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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

BURGETT, INC.,

No. 2:11-cv-01554-MCE-JFM

Plaintiff,

v.

MEMORANDUM AND ORDER

AMERICAN ZURICH INSURANCE
COMPANY,

Defendant.

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This matter arises out of Plaintiff Burgett, Inc.'s ("Plaintiff") motion for partial summary judgment for payment of attorneys' fees plaintiff incurred prior to November 23, 2010, the date plaintiff tendered to Defendant the defense of the underlying action brought against it by Persis International Inc.¹ and Edward F. Richards (collectively, "Persis").

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¹ Persis International, Inc. v. Burgett, Inc., 1:09-cv-07451 (N.D. Ill. 2011). Plaintiff attached the relevant complaint in the underlying action to its complaint. (See Pl.'s Compl., ECF No. 1, Ex. 2.)

1 Defendant, American Zurich Insurance, Inc. ("Defendant"),
2 Plaintiff's general liability insurance carrier, opposes the
3 motion. For the reasons set forth below, Plaintiff's motion is
4 DENIED.

5 On November 23, 2011, the court issued an order granting
6 Plaintiff's motion for partial summary judgment. (See Order, ECF
7 No. 22.) Specifically, the court held that Defendant breached
8 its duty to defend Plaintiff in the underlying Persis action.
9 (Id. at 22:26-28.) The court also held that Plaintiff should be
10 "awarded reasonable attorneys' fees for breach of its duty to
11 defend the underlying Persis action." (Id. at 23:1-2.)

12 Since the court issued its order, Defendant has paid Zurich
13 \$68,388.85 for expenses, fees and prejudgment interest Plaintiff
14 has incurred defending the Persis² action.³ (Pl.'s Stmt. of
15 Uncontroverted Facts ("UF"), ECF No. 28-4, ¶ 8.) Defendant,
16 however, refused to pay any fees Plaintiff incurred prior to
17 tendering defense of the Persis action to Defendant. (Id. ¶ 17.)

18 Plaintiff filed its motion on March 22, 2012, asking the
19 court to order Defendant to pay Plaintiff for those fees it
20 incurred defending the Persis action prior to tendering defense
21 of that action to Defendant.

22
23 ² Plaintiff also asks the court to order Defendant to pay
24 for fees Plaintiff incurred in defending an unrelated action –
25 the "Richards Lawsuit." (Pl.'s Mot. for Summ. J. ["MSJ"], ECF
26 No. 26, at 2:10-4:2.) The "Richards Lawsuit," however, is not,
and never has been, at issue before the court. To that end,
Plaintiff's motion is denied to the extent it seeks fees incurred
defending actions other than the Persis action.

27 ³ Plaintiff conceded that Defendant has reimbursed it for
28 all fees incurred for its post-tender defense of the Persis
Action. (See Pl.'s Reply to Def.'s Opp'n to MSJ ["Reply"], ECF
32 at 12:9-10.)

1 The sole issue before the court, therefore, is purely a legal
2 question: under California law, is an insurer who previously
3 breached its duty to defend required to pay fees incurred by the
4 insured prior to tendering defense of the underlying action?

5 Plaintiff's central argument in support of its motion is
6 that, because Defendant originally declined to defend the Persis
7 action, and Plaintiff had to seek a court order to invoke
8 Defendant's duty to defend, the date Plaintiff tendered defense
9 of the Persis action is irrelevant. More specifically, while
10 Plaintiff concedes that the duty to defend does not arise until
11 tender, Plaintiff asserts that the duty to reimburse is broader
12 and requires a Defendant who has breached its duty to defend to
13 pay all fees incurred by the insured, both pre- and post-tender.
14 According to Plaintiff, "[i]n addition to Zurich's undisputed
15 duty to defend post-tender, there is an additional implied-in-law
16 duty which requires Zurich to reimburse Burgett for its expenses
17 incurred in defending the Persis . . . action[] which predated
18 the date of tender in" the Persis action. (MSJ at 10:26-11:2.)
19 Plaintiff maintains that "[s]uch rules of law, even when not
20 squarely articulated, are properly deduced from the courts'
21 decisional logic." (Reply at 2:23-3:1.)

22 Defendant argues that California case law has long held that
23 "no duty to defend can arise before the insured tenders the
24 defense of the third party lawsuit to the insurer." (Opp'n to
25 MSJ, ECF 29 at 3:18-19.) Defendant asserts that "[t]ender of
26 defense is a condition precedent to the insured's right to be
27 indemnified. Thus, whatever a carrier might do after tender
28 cannot create a duty to reimburse fees incurred prior to tender,

1 since no duty exists until tender." (Id. at 4:1-3.) (Emphasis in
2 original.) Therefore, Defendant maintains, it has no duty to
3 reimburse Plaintiff for fees and costs it incurred prior to
4 tendering defense of the action.

5 The court finds that Plaintiff is only entitled to those
6 fees it would have incurred had Defendant initially accepted
7 defense of the Persis action, and thus, Plaintiff's motion should
8 be denied. While Plaintiff asks the court to impose an "implied-
9 in-law" obligation upon Defendant to reimburse fees incurred
10 prior to tender, Defendant has directed the court to a
11 significant body of California case law containing express
12 language stating that there is no duty to defend until the
13 insured tenders defense of the underlying action.

14 Specifically, under California law, "[i]t is well understood
15 . . . that an insurer's duty does not arise until defense is
16 tendered by the insured and the known facts point to a potential
17 for liability under the policy." Valentine v. Membrila Ins.
18 Services, Inc., 118 Cal. App. 4th 462, 473 (2004). This axiom
19 was firmly established by the California Supreme Court in
20 Montrose Chemical Corp. v. Super. Ct., 6 Cal. 4th 287, 295
21 (1993), which held that "[t]he defense duty is a continuing one,
22 arising on tender of defense and lasting until the underlying
23 lawsuit is concluded."

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1 This principle has been consistently reiterated since the holding
2 in Montrose. See Foster-Gardner, Inc. v. National Union Fire
3 Ins. Co., 18 Cal. 4th 857, 886 (1998) (holding that "the temporal
4 limits of the insurer's duty to defend" lies "between tender of
5 the defense and conclusion of the action."); Buss v. Super. Ct.,
6 16 Cal. 4th 35, 46 (1997) (duty to defend "arises as soon as
7 tender is made.") Defendant's duty to reimburse Plaintiff for
8 defense fees, therefore, spans from the date Plaintiff tendered
9 defense of the underlying action, November 3, 2010 (see Pl.'s
10 Compl., ECF 1, Ex 3), to the conclusion of the Persis action.

11 Plaintiff, conversely, has cited no California law holding
12 that an insurer who declines to accept defense after tender will
13 subsequently be obligated to pay pre-tender expenses if a court
14 finds the insurer did owe a duty to defend. For example,
15 Plaintiff relies heavily on Jamestown Builders Inc. v. General
16 Star Indemnity Co., 77 Cal. App. 4th 341 (1999). Jamestown,
17 however, is inapposite. Jamestown involved a "no-voluntary-
18 payment provision⁴ to preclude insurance coverage for repair
19 expenses incurred by a home developer." Id. at 343. The primary
20 holding in Jamestown was that where an insured does not tender
21 defense to the insurer, the insurance policy's no voluntary
22 payment provision will release an insurer's obligation to
23 indemnify a Plaintiff for a settlement entered into unilaterally,
24 absent a showing of prejudice. Id. at 350.

25
26 ⁴ The court notes that Defendant also argues that the
27 no-voluntary payment provision in its policy with Plaintiff also
28 negates any obligation to pay pre-tender costs. Because the
court finds that, under California law, the duty to Defendant
does not arise until tender, and thus, Defendant is not required
to pay pre-tender expenses, the court does not reach this issue.


1 Plaintiff, however, relies on dicta stating that, where an
2 insurer breaches its duty to defend, a no-voluntary payment
3 provision will not protect the insurer unless it can show that a
4 settlement entered into without its consent "was not reasonable
5 or was the product of fraud or collusion." Id. at 347-348.
6 Jamestown does not, however, create an "implied-in law"
7 obligation upon insurers who originally decline the insured's
8 tender to later reimburse the insured for pre-tender expenses.

9 Plaintiff's inability to cite to any California law directly
10 on point underscores the tenuous nature of its argument.
11 Plaintiff cannot now, post hoc, argue that there is some
12 unstated, yet implied, duty upon insurers to pay fees that it
13 would not have had to pay had it originally accepted tender.
14 Defendant, conversely, has cited to numerous cases supporting its
15 contention that it is not obligated to reimburse Plaintiff for
16 expenses incurred prior to tendering defense of the Persis
17 action. While an insurer is undoubtedly liable for the
18 consequences flowing directly from its breach, it is not liable
19 for costs incurred before it did anything wrong, and was unaware
20 that there was even a claim to defend.

21 For the foregoing reasons, Plaintiff's motion is DENIED in
22 its entirety.

23 IT IS SO ORDERED.

24 Dated: August 6, 2012

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26 
27 MORRISON C. ENGLAND, JR.
28 UNITED STATES DISTRICT JUDGE