IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

CURT ADKISSON **Plaintiff,** **v.** **SAFECO INSURANCE COMPANY OF INDIANA** **Defendant.**	§ § § § § § § § § § §	**CIVIL ACTION NO. 6:23-CV-00146-JDK**

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Before the court is Defendant Safeco Insurance Company of Indiana's (Safeco) motion for summary judgment. (Doc. No. 34.) Plaintiff Curt Adkisson filed a response (Doc. No. 35) to which Safeco filed a reply (Doc. No. 37). The district court referred the motion to the undersigned for findings of fact, and recommendations for disposition. (Doc. No. 36.) For the reasons stated herein, the court **RECOMMENDS** that Safeco's Motion be **GRANTED**.

BACKGROUND

I. FACTUAL BACKGROUND

This case involves an insurance coverage dispute between a homeowner and his insurance company.[1] Around February 19, 2021 (i.e., the date of loss), one of Plaintiff's homes in Longview, Texas was damaged by busted pipes and subsequent water damages. (Doc. No. 3, at 3.) At this time, Plaintiff had a homeowner insurance policy with Safeco. (Doc. No. 34, at 4).

[1] Unless the court states otherwise, the facts are undisputed. When disputed, the facts are viewed in the light most favorable to the non-moving party, Plaintiff. *Gun Barrell Jacksonville LLC v. Depositors Ins. Co.*, No. 6:20-cv-469-JDK, 2021 WL 5154218, at *1 n.1 (E.D. Tex. Oct. 9, 2021).

On the date of loss, Plaintiff lived in Godley, Texas, which was over 190 miles away from the property. (Doc. No. 35, at 3.) Despite this distance, Plaintiff routinely returned to the property, "spending 3-5 days there whenever possible," often to "visit[] his only daughter" or "grand dog." (Doc. No. 35-2, at 7.) He maintained voter registration, credit cards, and "other essential mail" all addressed to the home. (Doc. No. 35 at 3.) When he could, Plaintiff regularly performed "house projects" and various renovations. *Id.* at 4. However, due to COVID-19 restrictions, Plaintiff became more-and-more restricted on when he could visit the property due to his work. (Doc. No. 34, at 7).

While he was in the process of performing renovations, Plaintiff moved most of his belongings and personal property from inside the home to a garage and shop in the backyard. *Id.* Inside, he kept an air mattress, television, and clothes in one of the rooms. *Id.* The house lacked central heat, but he used several electric heaters and a central AC system throughout the home. *Id.* He used a small refrigerator for his food and drinks because the main fridge was broken and had remnants of rotten food and rat droppings. *Id.* And although the home lacked a washer and dryer, Plaintiff was in the process of "updat[ing] the electrical connections" for new ones. *Id.* However, according to Plaintiff, he recalled that generally "everything was turned off" at the property. (Doc. No. 34, at 7 (quoting Exb. B-10 54: 2–9; 56; 2-3)).

In February 2021, a historic freeze hit Texas, leaving many without power. *Id.* at 5; NAT. CTR. FOR ENV'T INFO., *The Great Texas Freeze: February 11–20, 2021* (Feb. 24, 2023), https://www.ncei.noaa.gov/news/great-texas-freeze-february-2021. During the freeze, one of Plaintiff's neighbors informed Plaintiff that the home's outdoor faucet was spewing water. *Id.* No one was present in the home during the freeze or when some of the home's pipes burst. *Id.* Plaintiff alerted his cousin who then turned off the water the next day. *Id.* Following the freeze, Plaintiff's

daughter inspected the home. *Id.* She witnessed significant water damage throughout the home and reported such to Plaintiff. *Id.* The home's water pipes had frozen and subsequently burst in the upstairs bathroom and basement ceiling, flooding extensive portions of the property. (Doc. No. 34, at 8).

Plaintiff filed a claim with Safeco on March 9, 2021. *Id.* at 9. Safeco assigned the claim to an adjuster, Mary Tate, and sent a field adjuster, Larry Hollon, to inspect the property a week after the date of loss. *Id.* In an approximately ten-minute inspection,[2] Hollon found that the home was in a "state of disrepair" and "appeared not to have been lived in for some time." *Id.* Because the home's power was out and the light switches were nonoperational, Hollon resorted to using a flashlight to take photographs of the damage. *Id.* He did not inspect Plaintiff's bedroom, the garage, the back patio, or the dining room table. *Id.* He took a photo of the thermostat to record the temperature, but he did not document or inspect the various space heaters spread throughout the home. *Id.* at 5–6. Plaintiff's daughter, who was present during this inspection, informed Hollon that Plaintiff often slept at the home on the weekends. (Doc. No. 34, at 9).

Hollon eventually produced two estimates, the latter of which added an additional cost for insulation in the home's basement. (Doc. No. 35, at 6.) Nonetheless, Hollon concluded the home was "vacant," but he could not determine how long the home had been vacant. *Id.* ("I don't know if it had been, you know, two days or if it had been two years. I don't know."). Hollon never

---

[2] The parties dispute how long Hollon's inspection of the property lasted. Plaintiff claims it was no longer than "ten minutes total." (Doc. No. 35-2, at 9.) Safeco contends that the inspection was more than ten minutes based on Hollon's deposition:

> [Plaintiff's Counsel]: "How long do you think you were involved in or otherwise associated with this claim?"
>
> [Hollon]: "The inspection, probably an hour or less. I'm not sure. I don't recall the exact time I was there. The writing the estimate probably took a couple of hours . . . . I don't—I don't recall exactly."

(Doc. No. 35-4, at 3).

inquired about the Policy's vacancy definition or asked Plaintiff any questions regarding who was living at the home prior to the date of loss. *Id.* Further, he failed to contact anyone to verify the status of the home's electricity or water prior to the date of loss. *Id.*

Hollon reported his findings to Safeco and Mary Tate. *Id.* at 10. As a part of Tate's investigation, she requested Plaintiff to produce three months of water, electricity, and gas bills for the home. *Id.* Plaintiff responded that he did not have the gas on at the home, but produced the requested water and electricity bills, "which showed limited use." *Id.*

Safeco denied coverage. In its denial letter to Plaintiff, Safeco explained it denied coverage because the property appeared to be "vacant" or "unoccupied" at the date of loss, which triggered the policy's "freezing exclusion." (Doc. No. 34-16, at 13.) Specifically, the Policy states that Safeco does "not cover loss caused directly or indirectly by . . . [f]reezing of a plumbing . . . system, or of a household appliance, or by discharge, leakage or overflow from within the system or appliance caused by freezing, while the dwelling is vacant, unoccupied or being constructed . . . ." (Doc. No. 34-2, at 30.) However, the exclusion grants an exception if the insured takes reasonable care to either "maintain heat in the building" or "shut off the water supply and drain the system and appliances of water." *Id.* In its claim denial letter, Safeco determined that the pipes burst while the property was vacant, unoccupied, or being constructed and that Plaintiff did not use any reasonable care to maintain heat in the building or shut off the water supply and drain the system and appliances of water. (Doc. No. 34-9, at 2).

To date, Plaintiff has not permanently moved into the property as he intended. (Doc. No. 34, at 11.) The property has changed owners several times and now is occupied by a family unrelated to Plaintiff. *Id.* (citing Exbs. B-15, B-16).

II. PROCEDURAL HISTORY

On February 16, 2024, Plaintiff sued Safeco and the adjusters that handled his claim—Tate and Hollon—in Texas state court, asserting claims for breach of contract, violations of the Texas Insurance Code, and violations of the common law duty of good faith and fair dealing. (Doc. 3, at ¶¶ 51–70.) Plaintiff further alleged that Safeco committed violations of the Texas Insurance Code "knowingly." *Id.* at ¶ 71–72. Plaintiff seeks relief in the form of actual, consequential, and exemplary damages, statutory interest, attorneys' fees in accordance with the court's order adopting, costs of court, pre- and post-judgment interest, and such other and further relief to which Plaintiff is entitled. (Doc. No. 3, at 16).

On March 24, 2024, Safeco removed the case to federal court based on diversity jurisdiction. (Doc. No. 1). That same day, Safeco filed an amended answer (Doc. No. 4), asserting various affirmative defenses, including the bona fide dispute rule, failure to mitigate damages, Plaintiff's negligent and/or wrongful acts or omissions, waiver and estoppel, and other statutory bars on Plaintiff's sought relief.

A few days later, Safeco filed a motion to dismiss the adjusters based on Safeco's election of liability under Texas Insurance Code § 542A.006, along with a motion to limit plaintiff's claim for attorney's fees as Plaintiff failed to properly serve pre-suit notice as mandated by § 542A.003 of the Texas Insurance Code. (Doc. Nos. 7–8.) On June 9, the court granted Safeco's motions and thus, dismissed the adjusters from the lawsuit and adopted United States Magistrate Judge K. Nicole Mitchell's Report and Recommendation to limit Plaintiff's claim for attorney's fees. (Doc. No. 21).

On September 13, 2024, Safeco filed this motion for summary judgment (Doc. No. 34) on all of Plaintiff's contractual and extra-contractual claims. Defendant also seeks summary judgment on Plaintiff's claims for exemplary and treble damages. *Id.* at 25–26.

III. SUMMARY JUDGMENT EVIDENCE

Attached to its motion (Doc. No. 34), Safeco submits the following evidence in support of its request for summary judgment:

Exhibit A: Affidavit of Lisa Seutter;

Exhibit A-1: Plaintiff's Homeowner Policy;

Exhibit A-2: Notes from Plaintiff's 2019 Theft claim bearing number 041675122;

Exhibit A-3: Notes from the claim at issue;

Exhibit A-4: Photographs provided by Plaintiff's contractor Maverick Construction;

Exhibit A-5: Photographs taken by L. Hollon dated March 16, 2021, on behalf of Safeco;

Exhibit A-6: Electric bills produced by Plaintiff;

Exhibit A-7: Water bills produced by Plaintiff;

Exhibit A-8: Safeco coverage position letter dated March 24, 2021;

Exhibit B: Affidavit of Mark Tillman;

Exhibit B-1: Plaintiff's demand letter dated February 16, 2023;

Exhibit B-2: Plaintiff's response to Defendant's discovery requests dated July 31;

Exhibit B-3: Plaintiff's Responses to Defendant's Second Set of Discovery dated January 12, 2024;

Exhibit B-4: Plaintiff's Amended Responses to Defendant's First Set of Discovery Requests dated March 15, 2024, and interrogatory verification;

Exhibit B-5: Plaintiff's Responses to Defendant's Third Set of Requests for Production dated May 20, 2024;

Exhibit B-6: Plaintiff's production labeled ADKISSON 000041-000050, 0000054-0000056, 000065-000085, 000090-000094, 000117-000122, 000123-000126, 000129-000130, 000132-000137, 000162-000163 and 000164-000178;

Exhibit B-7: Defendant's production labeled SAFECO 000408-000417;

Exhibit B-8: Affidavit and documents produced by Southwestern Electric Power Company;

Exhibit B-9: Affidavit and documents produced by Gum Springs Water;

Exhibit B-10: Plaintiff Curt Adkisson's deposition transcript excerpts;

Exhibit B-11: Larry Hollon's deposition transcript excerpts;

Exhibit B-12: Warranty Deed dated December 2, 2016, with Michael Glen Adkisson as grantee;

Exhibit B-13: Special Warranty Deed with Vendors Lien dated May 27, 2020, with Riverside Homebuilders, Ltd. as grantor and Curtis V. Adkisson as grantee;

Exhibit B-14: Warranty Deed with Vendors Lien dated July 19, 2022, with Curtis Vince Adkisson as grantor and Abby Nicole Adkisson and John Phillips as grantees;

Exhibit B-15: Warranty Deed with Vendors Lien dated August 31, 2023, with Abby Nicole Adkisson and John Phillips as grantors and Heather Lowe, Matthew Lowe and Carrie Lowe as grantees;

Exhibit B-16: Release of Lien dated September 18, 2023, with the borrowers as Abby Adkisson and John Phillips releasing their lien on the Property; and;

Exhibit B-17: Copy of a listing for the sale of the Property; and

(Doc. No. 34).

Attached to his response (Doc. No. 35), Plaintiff submits the following evidence in support of the response to Safeco's motion:

Exhibit A: Deposition Excerpts Curt Adkisson;

Exhibit B: Deposition Excerpts Abby Adkisson;

Exhibit C: Deposition Excerpts Safeco Corporate Representative;

Exhibit D: Deposition Excerpts Larry Hollon; and

(Doc. No. 35.) Neither Plaintiff nor Safeco has objected to the respective summary judgment evidence.

LEGAL STANDARD

A motion for summary judgment should be granted if the record, taken as a whole, "shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56. The Supreme Court has interpreted the plain language of Rule 56 as mandating "the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

"[T]he party moving for summary judgment must 'demonstrate the absence of a genuine issue of material fact,' but need not negate the elements of the nonmovant's case." *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc) (quoting *Celotex*, 477 U.S. at 323–25). A fact is material if it might affect the outcome of the suit under the governing law. *Merritt-Campbell, Inc. v. RxP Prods., Inc.*, 164 F.3d 957, 961 (5th Cir. 1999). Issues of material fact are genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* If the moving party does not have the ultimate burden of persuasion, the party "must either produce evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000); *see also Duplantis v. Shell Offshore, Inc.*, 948 F.2d 187, 190 (5th Cir. 1991).

If the moving party "fails to meet this initial burden, the motion must be denied, regardless of the nonmovant's response." *Little*, 37 F.3d at 1075. If the movant meets this burden, Rule 56 requires the opposing party to go beyond the pleadings and to show by affidavits, depositions, answers to interrogatories, admissions on file, or other admissible evidence that specific facts exist

over which there is a genuine issue for trial. *EEOC v. Tex. Instruments, Inc.*, 100 F.3d 1173, 1180 (5th Cir. 1996); *Wallace v. Tex. Tech Univ.*, 80 F.3d 1042, 1046–47 (5th Cir. 1996). The nonmovant's burden may not be satisfied by conclusory allegations, unsubstantiated assertions, metaphysical doubt as to the facts, or a mere scintilla of evidence. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); *Wallace*, 80 F.3d at 1047; *Little*, 37 F.3d at 1075.

When ruling on a motion for summary judgment, the court is required to view all justifiable inferences drawn from the factual record in the light most favorable to the nonmoving party. *Matsushita*, 475 U.S. at 587. However, the court will not, "in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts." *McCallum Highlands, Ltd. v. Wash. Capital Dus, Inc.*, 66 F.3d 89, 92 (5th Cir. 1995).

DISCUSSION

Safeco argues that it did not breach its contract with Plaintiff when it denied coverage because Plaintiff did not "reside" at the home on the date of loss.[3] (Doc. No. 34, at 15.) Because an insured must "reside" at the property to be afforded coverage, Safeco argues summary judgment is appropriate because Plaintiff has not put forth facts raising a genuine issue as to whether the property was Plaintiff's residence. *Id.* Plaintiff responds that residing at the property is not a condition precedent to coverage, but even if it was, he has put forth several facts showing that he resided at the home, making it his residence. (Doc. No. 35, at 13–14.) Moreover, Plaintiff argues that Texas law recognizes that a person may have multiple residences, and the fact that Plaintiff had two residences does not preclude coverage under the Policy. *Id.*

[3] Safeco also moves for summary judgement on Plaintiff's contractual and extracontractual claims on the grounds that Plaintiff has failed to raise a genuine issue of fact on whether he maintained reasonable heat in the home or turned off the home's water and drained the appliances—the two exceptions under the Policy's freezing exclusion. (Doc. No. 34, at 21–27.) However, as explained below, because summary judgment on the residence issue is appropriate, the court does not reach Safeco's additional arguments.

I. Insurance Policy Interpretation in Texas

This case is a diversity of jurisdiction case and thus, the court applies Texas law. *Greenwich Ins. Co. v. Capsco Indus., Inc.*, 934 F.3d 419, 422 (5th Cir. 2019). As such, the burden of proving coverage under an insurance policy lies with the insured. *Federated Mut. Ins. Co. v. Grapevine Excavation Inc.*, 107 F.3d 720, 723 (5th Cir. 1999). If the insured satisfies his burden in proving coverage, the burden shifts to the insurer to demonstrate that a policy exclusion applies. *Crownover v. Mid-Continent Cas. Co.*, 772 F.3d 197, 201 (5th Cir. 2014) (quoting *Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 124 (Tex. 2010)). If the insurer satisfies its burden then the insured must demonstrate that a policy exception applies. *Id.* (quoting *Gilbert*, 327 S.W.3d at 124).

In Texas, to prevail on a breach of insurance contract claim, the insured must prove: "(1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages sustained by the plaintiff as a result of the breach." *Advanced Indicator & Mfg., Inc. v. Acadia Ins. Co.*, 50 F.5th 469, 476 (5th Cir. 2022) (quoting *Certain Underwriters at Lloyd's of London v. Lowen Valley View, L.L.C.*, 892 F.3d 167, 170 (5th Cir. 2018)). It is likely undisputed that a valid contract exists, and that damage occurred considering the water damage to Plaintiff's home. However, whether Safeco breached the contract turns on whether Plaintiff has satisfied all conditions precedent to coverage. To answer this question, the court must interpret and apply the policy's "residence premises" provision, which the parties dispute.

In Texas, insurance policies are "construe[ed] . . . according to general rules of contract construction to ascertain the parties' intent." *Gilbert*, 327 S.W.3d at 126. The court looks first at the insurance policy's language and must "examine the entire agreement and seek to harmonize

and give effect to all provisions so that none will be meaningless." *Id.* Unless the parties intended for terms to have a special or technical meaning, "[t]he policy's terms are given their ordinary and generally accepted meaning . . . ." *Id.* "For more than a century," it has been the court's prerogative to enforce the contract between the parties where "the language is plain and unambiguous." *Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 753 n.50 (Tex. 2006) (quoting *E. Tex. Fire Ins. Co. v. Kempner*, 27 S.W. 122, 122 (Tex. 1894)). If so, the court will not "make a new contract for them" or seek to "change that which [the parties] have made under the guise of construction." *Id.* (quoting *Kempner*, 27 S.W. at 122).

However, in the case that an insurance policy's terms are subject to more than one reasonable construction (i.e., the terms are ambiguous), the court interprets the policy "in favor of coverage." *Id.* at 133. Specifically, "[w]here an ambiguity involves an exclusionary provision of an insurance policy," the court must adopt the construction requested by the insured if that construction is not unreasonable. *Id.* This is true even if the insurer's preferred construction "appears to be more reasonable or a more accurate reflection of the parties' intent." *Balandran v. Safeco Ins. Co. of Am.*, 972 S.W.2d 738, 741 (Tex. 1998). "But an ambiguity does not exist simply because the parties interpret a policy differently." *Gilbert*, 327 S.W.3d at 133. If the policy as written has a clear and definite legal meaning, it is not ambiguous. *Id.*

II. Residence Premises Clause

The parties dispute whether the policy's "residence premises clause" is a condition precedent to coverage. Safeco contends that the policy's unambiguous language requires the insured to demonstrate that he "resides" at the property to be afforded coverage. (Doc. No. 34, at 15.) Safeco argues that Texas precedent interprets such a provision as "a condition precedent to dwelling coverage under a standard homeowner's policy." *Id.* Plaintiff disagrees and argues that

he does necessarily read the provision as requiring an insured to establish residence prior to being afforded coverage.[4] Oral Argument at 2:11:13, *Adkisson v. Safeco Ins. Co. of Ind.*, No. 6:23-cv-146 (E.D. Tex. Nov. 8, 2024).

A condition precedent is an act or event that occurs subsequently to the making of a contract that occurs before there is a right to immediate performance and prior to a breach of one's contractual duty. *Hohenberg Bros. Co. v. George E. Gibbons & Co.*, 537 S.W.2d 1, 3 (Tex. 1976). "A condition precedent may be either a condition to the formation of a contract or to an obligation to perform an existing agreement." *Dillon v. Lintz*, 582 S.W.2d 394, 395 (Tex. 1979) (quoting 5 S. WILLISON, A TREATISE ON THE LAW OF CONTRACTS, § 666 (3d ed. 1961)).

Here, the Policy only covers covered losses to the "*residence premises* shown in the [Policy] [d]eclarations used principally as a private residence . . . ." (emphasis added) (Doc. No. 34-2, at 26.) The Policy defines "residence premises" as:

> a. the one, two, three or four family dwelling, used principally as a private residence;
>
> b. other structures and grounds; or
>
> c. that part of any other building;
>
> where you *reside* and which is shown in the Declarations.

Id. at 52 (emphasis added). Because the Policy specifically defines "residence premises", the court applies that definition. *Sw. Airlines Co. v. Liberty Ins. Underwriters, Inc.*, 90 F.4th 847, 852 (5th Cir. 2024) (quoting *Terry Black's Barbecue, L.L.C. v. State Auto. Mut. Ins. Co.*, 22 F.4th 450, 454 (5th Cir. 2022)).

[4] Although Plaintiff argues that he does not interpret the residence premises clause as a condition precedent, and that it "ties into the vacancy provisions," he fails to provide any other way to interpret the provision. Oral Argument at 2:11:13, *Adkisson v. Safeco Ins. Co. of Ind.*, No. 6:23-cv-146 (E.D. Tex. Nov. 8, 2024).

The Policy, however, does not define "reside," and thus, the court looks to this term's plain, ordinary meaning. *Terry Black's*, 22 F.4th at 455 (citing *Gilbert*, 327 S.W.3d at 126). Texas courts have generally interpreted "reside," and similarly the term's noun form "residence," to mean: "[T]he '[p]lace where one actually lives or has his home; a person's dwelling place or place of habitation; . . . a dwelling house' and that permanent residence 'requires a home and fixed place of habitation to which a person intends to return when away.'" *Ferrara v. Nutt*, 555 S.W.3d 227, 236–37 (Tex. App.—Hous. [1st Dist.] 2018, no pet.) (citing *Owens Corning v. Carter*, 997 S.W.2d 560, 571 (Tex. 1999), *cert. denied*, 528 U.S. 1005 (1999)) (construing "residence" as used in *forum non conveniens* statute); *Dickey v. McComb Dev. Co.*, 115 S.W.3d 42, 45 (Tex. App.—San Antonio 2003, no pet.) (construing the term "residence").[5] Thus, to determine residence, we look for "the place where one actually lives or has his home." *Malnar v. Mechell*, 91 S.W.3d 924, 928 (Tex. App.—Amarillo 2002, no pet.) (citing *Owens Corning*, 997 S.W.2d at 571)).

"An individual does not, however, need to be physically present within the home to claim it as his residence. He may live temporarily in one place while maintaining his residence in another." *Dickey*, 115 S.W.3d at 45. And simply because an individual is physically absent from the home does not necessarily mean, "by itself, that the abode is no longer his residence." *Id.* However, to "reside," "requires more than purchasing a home or intending to move into it." *Korbel*, 308 F. App'x at 805–06. Thus, determining a person's residence requires observation of the totality of the person's factual circumstances. *See, e.g.*, *id.* (examining numerous facts in weighing whether the insured resided at the insured property); *Russ v. Safeco Ins. Co. of America*, No. 2:11-cv-195, 2013 WL 1310501, at *6–8 (S.D. Miss. Mar. 26, 2013) (same).

[5] Other courts, including the Fifth Circuit, have assigned similar definitions. *See, e.g.*, *Korbel v. Lexington Ins. Co.*, 308 F. App'x. 800, 805 (5th Cir. 2009) (applying Louisiana law and defining "reside" as "to dwell permanently or for a considerable time, to have one's settled or usual abode, to live, in or at a particular place").

The plain language of the policy's residence premises provision shows that it is a condition precedent to coverage. *See Huizar v. Benchmark Ins. Co.*, No. 4:22-cv-3404, 2024 WL 1417972, at *6 (S.D. Tex. Apr. 2, 2024) ("To be insured under the terms of the Policy, the Property must be the insured's residence premises."). The policy expressly conditions coverage to only the dwelling on the "residence premises." (Doc. No. 34-2, at 26.) Thus, to establish coverage, Plaintiff must demonstrate that his dwelling was on the residence premises, which is "where [he] reside[s] and which is shown in the Declarations." *Id.* at 52. Without residence, the dwelling would not be on the policy's definition of the residence premises, which is required to afford coverage under the policy's dwelling coverage. *Id.*

This reading aligns with the numerous Texas and federal courts that have interpreted similar provisions. For example, in *American Risk Insurance Co., Inc. v. Serpikova*, the court concluded that the policy's residence premises clause required the insured to demonstrate that he resided at the premises prior to being afforded coverage. *Am. Risk Ins. Co., Inc. v. Serpikova*, 522 S.W.3d 497, 503 (Tex. App.—Hous. [14th Dist.] 2016, no pet.) (applying the Supreme Court of Texas's decision in *Greene v. Farmers Insurance Exchange*, 446 S.W.3d 761 (Tex. 2014)). There, the insured argued that the policy's residence premises clause only required a showing that the home was listed on the policy's declarations page. *Id.* at 502. However, the court disagreed and reasoned that because the policy clearly stated that the residence premises required the insured to reside or intend to reside on the property, the insured needed to make this showing under her burden. *Id.* Importantly, the court reasoned that the presence of a "vacancy clause," which suspended coverage of the residence premises sixty days after the premises had become "vacant," did not alleviate the plaintiff's burden in proving residence. *Id.* at 503 ("If an insured under the

Greene policy never resided in the dwelling during the policy term, there would be no 'moving from the dwelling' that would trigger *Greene*'s vacancy clause.").

To be sure, Plaintiff spends much of his argument asserting that he did not "vacate" the property and thus, he should still be afforded coverage. (Doc. No. 35, at 12–14.) However, this conflates the residence premises clause with the policy's vacancy provisions.[6] The vacancy clause suspends coverage when the insured has vacated the property for too long of a period. *See Greene*, 446 S.W.3d at 765–66 (explaining that vacancy clauses serve as an agreement between the parties that the insurer will continue insuring the premises for sixty days after the dwelling is no longer the insured's residence). However, this clause is not triggered unless the insured first establishes that the dwelling is his residence. *See Serpikova*, 522 S.W.3d at 503. Thus, like the court concluded in *Serpikova*, before even considering the policy's vacancy clause, Plaintiff must first establish that the property was his residence. *Id.* He has failed to do so.

Here, Plaintiff has undisputably put forth facts satisfying the first and third requirements of the Policy's residence premises condition. Neither party disputes that Plaintiff's home was to be used as anything other than a private residence such as a business or rental home. Further, the Policy's declarations list the residence. (Doc. No. 34-2, at 22). Thus, the court turns to the Policy's second residence premises requirement: whether Plaintiff "resided" at the premises on the date of loss.

Safeco contends that it is not liable under the Policy because the evidence conclusively establishes that Plaintiff did not "reside" at the home on the date of loss. (Doc. No. 34, at 20.)

[6] The policy's "vacancy clause" suspends coverage afforded under the policy's dwelling coverage if the property is "vacant" for sixty days. The policy defines vacant as when "the insured moves from the dwelling and a substantial part of the personal property is removed from the dwelling." (Doc. No. 34-2, at 38).

Safeco cites *Korbel v. Lexington Insurance Co.*,[7] in support of the argument that Plaintiff cannot recover damages from the home because he did not reside there. *Korbel*, 308 F. App'x at 805 (applying Louisiana law). In *Korbel*, the Fifth Circuit looked at the generally prevailing meaning of "reside," which they defined as "to dwell permanently or for a considerable time, to have one's settled or usual abode, to live, *in* or *at* a particular place." *Id.* (emphasis in original) (quoting *Reside*, OXFORD ENGLISH DICTIONARY (2d. ed. 1989)). The court found that the insured "resided" at his parents' house because he ate, bathed, and usually slept there. *Id.* Moreover, the court concluded that Plaintiff did not reside at the insured property because he only sometimes slept at the house when working on renovations, the home was "gutted," and he only kept a minimal amount of furniture in the home. *Id.* Additionally, the court emphasized the fact that Plaintiff did not "engage in leisure activities at the house." *Id.* The court found this property to not be one of the plaintiff's residences even though he spent considerable time working on the insured premises, intended such house to be his future home, and received mail at the property. *Id.*

As mentioned above, the Texas Supreme Court held that "residence" means the "[p]lace where one actually lives or has his home; a person's dwelling place or place of habitation; . . . a dwelling house."[8] *Owens Corning*, 997 S.W.2d at 571 (interpreting the generally accepted meaning of "residence"). At the hearing on Defendant's motion, Plaintiff argued that in Texas, an individual can have multiple residences. Oral Argument at 2:13:18, *Adkisson v. Safeco Ins. Co. of Ind.*, No. 6:23-cv-146 (E.D. Tex. Nov. 8, 2024). Specifically, Plaintiff argues that on the date of loss Plaintiff had two residences—the Godley Residence and the Insured Property. *Id.* at 2:13:20. The court

[7] Although *Korbel* is not binding on this court because it relied on Louisiana state law in coming to its conclusion, it is a helpful analog to this case because of the case's factual similarities. *Korbel*, 308 F. App'x at 805.

[8] Dictionaries consistently define "reside" as "to dwell permanently or continuously." *See, e.g.*, *Reside*, MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/reside (last visited Nov. 12, 2024) (defining "reside" as "to dwell permanently or continuously"); *Reside*, OXFORD ENGLISH DICTIONARY (2d. ed. 1989) (defining "reside" as "to dwell permanently or for a considerable time, to have one's settled or usual abode, to live, *in* or *at* a particular place").

agrees that in Texas an individual can have more than one residence. *See Cicciarella v. Amica Mutual Ins. Co.*, 66 F.3d 764, 769 (5th Cir. 1995) (citing *Hartford Casualty Ins. Co. v. Phillips*, 575 S.W.2d 62,64 (Tex. App.—Texarkana 1978, n.w.h.) ("[A] person may, and many do, have more than one residence.")). However, just because one may have multiples residences in Texas does not alleviate the insured's burden of proving that he resided at the insured property on the date of loss.

Plaintiff asserts various evidence that purportedly creates a fact issue on whether the home was Plaintiff's residence on the date of loss. (Doc. No. 35, at 14–15.) This evidence includes: (1) Plaintiff regularly visited the property; (2) Plaintiff had begun renovations on the home with the intent to make it his permanent retirement home; (3) he received mail at the home; (4) he maintained voter registration at the residence; (5) his living room and dining area property was stored in the property's shop/garage because he was renovating the home's ceilings; (6) although the large refrigerator was inoperable, he maintained a smaller fridge for food and drinks; (7) he maintained electricity and water on the property; and (8) he used several space heaters to maintain heat in the property. *Id.* at 14–15. Plaintiff argues that this evidence creates a fact issue as to whether the property was vacant because "temporary absences from the property" does not necessarily make a property vacant when there are factual circumstances indicating that Plaintiff had not abandoned the property. *Id.* at 13. This argument again misses the mark by relying on facts with respect to whether the property he "vacated" or "abandoned" the property, but fails to raise a genuine issue of material fact establishing that the property was Plaintiff's residence on the date of loss.

Although Plaintiff spent some time at the property, including performing renovations and designating the address for some mail and his driver license, this evidence does not indicate that

the property was his "residence." Rather, the evidence indicates that he only resided at the Godley Residence at the date of loss because it was then, and remains to be, his "dwelling" place where he actually lives. *Owens Corning*, 997 S.W.2d at 571. Notably, on the actual date of loss, Plaintiff was not present at the property. (Doc. No. 35, at 5.) A neighbor had to notify him that water was spewing out of his outside faucet. *Id.* At no time on the date of loss or possibly even weeks after did Plaintiff return to the property to address the issue. (Doc. No. 34-20, at 21.) He instead texts his cousin to go and turn off the water and assigns his daughter the task of speaking with the insurance adjuster on March 16—over three weeks after the date of loss. (Doc, No. 34, at 9.) While the court acknowledges how the weather conditions and Plaintiff's work schedule may affect his availability to travel to the property, his continuous absence, along with other facts, indicates that the property was not where he lived during this period.

To this point, according to his deposition, Plaintiff voluntarily moved away from the property years before the COVID-19 pandemic for his work in Fort Worth, Texas. (Doc. No. 34-20, at 12–13.) He only stayed at the property when he was performing renovations on the property, which was sporadic and random at best. *Id.* at 36. He intended the home to be his permanent residence only in the future. *Id.* at 19–20. He worked and predominantly stayed over hundreds of miles away from the property where he performed a vast majority of his daily tasks. *Id.* at 4–5. The house lacked a central heating unit. *Id.* at 29, 31. Most of Plaintiff's furniture—absent some clothes, a television, and an air mattress—had either been moved to the Godley Residence or outside the dwelling. *Id.* His primary refrigerator had been broken for "several years" and was broken and littered with rat droppings and rotten food. *Id.* at 21; (Doc. No. 34 at 20.) Although he maintained a small refrigerator, Plaintiff testified in his deposition that it was only big enough for some drinks or small food items. (Doc. No. 35-1, at 21–22).

Most important of all, Plaintiff himself classified the times he stayed at the property as "visits." (Doc. No. 35, at 14) ("Plaintiff regularly *visited* the property, each month, although working away."(emphasis added)). Indeed, it is hard to reconcile Plaintiff's argument that he "resides" at a place he himself classifies as a place he "visits," which is commonly defined as "a brief *residence* as a guest" or an "extended but temporary stay." *Visit*, WEBSTER'S THIRD NEW INTER. DICTIONARY 2557 (1981).

These facts are even more troublesome for Plaintiff under the plain meaning of the word "reside," because Plaintiff's sporadic visitation and living at the property was not "permanent or continuous." *Reside*, MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/reside (last visited Nov. 10, 2024) (defining "reside" as "to dwell permanently or continuously"). Plaintiff testified in his deposition that prior to 2020, he typically visited the property "two [or three] times a month, typically on weekends." (Doc. No. 34-20, at 18.) However, these visits decreased following COVID-19; he only could sporadically stay at the property because he was "working the six and seven day[]" shifts in Fort Worth, Texas. *Id.* at 19.

Here, Plaintiff's irregular, random visits to the property cannot reasonably be classified as "permanent or continuous" under the plain meaning definition of "reside." In fact, much like the Fifth Circuit's decision in *Korbel*, which applied the plain meaning definition of "reside," Plaintiff did not establish that he performed "leisure activities at the house," but rather, "was only there if he was '[w]orking on the house, picking up mail, checking on something,'" or visiting someone. *Korbel*, 308 F. App'x at 805–806. His "permanent or continuous" residence was in Godley, Texas, where even today, he currently remains.

Therefore, under these circumstances, there is no reasonable dispute as to whether Plaintiff resided at the property on the date of loss and thus, Plaintiff has failed to meet his burden in proving

coverage under the policy. Accordingly, the court **GRANTS** summary judgment on the basis that Plaintiff failed to reside at the property on the date of loss.[9]

RECOMMENDATION

For the reasons stated herein, the court **RECOMMENDS** that Safeco's motion for summary judgment (Doc. No. 34) be **GRANTED**. Within fourteen days after receipt of the Magistrate Judge's Report, any party may serve and file written objections to the findings and recommendations contained in the Report. A party's failure to file written objections to the findings, conclusions, and recommendations contained in this Report within fourteen days after being served with a copy shall bar that party from de novo review by the district judge of those findings, conclusions, and recommendations and, except on grounds of plain error, from appellate review of unobjected-to factual findings and legal conclusions accepted and adopted by the district court. *Douglass v. U.S. Auto. Ass'n*, 79 F.3d 1415, 1430 (5th Cir. 1996).

So ORDERED and SIGNED this 15th day of November, 2024.

JOHN D. LOVE
UNITED STATES MAGISTRATE JUDGE

[9] At the summary judgment hearing, Plaintiff's counsel agreed that if he failed to create a genuine issue of material fact to maintain his breach of contract claims, then summary judgment should also be granted as to his extracontractual claims for lack of an independent injury according to the Supreme Court of Texas's decision in *USAA Texas Lloyds Co. v. Menchaca*. Oral Argument at 2:46:25, *Adkisson v. Safeco Ins. Co. of Ind.*, No. 6:23-cv-146 (E.D. Tex. Nov. 8, 2024); *see also USAA Tex. Lloyds Co. v. Menchaca*, 545 S.W.3d 479, 492 (Tex. 2018); *Republic Ins. Co. v. Stoker*, 903 S.W.2d 338, 341 (Tex. 1995). Because the court concludes that summary judgment is appropriate for Plaintiff's contractual claims, Plaintiff's remaining claims for violations of the Texas Insurance Code, breach of the duty of good faith and fair dealing, and attorneys' fees fail as a matter of law.