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FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON **Jun 21, 2018**

SEAN F. McAVOY, CLERK

THE CINCINNATI SPECIALTY
UNDERWRITERS INSURANCE
COMPANY, an Ohio corporation,

Plaintiff,

v.

MILIONIS CONSTRUCTION, INC., a
Washington corporation; STEPHEN
MILIONIS. an individual; and
JEFFREY WOOD and ANNA WOOD,
husband and wife, and the marital
community composed thereof,

Defendants.

No. 2:17-CV-00341-SMJ

**ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT**

Before the Court, without oral argument, is Plaintiff the Cincinnati Specialty Underwriters Insurance Company (Cincinnati) Motion for Summary Judgment, ECF No. 32. Cincinnati seeks a declaration that it has no duty to defend or indemnify Milionis in the underlying suit. Defendants Milionis Construction and Stephen Milionis oppose the motion, and defendants Jeffrey and Anna Woods separately oppose the motion. Having reviewed the pleadings and the file in this matter, the Court is fully informed and denies the motion.

1 **BACKGROUND**

2 **A. Procedural background**

3 This case arises from a lawsuit between Jeffrey and Anna Wood and
4 Milionis Construction Company and Stephen Milionis in Spokane County
5 Superior Court (“the underlying suit”). The Woods engaged Milionis Construction
6 Company (“Milionis”) to serve as the general contractor for the construction of a
7 residential home in Newman Lake, Washington. In the underlying suit, the Woods
8 allege that Milionis breached the parties’ agreement by, among other things,
9 failing to (a) perform in a workmanlike manner, (b) follow plans and
10 specifications, (c) purchase and install required materials, (d) provide an
11 accounting for fees, and (e) abandoning the job site. The Woods asserted claims
12 for breach of contract, quantum meruit, promissory estoppel, breach of good faith
13 and fair dealing, negligence, negligent misrepresentation, and violation of the
14 Washington Consumer Protection Act.

15 After the Woods brought the underlying suit, Milionis tendered the suit to
16 Cincinnati for defense and indemnity. Cincinnati is currently defending the
17 underlying suit under a reservation of rights. Cincinnati brought this suit seeking
18 declaratory judgment that it does not have a duty to defend or indemnify.
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1 **B. Factual background**

2 Cincinnati issued a commercial general liability policy, Policy Number
3 CSU0053004 to Milionis in November 2014. The policy was effective from
4 November 23, 2014, to November 23, 2016. The policy provides Milionis
5 coverage for “sums that the insured becomes legally obligated to pay as damages
6 because of ‘bodily injury’ or ‘property damage’ to which this insurance applies.”
7 ECF No. 34 at 29. The policy further states that Cincinnati has “the right and duty
8 to defend the insured against any ‘suit’ seeking those damages. However, we will
9 have no duty to defend the insured against any ‘suit’ seeking damages for ‘bodily
10 injury’ or ‘property damage’ to which this insurance does not apply.” *Id.*

11 The policy also contains an Independent Contractors Limitations of
12 Coverage Endorsement. *Id.* at 46. The endorsement requires Milionis to (a) obtain
13 a formal written contract with all independent contractors and subcontractors
14 verifying valid commercial general liability insurance, (b) obtain a formal written
15 contract stating the independent contractor or subcontractor agrees to indemnify
16 Milionis for any liability, and (c) verify in the contract that the independent
17 contractor or subcontractor has named Milionis as an additional insured on the
18 liability policy. *Id.* The endorsement provides “this insurance will not apply to any
19 loss, claim or ‘suit’ for any liability or any damages arising out of operations or
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1 completed operations performed for you by any independent contractors or
2 subcontractors unless all of the above conditions are met.” *Id.*

3 Milonis did not obtain written hold harmless agreements from its
4 subcontractors and was not named as an additional insured on its subcontractors’
5 policies. Cincinnati moves for summary judgment based on Milonis’s failure to
6 comply with those conditions. Milonis does not dispute these facts, but opposes
7 summary judgment.

8 **LEGAL STANDARD**

9 Summary judgment is appropriate if the “movant shows that there is no
10 genuine dispute as to any material fact and the movant is entitled to judgment
11 as a matter of law.” Fed. R. Civ. P. 56(a). Once a party has moved for summary
12 judgment, the opposing party must point to specific facts establishing that there
13 is a genuine dispute for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).
14 If the nonmoving party fails to make such a showing for any of the elements
15 essential to its case for which it bears the burden of proof, the trial court should
16 grant the summary judgment motion. *Id.* at 322. “When the moving party has
17 carried its burden under Rule [56(a)], its opponent must do more than simply
18 show that there is some metaphysical doubt as to the material facts. . . . [T]he
19 nonmoving party must come forward with ‘specific facts showing that there is
20 a genuine issue for trial.’” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*,

1 475 U.S. 574, 586–87 (1986) (internal citation omitted). When considering a
2 motion for summary judgment, the Court does not weigh the evidence or assess
3 credibility; instead, “the evidence of the non-movant is to be believed, and all
4 justifiable inferences are to be drawn in his favor.” *Sgt. Anderson v. Liberty*
5 *Lobby, Inc.*, 477 U.S. 242, 255 (1986). “In short, what is required to defeat
6 summary judgment is simply evidence ‘such that a reasonable juror drawing all
7 inferences in favor of the respondent could return a verdict in the respondent’s
8 favor.’” *Zetwick v. Cty. of Yolo*, 850 F.3d 436, 441 (9th Cir. 2017) (quoting *Reza*
9 *v. Pearce*, 806 F.3d 497, 505 (9th Cir. 2015)).

10 DISCUSSION

11 A. Cincinnati has a duty to defend Milionis in the underlying suit.

12 Liability insurance policies generally impose on the insurer two distinct
13 duties: the duty to defend the insured against lawsuits or claims and the duty to
14 indemnify the insured against any settlements or judgments. *See Am. Best Food,*
15 *Inc. v. Alea London, Ltd.*, 229 P.3d 693, 696 (2010). The duty to defend is broader
16 than the duty to indemnify. *Id.* The duty to defend exists if the policy conceivably
17 covers the claim allegations, while the duty to indemnify exists only if the policy
18 actually covers the claim. *Id.* To determine whether an insurer has a duty to defend,
19 the Court looks only at the “eight corners” of the policy and the complaint. *Expedia,*
20 *Inc. v. Steadfast Ins. Co.*, 329 P.3d 59 (Wash. 2014). Here, the complaint in the

1 underlying suit alleges statutory, contractual, and tort claims, the bases of which are
2 conceivably covered under Milionis’s general commercial liability policy with
3 Cincinnati. Accordingly, Cincinnati has a duty to defend Milionis in the underlying
4 suit.

5 **1. The “Damage to Your Work” policy exclusion does not relieve**
6 **Cincinnati of its duty to defend the underlying suit.**

7 Cincinnati first argues that it has no duty to defend Milionis in the
8 underlying suit based on the “Damage to Your Work” exclusion. The exclusion
9 applies to “‘property damage’ to ‘your work’ arising out of it or any part of it and
10 included in the ‘products-completed operations hazard.’” ECF No. 34 at 58. The
11 products liability operations hazard includes “‘all bodily injury’ and ‘property
12 damage’ . . . arising out of ‘your product’ or ‘your work’” if the product is no
13 longer in the insureds’ possession or the work has been completed or abandoned.
14 Thus, the “Damage to Your Work” policy exclusion limits coverage to property
15 damage that occurs before the work has been completed or abandoned.

16 The “Damage to Your Work” policy exclusion does not necessarily preclude
17 coverage for the claims asserted in the Woods’ complaint in the underlying suit.
18 The Woods allege that Milionis “performed numerous tasks in a substandard and
19 unworkmanlike manner” including “failure to assert steel columns at necessary
20 points in the basement walls per the structural details of the engineering and
architectural drawings” and “improperly stepping down the west side

1 foundation . . . [causing] the foundation wall to sit two feet higher than it was
2 supposed to be.” ECF No. 34 at 77. These allegations assert property damage that
3 occurred before the work was completed or abandoned. Accordingly, the “Damage
4 to Your Work” policy exclusion does not exclude coverage based on the facts
5 alleged in the complaint.

6 **2. The independent contractor liability endorsement does not relieve**
7 **Cincinnati of its duty to defend the underlying suit.**

8 Cincinnati next argues that the Woods’ claims are not covered because
9 Milionis failed to comply with the subcontractor endorsement. Again, this matter
10 cannot be determined from the face of the policy and the complaint. The policy
11 contains an Independent Contractors Limitations of Coverage endorsement, which
12 permits coverage for “any loss, claim or ‘suit’ for any liability or any damages
13 arising out of operations or completed operations performed for you by any
14 independent contractors or subcontractors” as long as all conditions in the
15 endorsement are met. Cincinnati asserts that Milionis failed to comply with the
16 endorsement’s requirements, however this cannot be determined from the eight
17 corners of the policy and the complaint. Further, the underlying suit alleges causes
18 of action that extend beyond “completed operations performed for [Milionis] by
19 any independent contractors or subcontractors.”

20 **B. Questions of fact preclude summary judgment on Cincinnati’s duty to**
indemnify Milionis for liability sustained in the underlying suit.


1 Cincinnati also seeks summary judgment that it has no duty to indemnify
2 Milionis for damages incurred in the underlying suit. The duty to indemnify is a
3 separate obligation from the duty to defend. *New Hampshire Indem. Co., Inc. v.*
4 *Budget Rent-A-Car Systems, Inc.*, 64 P.3d 1239, 1243 (Wash. 2003) (citing
5 *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 15 P.3d 115, 134 (Wash.
6 2000)). The duty to indemnify turns on the insured's actual liability to the
7 claimant and the actual coverage under the policy. *Hayden v. Mutual of Enumclaw*
8 *Ins. Co.*, 1 P.3d 1167, 1171 (Wash. 2000). To determine coverage, the insured
9 must establish that the loss falls within the scope of the policy's insured losses.
10 *Allstate Ins. Co. v. Bowen*, 121 Wash. App. 1030 (2004). Because the underlying
11 suit has not yet concluded, questions of fact remain regarding the basis of
12 Milionis's actual liability, if any, to the Woods. Accordingly, summary judgment
13 is not proper on this issue.

14 Accordingly, **IT IS HEREBY ORDERED:**

15 **1.** Plaintiff's Motion for Summary Judgment, **ECF No. 32**, is **DENIED.**

16 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this Order and
17 provide copies to all counsel.

18 **DATED** this 21st day of June 2018.

19 
20 SALVADOR MENDEZ, JR.
United States District Judge