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CERTAIN UNDERWRITERS AT LLOYD'S, LONDON SUBSCRIBING TO POLICY NUMBER HGB0139660; and WASHINGTON & FINNEGAN, INC.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

JAN KORBELIN and MARINA GRASIC,

Plaintiff,

v.

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON SUBSCRIBING TO CERTIFICATE NUMBER HGB0139660 and WASHINGTON & FINNEGAN INC.,

Defendants.

Case No. 21STCV15017

DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, MOTION FOR SUMMARY ADJUDICATION

[*Filed concurrently with Defendants' Objections to Evidence Submitted By Plaintiffs Re Motion For Summary Judgment*]

Judge: Hon. Rupert Byrdsong
Dept.: 28

Date: October 24, 2023
Time: 8:30 AM
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RESERVATION ID: 919970994823

Complaint Filed: April 21, 2021
Trial Date: February 20, 2024

I. INTRODUCTION

In order to defeat Underwriters' motion for summary judgment, Plaintiffs attempt to deny their own expert's conclusion that the source of the water intrusion was the downspout-roof drain/ scupper. They obviously attempt to mislead the Court in this fashion because the insurance policy is very specific that such water intrusion is not covered. But not only is the cause of loss not covered -- the resultant damage is also not covered. Indeed, Underwriters' motion provided the directly applicable law on the subject: "By specifying in the water damage exclusion that even though water damage caused by a sudden and accidental release of water is covered, mold resulting from that damage is not, the policy makes clear that mold damage caused by a sudden and accidental release of water is an excluded peril." *See DeBruyn v. Sup. Ct* (2008) 158 Cal. App. 4th 1213, 1223-1224. Plaintiffs' response to the DeBruyn analysis? Silence. Plaintiffs totally ignore both *DeBruyn,* and *Julian*, the California Supreme Court case confirming that insurers are not precluded from limiting coverage to some manifestations of a covered peril. As described below, and as a matter of law, both the cause of the loss and the actual damages sustained – mold and rot – are excluded from coverage under the insurance policy.

II. THE CAUSE OF LOSS OF PLAINTIFFS' PRIMARY CLAIM – WATER INTRUSION THROUGH THE DOWNSPOUT – IS NOT COVERED

a. <u>The water entered the "exterior wall assembly" thru the downspout (as Plaintiffs know), and accordingly is not a covered loss</u>.

Plaintiffs dispute UMF #7, namely that "Plaintiffs' expert concluded that the source of water intrusion which led to the widespread decay and claimed sagging floor damage of the dining room floor was a downspout – roof drain/scupper." See UMF # 7. Plaintiffs' response is: "Disputed. The cause of the loss to the second-floor dining room is water intrusion through the exterior wall assembly at or above the second-floor level …" Plaintiffs cite the Pond Depo. 65:9-23, which includes his testimony that the source of the water intrusion **is the scupper**:

> "That is the scupper as it penetrates through the leader head and through the parapet wall… so when we sprayed inside that box, in five minutes we got water intrusion at the dining room ceiling coming down…" (Plaintiffs' Opp. Ex. 4)

Plaintiffs also attach their expert's conclusion in his report:" The roof drain/scupper appears to be the source of the water intrusion and damage…" (Plaintiffs' Opp., Ex. 4, BS pond 0018).

Plaintiffs' attempt to mislead this Court can only be attributed to Plaintiffs' knowledge of the consequence of their own expert's conclusion: mold, fungus and wet rot **are not covered** if

the overflow of water is from a "roof drain, gutter, downspout or similar fixtures." See Section I, A. (5) referenced in moving papers, 9:9-20.

b. Both parties' experts agree the source of the water was the downspout.

In Underwriters' expert Matt Steiner's first report, dated September 19, 2020, he noted that "rainwater on the roof that flows through the scuppers can overtop the downspout entry or splash between the downspout and the exterior finish." See moving papers, Ex. N, P. 7 of 8. In his supplemental report, dated November 4, 2020, he concluded that the "Damage was caused by long-term water intrusion through the exterior wall assembly at or above the second-floor level." Id., Ex. O, p. 3 of 4. The conclusion of Plaintiffs' expert, Russell Pond, on April 13, 2022 (almost 1 1/2 years later) that the source was the scupper, is entirely consistent with Mr. Steiner's two reports.

Plaintiffs acknowledge in their Opposition that the "Policy excludes coverage for loss to property caused by faulty, inadequate, or defective design, specifications, workmanship…" Opp., p. 13:1-5. Plaintiffs then argue: "However, any ensuing loss to property caused by such workmanship **is covered**." (Emphasis in original). Thus, whether Plaintiffs' claim is covered depends solely on whether the ensuing loss is covered. As described below, it is not.

c. Plaintiffs' failure to respond to the *DeBruyn* line of cases is tantamount to an admission that the cases apply.

Plaintiffs filed an opposition of 20 pages, spending copious amounts of time on irrelevant (and false) matter.[1] Yet, Plaintiffs did not address – at all, not even a citation – Underwriters' analysis of the *DeBruyn* and *Julian* cases. (See moving papers 19:15-21:25.) Mold, fungus and wet rot are not covered as ensuing loss **unless** "such loss results from the accidental discharge or overflow of water" from "a plumbing, heating, air conditioning or … household appliance…" and, "household appliance does not include a roof drain, gutter, downspout…" Insurers may so limit coverage based on the above cases.[2]

[1] While Plaintiffs' Opposition contains numerous half-truths and falsehoods, they need not and will not be addressed here, as such allegations are irrelevant to the issues before this Court.

[2] See California Insurance Law §36.13[3][g], Rust, Mold, Fungus, Wet or Dry Rot Exclusions. "The court held that the policy did not violate the efficient proximate cause rule because by specifying in the water damage exclusion that even though water damage caused by sudden and accidental release of water was covered, mold resulting from that damage was not; the policy made clear that mold damage caused by a sudden and accidental release of water was an excluded peril.

Amazingly, Plaintiffs' own citations acknowledge this. Plaintiffs cite Murry v. State Farm Fire & Cas. Co. (1990) 219 Cal. App. 3d 58, 64 [ensuing loss provision provides homeowners with coverage for losses which flow from an excluded loss, **as long as the "ensuing** "loss is not also specifically excluded." (See Opp., 13:16-18.)

III. PLAINTIFFS' CLAIM THAT THE ENDORSEMENT GUARANTEES CASH IS CONTRADICTED – AGAIN – BY THE INSURANCE POLICY; THE ENDORSEMENT LIMITS THE AMOUNT RECOVERABLE, IF COVERAGE EXISTS.

Plaintiffs make a point of arguing that even though they are claiming more than one million dollars for mold and rot remediation, they at least get $10,000 because "that endorsement actually provides $10,000 of coverage for costs and expenses related to mold, mildew or fungus." (Opp., 16:16-23). Again, Plaintiffs fail to read the endorsement.

> "Notwithstanding any provision to the contrary within this policy … this policy insures physical damage to property insured under Coverage A … by mold, mildew or fungus **but only when such damage is the direct result of physical loss or damage to property insured under Coverage A** … by one of the following listed perils occurring during the period of this policy.
>
> Listed Perils
>
> Fire; Accidental Discharge or Overflow of Water.
>
> **This coverage is subject to all limitations contained within this policy** and, in addition, to each of the following specific limitations:
>
> * * *
>
> 3. **Insurance under this policy in respect of mold, mildew or fungus shall not include any sum relating to:**
>
> (i) **faulty workmanship, material, construction or design;**
>
> 4. **The maximum amount payable … is $10,000."** (Emphasis added.)

Thus, the endorsement does not provide an extra $10,000. It limits the amount of coverage -- *if coverage exists* -- to $10,000. For example, if mold "hidden within the walls" were caused by the accidental overflow of water from a dishwasher, the insured would be entitled to an amount not to exceed $10,000. If, on the other hand, the source of the water was a downspout, no coverage would exist.

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IV. PLAINTIFFS' AMBIGUITY ARGUMENT MISSTATES CALIFORNIA LAW AND IS FRIVOLOUS

Plaintiffs also attempt to avoid the dry rot exclusion by arguing it is ambiguous, citing *Jordan v. Allstate Ins. Co*. (2004) 116 Cal.App.4th 1206. (Opp., p. 15) As explained in Underwriters' motion, which explanation Plaintiffs ignore in their opposition, *Jordan* found that a layperson would readily understand that "'wet or dry rot' embraces damage or decay caused by a fungus." (*Id.*, at p. 1218.) The ambiguity analysis in *Jordan* concerned the insurer's argument in that case that the "dry rot" exclusion applied to collapse coverage. (*Id*., at p. 1219.) "Put another way, an insured's objectively reasonable expectation of coverage could arise from a reading of the entire policy in context because the "collapse" exception for "decay" will justify coverage for a collapse caused by "dry rot," even if noncollapse damage caused by dry rot is excluded." (*Id*., at 1220.) Certain Underwriters do not contend that the "dry rot" exclusion applies to collapse coverage.[3] Thus the analysis Plaintiffs rely on is inapplicable. Moreover, Plaintiffs' attempt to analogize the Jordan facts to this case's exclusions for mold/rot and the Mold Endorsement is absurd. As discussed in the Mold Endorsement analysis above, the endorsement simply limits the amount of coverage to no more than $10,000, if coverage exists.

V. THE POLICY DOES NOT COVER THE SMALL FLOOR STAIN ON THE FIRST FLOOR

Plaintiffs' primary claim for remediation of mold/rot damage inside the walls, discussed above, is for more than $500,000. The secondary claim, the stained floor on the first floor bedroom/office, is for less than $5,000.00 (below the deductible). It also is not covered.

Underwriters' investigation included an inspection and analysis of the floor stain by a licensed, experienced structural engineer, Matt Steiner, P.E., S.E. (see photo of floor stain at Steiner Decl., Ex. N, Photo no. 28 at p. DEFS 00366.) Mr. Steiner explained in a detailed report that Plaintiffs' "non-operable drain at the base of the west side drainage channel allowed rainwater to pool and overflow," and enter "through gaps and separation joints" between the retaining wall and drainage channel. (Steiner Decl., Ex. N, p. DEFS 00350.) Mr. Steiner

[3] Plaintiffs correctly do not contend they are entitled to collapse coverage. Plaintiffs' factual argument about a "risk of potential collapse" (Opp. p. 3) is thus irrelevant because it is undisputed that there was no collapse. (Vanderford Decl., Ex. K, Policy, page 7 of 22) [Collapse defined to mean "an abrupt falling down or caving in of a building," and expressly does not include "a building or any part of a building that is in danger of falling down or caving in," "even if it shows evidence of … sagging…."].)

photographed the drain filled with debris and standing water, as well as the gaps and separation joints, during his site visit on September 3, 2020.[4] (see Photo No. 38 at Steiner Decl., Ex. N, p. DEFS00371.)

The policy does not cover such water damage.

> **SECTION I – EXCLUSIONS**
> **A.** We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss. These exclusions apply whether or not the loss event results in widespread damage or affects a substantial area.

(Vanderford Decl., Ex. K p. 11, DEFS 0010)

> Water Damage, meaning:
> * * *
> **c.** Water, or water-borne material, below the surface of the ground, including water which:
> * * *
> **(2)** Seeps or leaks through;
> a building, sidewalk, driveway, foundation, swimming pool or other structure;
> caused by or resulting from human or animal forces or any act of nature.

(Vanderford Decl., Ex. K, p. DEFS 00275)

Plaintiffs attempt to create a dispute by relying on their architect expert's (Ross Pond) mere disagreement with structural engineer Steiner's analysis that water was allowed to pool and overflow the drainage channel, contributing to water intrusion through separations between the retaining wall and the edge of the drainage channel. Plaintiffs' architect-expert Pond's disagreement stems from an investigation he did two years later and is supported by only two conclusory sentences in his report. (Conover Decl., Ex. 5, at Pond Report, p. Pond 0018.) No declaration or analysis is provided.

Moreover, while Pond relied upon experts in leak detection for the intrusion through the scupper that led to damage between the walls, he did not rely on leak detection experts to replicate the conditions present for Steiner's examination of the staining on the first floor. In fact,

[4] Plaintiffs incorrectly argue that Mr. Steiner's conclusion constitutes a "new theory." (Opp. p. 8) The conclusion was stated in Mr. Steiner's initial September 19, 2020, report. Plaintiffs also inexplicably argue that Mark Wallace is Underwriters' non-retained expert. (Opp., p. 8) Plaintiffs do not support this false assertion. Mr. Wallace was a friend of Plaintiffs until they stiffed him for money spent on a joint vacation to Mexico. (Wallace depo., 42:1-21).

Architect Pond admitted in deposition that he never tried to replicate the documented overflow condition at all. (Conover Decl., Ex. 5, p. 130 ["I did not clog the drain, that's correct."]; p. Pond 0016, IMG_4791].)[5] This admission, on its face, bars admissibility of his opinion. *Andrews v. Barker Bros. Corp.* (1968) 267 Cal.App.2d 530, 537 ["It is the settled rule that evidence of the results of experiments as to a disputed fact is not admissible unless the conditions of the experiment are substantially identical to those out of which the dispute arises."]

Pond's own photographs do not support his unexamined conclusion that water from "above" reached the first level floor. Those photos which were taken after the insulation was removed, show the water stains do not run to the floor. (Conover Decl., Ex. 5, p. Pond 0016, IMG_4791])) Such "self-serving conclusions devoid of any basis, explanation, or reasoning" do not create a material dispute sufficient to defeat summary judgment. (*Golden Eagle Refinery Co. v. Associated Internat. Ins. Co*. (2001) 85 Cal.App.4th 1300, 1315, disapproved on other grounds in *State of California v. Allstate Ins. Co*. (2009) 45 Cal.4th 1008, 1036; *Bozzi v. Nordstrom, Inc.* (2010) 186 Cal.App.4th 755, 761-765 [affirming summary judgment where opposing party's expert opinion was conclusory, speculative and not supported by facts.].)

Finally, Plaintiffs' argument that they are entitled to the $25,000 limit for loss caused by water which backs up through drains is again based on a misreading of the policy's water damage exclusion. (Opp., p. 17) The water damage exclusion provides that the policy does not insure for loss caused directly or indirectly by water that "[s]eeps or leaks through … a building … foundation … or other structure." (Vanderford Decl., Ex. K p. 11, DEFS 0010, p. DEFS00275.) Plaintiffs have not met their burden of proof to show any material dispute that the wood floor stain was caused by drainage channel water that entered the house through gaps and separation joints. The $25,000 limit thus has no application.

VI. PLAINTIFFS' BAD FAITH ARGUMENT LACKS MERIT

As explained, the policy does not cover the Plaintiffs' claims. Plaintiffs therefore do not have a claim for breach of the implied covenant of good faith and fair dealing. (*Kransco v. American Empire Surplus Lines Ins. Co*. (2000) 23 Cal.4th 390, 408 ["without coverage there can be no liability for bad faith on the part of the insurer"]; *Cardio Diagnostic Imaging, Inc. v. Farmers Ins.* Exchange (2012) 212 Cal.App.4th 69, 76 ["because no policy benefits were due under the policy, [the insured's] claim for breach of the implied covenant of good faith and fair dealing cannot be maintained"].)

[5] Pond also admitted the drain had been modified at some point after Steiner's inspection.

VII. CONCLUSION

Plaintiffs' arguments against application of the policy's exclusions ignores the basic principle that "[a]n insurance company has the right to limit the coverage of a policy issued by it and when it has done so, the plain language of the limitation must be respected." (*National Ins. Underwriters v. Carter* (1976) 17 Cal.3d 380, 386.) For this reason and those in this and the moving brief, Underwriters' motion should be granted.

Dated: October 19, 2023

VANDERFORD & RUIZ, LLP

By:_____
Ty S. Vanderford
James J. Mcgarry
Attorneys for Defendants
CERTAIN UNDERWRITERS AT LLOYD'S, LONDON SUBSCRIBING TO CERTIFICATE NO. HGB0139660 and WASHINGTON & FINNEGAN, INC.

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action; my business address is 77 North Mentor Avenue, Pasadena, CA 91106.

On **October 19, 2023**, I served the document(s) described as DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, MOTION FOR SUMMARY ADJUDICATION, on the interested party(s) as follows:

Glenn R. Kantor, Esq. Stacy Monahan Tucker, Esq. Jaclyn D. Conover, Esq. KANTOR & KANTOR, LLP 19839 Nordhoff Street Northridge, CA 91324	Attorneys for Plaintiffs, JAN KORBELIN and MARINA GRASIC Tele: (818) 886-2525 - Fax: (818) 350-6272 Email: gkantor@kantorlaw.net; stucker@kantorlaw.net; jconover@kantorlaw.net cspencer@kantorlaw.net cmormann@kantorlaw.net

☐ **(BY MAIL)** I am readily familiar with this firm's practice of collection and processing mail. Under that practice it would be placed in this firm's outgoing mail bin on that same day, with postage thereon fully prepaid, to be deposited with the U.S. Postal Service at Pasadena, California. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☒ **(BY ELECTRONIC SERVICE VIA FIRST LEGAL SUPPORT SERVICES)** I caused the above-referenced document(s) to be served on the individual(s) listed above via electronic transmission through First Legal Support Services in compliance with the e-filing system and guidelines of the Los Angeles Superior Court.

☐ **(BY FEDERAL EXPRESS)** By placing a true and correct copy of the above document(s) in a sealed envelope addressed as indicated above and causing such envelope(s) to be delivered to the FEDERAL EXPRESS delivery service and to be delivered by the next business day to the address(s) designated.

☒ **(BY EMAIL)** Based on an agreement of the parties to accept service by e-mail or electronic transmission, I caused the above document(s) to be sent to the person(s) at the e-mail addresses listed above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

☐ **(BY PERSONAL DELIVERY)** I caused the document(s) listed above to be personally delivered to the person(s) at the address(es) set forth above.

☒ **(STATE)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on **October 19, 2023**, at Pasadena, California.

DONNA MARTIN
Print Name

Donna Martin
Signature