by a sulfate attack
22 on the wall, resulting from a combination of moist conditions, the
23 application of the wrong type of plaster, and inadequate wall
24 preparation. See Maryland MSJ Order at 4-5.

25 On October 28, 2006, Chavez and Serna sold their business and
26 assigned their lease to Raquel Pardo ("Pardo"). OneBeacon MSJ
27 Order at 3. Around this time, Plaintiff became aware of the wall
28 damage. Id. Pardo entered into a new lease with Plaintiff on

1 April 25, 2007. Id. On May 15, 2007, OneBeacon issued an
2 insurance policy to Pardo that listed both Plaintiff and Pardo as
3 named insureds. Id.

4 On June 13, 2007, a halogen light fixture in Pardo's unit set
5 fire to some of her dresses, further damaging the property.
6 Maryland MSJ Order at 3. Pardo breached her rental agreement and
7 stopped paying rent in October of 2007. Id. at 4. It is unclear
8 whether the fire or plaster damage was a factor in Pardo's decision
9 to breach her lease. Id.

10 Jardine tendered his claim for fire and wall damage to
11 Employers on December 20, 2007. OneBeacon MSJ Order at 3. In
12 investigating the fire claim, Employers reviewed the Hayward Fire
13 Department incident report, reports from the Hayward Fire
14 Prevention inspector and ABI Electric, a repair estimate prepared
15 by Jardine's consultant, and an inspection and cost estimate
16 prepared by Erik Quinn, a third party adjuster. Id. Jardine's
17 consultant estimated the damages at \$34,423, plus the unestimated
18 expense of "code upgrades" that might be required by the city of
19 Hayward. Id.

20 On January 16, 2008, Jardine commenced an action against
21 Chavez, Serna, and Pardo in Alameda County Superior Court (the
22 Chavez Action). Id. at 4. Jardine brought claims for breach of
23 contract, waste, and negligence against Chavez, Serna, and Pardo
24 for the damage to the wall. Id. Jardine's claims against Pardo
25 were dismissed without prejudice. Chavez and Serna appeared pro
26 se. After a bench trial, judgment was entered in favor of Jardine
27 and against Chavez and Serna in the amount of \$1,003,854.20 in
28 damages. Id.

1 As to Jardine's fire loss claim with Employers, Ronald Cook
2 ("Cook"), Employers' coverage counsel, negotiated a settlement with
3 Plaintiff which was executed on April 2, 2008 ("the Settlement
4 Agreement"). Id. Under the Settlement Agreement, Employers agreed
5 to pay Plaintiff \$39,781.25 for repair and lost business in
6 exchange for a release of any and all claims against Employers
7 arising out of the fire loss. Id. Jardine and Cook exchanged
8 several drafts of the Settlement Agreement, and Jardine's
9 modifications were ultimately agreed to by Employers. Id. at 4-5.

10 Employers denied the wall damage claim in April 2008 on the
11 basis that the damage was visible and known to both Pardo and
12 Jardine as early as November 2006 when Pardo assumed the lease --
13 before the Employers policy incepted on May 15, 2007. Id. at 5.
14 Employers also denied Jardine's third-party claim against Pardo,
15 writing: "your policy does not permit liability claims against
16 property you own." Id.

17 On May 5, 2009, Jardine commenced a second state court action
18 against Pardo with the same causes of action as the Chavez action.
19 Id. After a bench trial, Jardine ultimately received a judgment
20 against Pardo in the amount of \$1,224,203. Jardine v. Pardo, No.
21 HG09-450634 (Cal. Super. Ct. May 27, 2010) (hereinafter, "the Pardo
22 judgment").

23 On September 9, 2009, Jardine sold the Property to the City of
24 Hayward for \$1.3 million for the construction of a public
25 improvement project. OneBeacon MSJ Order at 5. The Property was
26 subsequently destroyed. Id.

27 In March 2010, Jardine commenced these actions against
28 Employers and Maryland in Alameda County Superior Court; Defendants

1 subsequently removed. In 10-3335, Plaintiff alleges Employers (1)
2 committed fraud, and (2) breached the implied covenant of good
3 faith and fair dealing ("the implied covenant") when it settled
4 Plaintiff's fire claim. 10-3335, ECF No. 1 Ex. A ("10-3335
5 Compl."). Jardine alleges that Employers falsely represented to
6 him the policy's coverage limits, which induced Jardine into
7 signing the Settlement Agreement. Id. In 10-3336, Jardine brings
8 claims for breach of contract and breach of the implied covenant in
9 connection with Employers' handling of his claim for wall and
10 plaster damage. 10-3336, ECF No. 47 ("10-3336 Am. Compl.").
11 Jardine has also asserted a cause of action under Insurance Code
12 Section 11580 in an attempt to collect on the Pardo judgment under
13 the Employers policy's third-party liability coverage.² Id.

14 In March 2011, Employers moved for summary judgment in both
15 10-3335 and 10-3336. See 10-3335 ECF No. 30; 10-3336 ECF No. 23.
16 The Court denied the 10-3335 motion on the grounds that a genuine
17 issue of material fact existed as to the enforceability of the
18 Settlement Agreement and certain elements of Jardine's fraud claim.
19 OneBeacon MSJ Order at 9-10. Further, the Court found no merit in
20 Employers' conclusory argument that Plaintiff was not damaged by
21 the alleged fraud. Id. at 11. The Court also denied the 10-3336
22 motion, finding that there was a triable issue of fact as to
23 whether the wall damage manifested prior to the inception of the
24 Employers policy. OneBeacon MSJ Order at 16.

25 Maryland found more success when it subsequently moved for
26 summary judgment in 10-3318 and 10-3319. See 10-3318 ECF Nos. 35,

27 ² Jardine also asserted causes of action for violations of the Fair
28 Claims Settlement Practices Act in both 10-3335 and 10-3336, but
subsequently stipulated to their dismissal. See 10-3335 ECF No.
49; 10-3336 ECF No. 50.

1 36. With respect to Jardine's claim for fire damage in 10-3319,
2 the Court found that the \$41,099.22 in insurance payments Jardine
3 received from Employers and Maryland "more than fully compensated
4 [Jardine] for the \$34,412.10 repair costs resulting from his fire
5 loss." Id. at 13-15. The Court also found that Jardine was not
6 entitled to code upgrade coverage under his Maryland policy because
7 he never performed any code upgrades after the fire and it was
8 unclear whether code upgrades were even necessary. Id. at 17.
9 Finally, the Court determined that Jardine was not entitled to
10 business income coverage (i.e., coverage for loss of rent) under
11 his Maryland policy because Pardo moved out after the "period of
12 recovery," i.e., the time it would have taken to repair the
13 property with reasonable speed or similar quality. Id. at 19. As
14 to 10-3318, the Court determined that Jardine's claim for wall
15 damage was barred by a provision in his Maryland policy which
16 excluded coverage for damage resulting from "deterioration."
17 Maryland MSJ Order at 11.

18 Seizing on the Court's Order granting Maryland's motions for
19 summary judgment, Employers now moves for summary judgment in 10-
20 3335 and 10-3336 for a second time. Employers argues that because
21 the Maryland and Employers policies are substantially similar, the
22 Court's Maryland MSJ Order precludes Jardine from proceeding with
23 his claims against Employers. With respect to the 10-3335 action,
24 Employers argues that the Court has already found that Jardine has
25 been more than fully compensated for the cost of repairing the fire
26 damage. Fire MSJ at 7. Employers further argues that the language
27 in the Maryland and Employers policies concerning code upgrade and
28 business income coverage is substantially similar and that the

1 Court already found that Jardine was not entitled to such coverage
2 under the Maryland policy. Id. at 8-12. As to the 10-3336 action,
3 Employers argues that its policy contains essentially the same
4 deterioration exclusion that the Court found applicable to
5 Jardine's claim against Maryland. Wall MSJ at 6-15. Employers
6 also argues that Jardine may not enforce the Pardo judgment against
7 Employers because Pardo was aware of the wall damage before the
8 inception of the policy and because the policy does not provide
9 coverage for economic losses such as loss of rental income. Id. at
10 15-20.

11
12 **III. LEGAL STANDARD**

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

1 opposing parties tell two different stories, one of which is
2 blatantly contradicted by the record, so that no reasonable jury
3 could believe it, a court should not adopt that version of the
4 facts for purposes of ruling on a motion for summary judgment."
5 Scott v. Harris, 550 U.S. 372, 380 (2007). "A subsequent motion
6 for summary judgment based on an expanded record is always
7 permissible." Williamsburg Wax Museum, Inc. v. Historic Figures,
8 Inc., 810 F.2d 243, 251 (D.C. Cir. 1987).

9
10 **IV. DISCUSSION**

11 Most of the issues raised in Employers' motions for summary
12 judgment have already been addressed in the Court's Order granting
13 summary judgment in favor of Maryland. As the facts surrounding
14 Jardine's wall and fire damage are the same and the Maryland and
15 Employers' insurance policies are functionally equivalent in most
16 relevant respects, the Court reaches the same conclusions now as it
17 did in the Maryland MSJ Order.

18 **A. Jardine's Claim for Fire Damage (10-3335)**

19 Employers argues that it is entitled to summary judgment on
20 Jardine's claims for fraud and breach of the covenant of good faith
21 and fair dealing in 10-3335 because Jardine did not suffer any
22 damages. See Fire MSJ at 2. Pointing to the Court's Maryland MSJ
23 Order, Employers argues that Jardine was more than fully
24 compensated for his fire damage under his Employers policy and is
25 not entitled to additional insurance proceeds for code upgrades or
26 loss of rental income. See id. The Court agrees.

27 As explained in the Maryland MSJ Order, Jardine received a
28 total of \$41,099.22 in insurance proceeds from Employers and

1 Maryland to compensate him for damage caused by the fire on the
2 Property. See Maryland MSJ Order at 13. Jardine has conceded that
3 the estimated cost to repair the damage was \$34,423.20, excluding
4 the cost of any code upgrades. See id. at 14. Accordingly,
5 Jardine was more than fully compensated for the cost of fire damage
6 repairs. As before, Jardine does not dispute that the cost of
7 basic repairs for the fire damage was \$34,423.20, but argues that
8 he was entitled to additional insurance proceeds for code upgrades,
9 depreciation, and lost rental income. See Fire Opp'n at 7, 11.
10 These arguments lack merit.

11 1. Code Upgrade Coverage

12 Jardine argues that he was entitled to the cost of code
13 upgrades under the "Increased Cost of Construction" coverage in the
14 Employers policy. See id. at 8. This provision states, in
15 relevant part:

16 e. Increased Cost of Construction

17 . . .

18 (2) In the event of damage by a Covered Cause of
19 Loss to a building that is Covered Property, we
20 will pay the increased costs incurred to comply
21 with enforcement of an ordinance or law in the
22 course of repair, rebuilding or replacement of
23 damaged parts of that property, subject to the
24 limitations stated in e.(3) through e.(9) of
25 this Additional Coverage.

26 . . .

27 (7) With respect to this Additional Coverage:

28 (a) We will not pay for the Increased Cost of
Construction.

(I) Until the property is actually
repaired or replaced, at the same or
another premises; and

(II) Unless the repairs or replacement are
made as soon as reasonably possible
after the loss or damage, not to
exceed two years. We may extend this

1 period in writing during the two
2 years.

3 10-3335 Silberstein Decl.³ Ex. 1 ("Policy") at OB 00146.

4 Addressing similar policy language in its Order on Maryland's
5 motion for summary judgment, the Court concluded that Jardine was
6 not entitled to coverage because Jardine never performed any code
7 upgrades after the fire. See Maryland MSJ Order at 17. The Court
8 sees no reason why it should reach a different conclusion in the
9 instant action. The Employers policy expressly provides that
10 Employers will not pay for the increased costs of construction
11 "[u]ntil the property is actually repaired or replaced." Policy at
12 OB 00146. Jardine does not dispute that he never repaired or
13 replaced the Property and, as the Property has been sold to the
14 City of Hayward and the building destroyed, he never will. As in
15 the Maryland MSJ Order, the Court holds that Jardine cannot recover
16 for code upgrades which were never performed. To hold otherwise
17 would award Jardine the kind of windfall payment that is expressly
18 foreclosed by the policy.⁴ See Maryland MSJ Order at 17.

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20
21 ³ Dawn A. Silberstein ("Silberstein"), attorney for Employers,
22 submitted declarations in support of Employers' 10-3335 Motion and
23 Reply Brief. 10-3335 ECF Nos. 51-1 ("10-3335 Silberstein Decl."),
24 62-1 ("10-3335 Silberstein Reply Decl."). Silberstein also filed
25 declarations in support of Employers' Motion and Reply in 10-3336.
26 10-3336 ECF Nos. 52-5 ("10-3336 Silberstein Decl."), 63-1 ("10-3336
27 Silberstein Reply Decl.").

28 ⁴ Jardine submits identical declarations from two general
contractors, Victor Periera ("Periera") and Gary Fair ("Fair"),
stating that City of Hayward would have required code upgrades had
Jardine applied for a building permit to repair the fire damage on
the property. See 10-3335 ECF Nos. 66 ("Periera Decl.") ¶ 8, 59
("Fair Decl.") ¶ 8. These declarations are irrelevant. Even if
building code upgrades would have been required, it remains
undisputed that Jardine never performed them.

1 Jardine argues that, in the OneBeacon MSJ Order, "the Court
2 found that triable issues of fact existed concerning building code
3 upgrade coverage." Fire Opp'n at 11. It is unclear what portion
4 of the OneBeacon MSJ Order Jardine is referring to as he does not
5 provide any citations, quotations, or page references. However, it
6 is clear that the Court made no such finding in its OneBeacon MSJ
7 Order.⁵

8 Jardine also argues that he is entitled to payment for code
9 upgrades because, in violation of the policy terms, Employers
10 delayed adjusting his claim and failed to "give notice of [its]
11 intentions within 30 days after [it] receive[d] the sworn proof of
12 loss." See Fire Opp'n at 10 (citing Policy at OB 00150). Jardine
13 asserts that he made his claim in June 2007, but, as late as April
14 2008, Employers had not appraised the damage, obtained a repair
15 estimate, or determined if replacement was appropriate. See id.
16 Jardine reasons that Employers should not be able to avoid its
17 responsibility to provide code upgrade coverage by delaying the
18 fire claim until the City of Hayward acquired the property. See
19 id.

20 Jardine's argument concerning unreasonable delay fails for at
21 least three reasons. First, and most importantly, Jardine does not
22 point to any language in the Employers policy stating that
23 Employers' delay or failure to give notice within 30 days would
24 trigger an obligation to pay for code upgrades. The Employers

25 ⁵ Jardine may be referring to the Court's discussion of whether he
26 had presented sufficient evidence to support his fraud claim. See
27 OneBeacon MSJ Order at 10-11. In that discussion, the Court
28 addressed allegations that Employers had misrepresented the scope
of its code upgrade coverage, but never concluded that a triable
issue of fact existed as to Jardine's entitlement to such coverage.
See id.

1 policy does state that Employers will not pay for code upgrades
2 unless and until such upgrades are made. As discussed above, it is
3 undisputed that Jardine never has and never will perform these code
4 upgrades. Second, Jardine's conclusory assertion that Employers
5 unreasonably delayed processing his claim is blatantly contradicted
6 by the record. Documents submitted by Employers show that Jardine
7 did not tender his claim for the June 2007 fire damage until
8 December 20, 2007.⁶ See 10-3335 ECF No. 62-5 ("Cook Reply Decl.")
9 Ex. A ("Dec. 20, 2007 Tender"). On April 2, 2008, Jardine and
10 Employers entered into the Settlement Agreement through which
11 Jardine agreed to accept \$39,781.25 to settle his fire claim.⁷ See
12 10-3335 Silberstein Reply Decl. Ex. 10 ("Settlement Agreement").
13 In light of these undisputed facts, Jardine cannot seriously
14 contend that Employers unreasonably delayed processing his fire
15 claim. Third, Jardine has presented no evidence showing that he
16 ever submitted a sworn proof of loss to Employers in connection
17 with his claim for fire damage. See Cook Reply Decl. ¶ 9
18 (declaring that Jardine "never submitted[] a Sworn Statement in
19 Proof of Loss for the fire claim").⁸

20
21 ⁶ Jardine argues that he "made his [fire] claim in June 2007."
22 Fire Opp'n at 10. However, Jardine's declaration is vague on when
23 he actually tendered his claim to Employers, stating only that the
24 fire occurred in June 2007 and that he "eventually submitted the
25 claim to [Employers]." 10-3335 ECF No. 57 ("Jardine Decl.") ¶ 8
(emphasis added). Jardine has submitted no evidence, testimonial
or otherwise, suggesting that he tendered his claim any earlier
than December 20, 2007.

26 ⁷ The declaration of Erik Quinn ("Quinn"), a third-party adjustor
27 who worked on Jardine's fire claim, also shows that Jardine was
28 contacted about his claim no later than six days after it was
tendered. See Quinn Reply Decl. ¶¶ 3-4.

⁸ Jardine did submit a proof of loss in connection with his claim
for wall damage in June 2010, almost three years after he submitted

1 For the foregoing reasons, the Court finds that Jardine has
2 failed to raise a genuine issue of material fact as to whether he
3 was entitled to coverage for code upgrades.

4 2. Depreciation Coverage

5 Jardine argues that "[e]ven if Employers was not obligated to
6 pay the full cost of repair, at least they were obligated to pay
7 the value of the fire damaged portion of the building." Fire Opp'n
8 at 9. In other words, Jardine contends that Employers is obligated
9 to pay for the depreciated value of the Property after the fire.

10 See id. This argument runs contrary to the express terms of the
11 Employers policy. The policy provides:

12 4. Loss Payment

- 13
- 14 a. In the event of loss or damage covered by this
Coverage form, at our option, we will either:
15 (1) Pay the value of lost or damaged property;
16 (2) Pay the cost of repairing or replacing the
lost or damaged property, subject to b.
17 below;
(3) Take all or any part of the property at an
18 agreed or appraised value; or
(4) Repair, rebuild or replace the property
19 with other property of like kind and
quality, subject to b. below.

- 20
- 21 b. The cost to repair, rebuild or replace does not
22 include the increased cost attributable to
enforcement of any ordinance or law regulating
23 the construction, use or repair of any
property.

24 Policy at OB 00150 (emphasis added). Thus, under the policy,
25 Employers had the discretion to compensate Jardine for his loss in
26 one of four ways. Employers chose option number two and paid for

27

28 his claim. See Cook Reply Decl. Ex D ("June 2010 Sworn Proof of
Loss").

1 the cost of repairs. Contrary to Jardine's assertion, Employers
2 was under no obligation to choose option number one and pay for the
3 value of the damaged property.⁹ Accordingly, Jardine has failed to
4 raise a triable issue of fact as to whether he was entitled to
5 compensation for depreciation of the Property.

6 3. Coverage for Loss of Rental Income

7 Jardine claims that he is also entitled to loss of rental
8 income for the period after Pardo ceased paying rent in October
9 2007. The Court previously held that Jardine could not recover for
10 loss of rental income against Maryland because Pardo stopped paying
11 rent after the conclusion of "the period of restoration," as
12 defined by the Maryland policy. See Maryland MSJ Order at 18-21.
13 The period of restoration under the Employers policy is even more
14 limited than the period of restoration under the Maryland policy.
15 Accordingly, Jardine's claim for loss of rental income is barred.

16 The Employers policy provides that "[Employers] will pay for
17 the actual loss of Business Income you sustain due to the necessary
18 suspension of your operations during the period of restoration."
19 Policy at OB 00155 (internal quotation marks omitted). The
20 Employers policy defines the period of restoration as the period of
21 time that:

22 ///

23 ⁹ Jardine also argues that "he had at least two properties he could
24 have built a replacement building on, if Employers had only paid
25 him the replacement costs allowed under the policy." Fire Opp'n at
26 10. The Court finds that Jardine's ownership of replacement
27 properties is completely irrelevant to his rights under the
28 Employers policy. As explained above, under the policy, Employers
had the option of paying Jardine for the cost to repair the
building rather than the cost of building on a replacement
property. Employers was under no obligation to pick Jardine's
preferred method of compensation. Further, Jardine has made no
showing that his \$34,423.20 in fire damage entitled him to recover
the replacement cost of the entire building.

- 1 a. Begins:
- 2 (1) 72 hours after the time of direct physical loss
- 3 or damage . . . ; or
- 4 (2) Immediately after the time of direct physical
- 5 loss or damage . . . ; and
- 6 b. Ends on the earlier of
- 7 (1) The date when the property at the described
- 8 premises should be repaired, rebuilt or
- 9 replaced with reasonable speed and similar
- 10 quality; or
- 11 (2) The date when business is resumed at a new
- 12 permanent location.

13 Id. at OB 00161. Unlike the Maryland Policy, the period of

14 restoration under the Employers policy "does not include any

15 increased period required due to the enforcement of any ordinance

16 or law[.]" Id. In other words, under the Maryland policy, code

17 upgrades cannot operate to extend the period of recovery.

18 Jardine concedes that the fire occurred on June 13, 2007 and

19 that Pardo ceased paying rent on October 1, 2007. See Fire Opp'n

20 at 5, 11. Thus, at trial, Jardine would have the burden of showing

21 that the period of recovery, i.e., the time it would have taken to

22 repair the property with "reasonable speed and similar quality,"

23 exceeded 106 days. Based upon a repair estimate prepared by

24 Jardine's contractor, VP construction, the Court previously found

25 that the period of recovery for Jardine's fire damage was only 60

26 days. Maryland MSJ Order at 19-20. Jardine did not challenge this

27 estimate before and does not challenge it here. In light of these

28 facts, the Court finds that Jardine has failed to raise a genuine

issue of material fact as to whether he lost rental income during

1 the period of restoration. Accordingly, his claim is barred by the
2 express terms of the Employers policy.¹⁰

3 Relying on the identical declarations of his contractors,
4 Periera and Fair, Jardine argues that repairs on the Property would
5 have taken eight months to complete. See Fire Opp'n at 12. Both
6 declarations state that the "building code upgrade and energy
7 requirements" would have taken an additional eight months to
8 complete. Fair Decl. ¶ 9; Periera Decl. ¶ 9. However, the
9 Employers policy expressly provides that the period of restoration
10 does not include any increased period required to perform such code
11 upgrades. See Policy at OB 00161. Accordingly, the Periera and
12 Fair declarations are irrelevant to determining the period of
13 restoration.

14 Jardine also argues that he is entitled to lost rent after
15 October 2007 because Employers delayed processing his claim until
16 months after the June 2007 fire. Fire Opp'n at 12. This argument
17 lacks merit. Jardine failed to tender his claim to Employers until
18 December 20, 2007, over two months after Pardo ceased paying rent
19 and six months after the fire. See Dec. 20, 2007 Tender. As
20 discussed above, once it was tendered, Employers promptly responded
21 to and settled Jardine's claim. Further, the policy does not
22 provide for an extension of the period of restoration due to a
23 delay in the processing or tendering of a claim.

24 Finally, Jardine argues that this Court has already
25 "acknowledged that Jardine did present evidence necessary to
26 establish a triable issue of fact that he incurred \$79,200 in lost

27
28 ¹⁰ Additionally, there is evidence that Jardine received \$9,000 for
lost rent under his settlement agreement with Employers. See Cook
Reply Decl. C at 3.

1 rent reimbursable under the Employers policy." Fire Opp'n at 12.
2 Once again, Jardine has failed to provide any citation to the
3 record so the basis for his assertion is unclear. In its OneBeacon
4 MSJ Order, the Court did reject Employers' argument that Jardine
5 had presented no evidence that he was damaged by Employers' alleged
6 misrepresentation. OneBeacon MSJ at 11-12. The Court found that a
7 declaration previously made by Jardine was sufficient to create a
8 genuine issue of material fact concerning his damages, including
9 lost rent. Id. at 11-13. However, in its prior motion for summary
10 judgment, Employers did not raise (and, thus, the Court did not
11 address) the limitations on recovery for lost rental income imposed
12 by the Employers policy. See id. Based on the expanded record now
13 before the Court, it is clear that no genuine issue of material
14 fact exists as to Jardine's entitlement to coverage for lost rent.

15 4. Jardine Fails to Raise a Triable Issue of Fact as to
16 Damages

17 The Court finds that Jardine has been more than fully
18 compensated for his claim for fire damage under the Employers
19 policy. The undisputed evidence shows that Jardine received
20 \$41,099.22 for \$34,423.20 in repair costs for his fire damage and
21 that he is not entitled to additional coverage for code upgrades,
22 depreciation, or loss of rental income. Accordingly, Jardine's
23 claims for fraud and breach of the covenant of good faith and fair
24 dealing must fail.

25 In order to establish a cause of action for fraud, Jardine
26 must prove five distinct elements: (1) that Employers made a
27 material misrepresentation, (2) with knowledge of falsity, (3) with
28 intent to defraud Jardine or induce reliance, (4) that Jardine

1 justifiably relied upon the false statement, and (5) that Jardine
2 was damaged thereby. See Seeger v. Odell, 18 Cal. 2d 409, 414
3 (Cal. 1941); Cicone v. URS Corp., 183 Cal. App. 3d 194, 200 (Cal.
4 Ct. App. 1986). In the instant action, there is no genuine issue
5 of material fact as to the fifth element -- Jardine received all
6 that he was entitled to under the Employers policy. Accordingly,
7 the Court GRANTS Employers' motion for summary judgment as to
8 Jardine's 10-3335 claim for fraud.

9 In order to establish a cause of action for breach of the
10 covenant of good faith and fair dealing, Jardine must establish (1)
11 that a benefit was due under the terms of the policy and (2) that
12 the insurer unreasonably withheld that benefit without probable
13 cause. See Gruenberg v. Aetna Ins. Co., 9 Cal. 3d. 566, 575 (Cal.
14 1973). Again, there is no genuine issue of material fact as to the
15 second element because Jardine has received everything he is due
16 under the policy. Accordingly, the Court GRANTS Employers' motion
17 for summary judgment as to Jardine's 10-3335 claim for breach of
18 the covenant of good faith and fair dealing.

19 **B. Jardine's Claim for Wall Damage (10-3336)**

20 In 10-3336, Jardine has brought first-party claims for breach
21 of contract and the implied covenant, asserting that Employers
22 violated the terms of the policy when it refused to compensate him
23 for damage to his wall. Jardine has also brought a third-party
24 claim to enforce the Pardo judgment against Employers under
25 California Insurance Code § 11580. Employers argues that Jardine's
26 first-party claims are barred by the deterioration exclusion in the
27 Employers policy. Employers also argues that Jardine's third-party
28 claim is barred because Pardo and Jardine discovered the wall

1 damage before the inception of the policy and because the Policy
2 does not provide Jardine with coverage for economic losses such as
3 lost rent. The Court agrees with Employers.

4 1. First-Party Claims for Breach of Contract and the
5 Implied Covenant

6 Employers argues that it is entitled to summary judgment on
7 the first party claims in 10-3336 because Jardine's claim for wall
8 damage is barred by the deterioration exclusion in the Employers
9 policy. 10-3336 MSJ at 6. The Employers policy provides, in
10 relevant part: "We will not pay for loss or damage caused by or
11 resulting from any of the following: . . . [r]ust, or other
12 corrosion, decay, deterioration, hidden or latent defect or any
13 quality in property that causes it to damage or destroy itself."
14 Policy at OB 00164 (emphasis added). In the Maryland MSJ Order,
15 the Court found that Jardine's claim for the same wall damage was
16 barred by almost identical language in the Maryland policy.¹¹
17 Maryland MSJ Order at 8-9, 13. The Court found that the wall
18 damage resulted from deterioration because Jardine had conceded
19 that the damage "occurred over an approximate year and a half
20 time." Id. at 11. The Court relied on Berry v. Commercial Union
21 Insurance Co., 87 F.3d 387, 389 n.3 (9th Cir. 1996), where the
22 Ninth Circuit held that "a degradation that takes two years to
23 manifest" was "slow-moving" and therefore constituted
24 deterioration. See id. at 11. As the Court is now faced with the
25 same facts, the same law, and a substantially similar policy, it

26 _____
27 ¹¹ The Maryland policy provides: "We will not pay for loss or
28 damage caused by or resulting from any of the following: . . .
Rust, corrosion, fungus, decay, deterioration, hidden or latent
defect or any quality in property that causes it to damage or
destroy itself." See Maryland MSJ Order at 8-9.

1 reaches the same conclusion -- Jardine's claim for wall damage is
2 barred by the deterioration exclusion in the Employers policy.

3 Jardine raises many of the arguments that were asserted or
4 might have been asserted in his opposition to Maryland's motion for
5 summary judgment in 10-3318. See Wall Opp'n at 9-13. Jardine's
6 recycled arguments were addressed and rejected in the Maryland MSJ
7 Order, and the Court will not address them again here. See id. at
8 10-12. Jardine's new arguments do not change the Court's
9 conclusion. Jardine is effectively asking the Court to find that
10 its analysis in the Maryland MSJ Order was incorrect. The Court
11 declines to do so.

12 Jardine's causes of action for breach of contract and the
13 implied covenant are premised on Employers' refusal to compensate
14 him for his first-party claim for wall damage. Because Jardine's
15 wall damage claim is barred by the deterioration exclusion in the
16 Policy, he is not entitled to compensation for the wall damage.
17 Therefore, he cannot possibly prevail on his causes of action for
18 breach of contract and the implied covenant.¹² Accordingly, the
19 Court GRANTS Employers' motion for summary judgment as to Jardine's
20 first cause of action for breach of contract and second cause of
21 action for breach of the implied covenant in 10-3336.

22 ///

23 ¹² Jardine argues that summary judgment is inappropriate on his
24 claim for breach of the implied covenant because substantial
25 factual disputes exist concerning whether Employers acted in bad
26 faith in assessing his claim. Wall Opp'n at 18. Jardine asserts
27 that Employers failed to send an agent to assess the problem or
28 adjust the claim. Id. Even if this were the case, "a claim for
breach of the implied covenant of good faith and fair dealing
cannot be maintained unless benefits are due under the plaintiff's
insurance policy." Dollinger DeAnza Assocs. v. Chicago Title Ins.
Co., 199 Cal. App. 4th 1132, 1156 (Cal. Ct. App. 2011). As
discussed above, Jardine is not entitled to any additional benefits
under the Employers policy.

1 2. Third-Party Claims under Insurance Code § 11580

2 Section 11580 of the California Insurance Code requires an
3 insurer doing business in California to allow suits by a judgment
4 creditor of its insured. Specifically, Section 11580 mandates that
5 policies must include:

6 A provision that whenever judgment is secured against the
7 insured . . . based upon . . . property damage, then an
8 action may be brought against the insurer on the policy
9 and subject to its terms and limitations, by such
judgment creditor to recover on the judgment.

10 Cal. Ins. Code § 11580(b)(2) (emphasis added).

11 Jardine asserts that Section 11580 entitles him to enforce the
12 Pardo judgment against Employers, Pardo's insurance carrier. See
13 10-3336 FAC 29-30. The judgment was for \$1,224,203.00, plus costs
14 and attorneys' fees, and Jardine alleges that it "includes [1] the
15 cost of repairing the south wall and the building as a result of
16 the damage to the front section of the wall, and [2] the related
17 lost rental income." Id. at 27.

18 i. Third-party claim for wall damage

19 Employers argues that Section 11580 bars Jardine's third-party
20 claim for wall damage because, under the statute, Jardine's right
21 to enforce the Pardo judgment is "subject to" the "terms and
22 limitations" of the Employers policy. See Wall WSJ at 14-15.
23 Employers further argues that the policy does not cover the relief
24 awarded by the Pardo judgment. See id. Employers specifically
25 points to Section I of the General Liability Coverage Form of the
26 Employers policy, which provides, in relevant part:

27 1. Insuring Agreement

28 a. We will pay those sums that the insured becomes
legally obligated to pay as damages because of

1 . . . property damage. . . . However, we will
2 have no duty to defend the insured against any
3 "suit" seeking damages for . . . "property
4 damage" to which this insurance does not apply.

5 . . .
6 b. The insurance applies to . . . "property
7 damage" only if:

8 . . .
9 (3) Prior to the policy, no insured . . . knew
10 that the . . . "property damage" had
11 occurred in whole or in part. If such
12 listed insured . . . knew, prior to the
13 policy period, that the . . . "property
14 damage" occurred, then any continuation,
15 change or resumption of such . . .
16 "property damage" during or after the
17 policy period will be deemed to have been
18 known prior to the policy period.

19 Policy at OB 00171 (emphasis added). Employers argues that the
20 General Liability Coverage Form bars Jardine's third-party claim
21 because Pardo was aware of the wall damage, "in whole or in part,"
22 as early as November 2006, several months before the Employers
23 policy incepted on May 15, 2007. See Wall MSJ at 17.

24 The Court agrees that Insurance Code Section 11580(b)(2), read
25 in conjunction with the Employers policy, bars Jardine's third-
26 party claim to enforce the Pardo judgment against Employers with
27 respect to the wall damage. Insurance Code Section 11580 requires
28 Jardine to establish that the Employers policy covers the relief
awarded by the Pardo judgment. The Employers policy does not cover
third-party claims for property damage where any one of the
insureds (i.e., either Pardo or Jardine) was aware of the property
damage, "in whole or in part," before the inception of policy.
Pardo has stated in a sworn statement and testified in a deposition
that she was aware of the damage to the front section of the south
wall of the Property as early as November 2006. See 10-3336

1 Silberstein Decl. Ex. 5 ("Nov. 22, 2010 Pardo Decl.") ¶ 2; Id. Ex.
2 8 ("May 25, 2011 Pardo Dep.") at 18:18-18:25, 24:25-26:8. The
3 policy did not incept until May 15, 2007. See Policy at OB 00204.
4 Accordingly, Jardine's third-party claim for wall damage
5 necessarily fails.

6 Jardine's arguments to the contrary are unpersuasive. First,
7 Jardine argues that, contrary to Pardo's declaration and testimony,
8 the damage to the front section of the south wall did not manifest
9 until after the inception of the policy. See id. at 17-18.
10 Jardine points to his own declaration, stating that he was aware of
11 damage to the rear section of the south wall in November 2006 but
12 "there were no problems with the front section of the south wall"
13 at any time prior to the inception of the policy in May 2007. 10-
14 3336 ECF No. 61 ("10-3336 Jardine Decl.") ¶¶ 14, 16. Jardine's
15 declaration does not raise a triable issue of fact. As an initial
16 matter, Jardine's declaration does not say anything about Pardo's
17 knowledge of the front wall damage prior to the inception of the
18 policy. It is possible that Pardo was aware of the front wall
19 damage in November 2006 while Jardine was not. Under the express
20 terms of the Policy, Pardo's knowledge of the damage prior to the
21 inception of the policy is sufficient to invoke the policy
22 exclusion. So long as Pardo knew of the damage in November 2006,
23 Jardine's knowledge is irrelevant. Additionally, Jardine concedes
24 that he knew about the damage to the rear section of the wall as
25 early as November 2006. 10-3336 Jardine Decl. ¶ 14. The policy
26 does not apply to property damage where, as here, prior to the
27 policy's inception, an insured "knew that . . . property damage had
28 occurred, in whole or in part." See Policy at OB 00171. The

1 damage to the front section of the south wall was merely a
2 "continuation, change or resumption" of the sulfate attack in the
3 rear section that had manifested as early as November 2006. See
4 Policy at OB 00171. Accordingly, the damage to the front section
5 is "deemed to have been known prior to the policy period." See id.

6 Second, pointing to the OneBeacon MSJ Order, Jardine argues
7 that the Court has already determined that a triable issue of
8 material fact exists as to whether damage to the front section of
9 the South wall occurred prior to the inception of the Employers
10 policy on May 15, 2007. Wall Opp'n at 16 (citing OneBeacon MSJ
11 Order at 16). Jardine overstates the preclusive effect of the
12 Court's prior holding. In the OneBeacon MSJ Order, the Court
13 addressed the issue of when Jardine knew about the damage to the
14 south wall in the context of California's "loss-in-progress" rule.
15 See OneBeacon MSJ Order at 15-16. The Court found that Jardine
16 could not recover for damage to the back two sections of the wall
17 but factual issues precluded summary judgment as to the front
18 section of the wall. See id. The Court's previous analysis
19 differed because it did not address when Pardo became aware of the
20 damage to the wall or the more stringent exclusion set forth in the
21 Employers policy.¹³

22 For these reasons, the Court holds that Jardine is barred from
23 enforcing the Pardo judgment insofar as it applies to Jardine's
24 claim for wall damage.

25 ///

26 ¹³ Jardine also appears to argue that the deterioration exclusion
27 in the Employers policy does not apply to his third-party claims.
28 See Wall Opp'n at 15-16. While that may be the case, the argument
is irrelevant since Employers is not attempting to apply the
deterioration exclusion to Jardine's third-party claims.

1 ii. Third-party claim for loss of rental income

2 Employers argues that Jardine is also barred from enforcing
3 the Pardo judgment insofar as it applies to Jardine's claim for
4 lost rent. Employers contends that the policy only covers damages
5 arising out of (1) bodily injury or (2) property damage and that
6 Jardine's claim for lost rent does not qualify as either. Wall MSJ
7 at 20. The Court agrees. The relevant portion of the Employers
8 policy provides: "We will pay those sums that the insured becomes
9 legally obligated to pay as damages because of 'bodily injury' or
10 'property damage' to which this insurance applies." Policy at OB
11 00171. Damages for lost rent qualify as injuries to intangible
12 property which fall outside the scope the Employers policy. See
13 Continental Casualty Co. v. Super. Ct., 92 Cal. App. 4th 430, 439-
14 40 (Cal. Ct. App. 2001).

15 Jardine contends that, under Vandenberg v. Super. Ct., 21 Cal.
16 4th 815 (Cal. 1999), Employers is obligated to pay all
17 consequential damages, even lost rent resulting from a breach of a
18 lease agreement. Jardine overstates the holding in Vandenberg.
19 The Vandenberg court held that property damage should have been
20 covered under a commercial general liability policy, regardless of
21 whether that property damage was alleged under a breach of contract
22 or tort cause of action. 21 Cal. 4th at 841. The Court did not
23 find that a policy that covers only property damage could be
24 interpreted to indemnify the policyholder against all consequential
25 economic losses.

26 Accordingly, the court also finds that Jardine is barred from
27 enforcing the Pardo judgment against Employers to the extent that
28 it applies to Jardine's claim for lost rental income. As Jardine's

1 third-party claim for wall damage is also barred, the Court GRANTS
2 Employers' motion for summary judgment as to Jardine's fourth cause
3 of action under Insurance Section 11580.

4

5 **V. CONCLUSION**

6 For the foregoing reasons, the Court GRANTS Defendant
7 Employers Fire Insurance Company's Motions for Summary Judgment
8 against Plaintiff James Jardine in case numbers 10-3335 and 10-
9 3336. JUDGMENT is hereby entered in favor of Employers and against
10 Jardine with respect to all of Jardine's claims in 10-3335 and 10-
11 3336.

12 IT IS SO ORDERED, ADJUDGED, AND DECREED.

13

14 Dated: December 27, 2011

15


UNITED STATES DISTRICT JUDGE

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