-WMC Acceptance Insurance Company v. American Safety Risk Retention Group, Inc. et al Doc. 131

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ACCEPTANCE INSURANCE COMPANY,

Plaintiff,

v.

AMERICAN SAFETY RISK RETENTION GROUP, INC. *et al.*,

Defendants.

Civil No. 08cv1057-L(WMc)

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND/OR PARTIAL SUMMARY JUDGMENT

In this equitable contribution action between liability insurers the parties filed cross-motions for summary judgment. For the reasons which follow, Plaintiff's motion is **GRANTED IN PART AND DENIED IN PART**, and Defendants' motion is **DENIED**.

Plaintiff defended its insured Bay Area Construction Framers, Inc. ("Bay Area") in the underlying construction defect litigation, and paid a settlement on behalf of Bay Area. Bay Area had contracted with Davidon Homes ("Davidon"), a general contractor, for framing work at a residential development project known as the Portola Meadows Townhomes ("Project"). Three other framing subcontractors worked on the Project. Bay Area's work was completed in 1998. Bay Area was insured under commercial liability polices obtained from Plaintiff for the period September 17, 1993 to August 15, 2000, from Defendant American Safety Risk Retention Group, Inc. ("ASRRG") for the period August 15, 2000 to October 1, 2001, and from Defendant

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American Safety Indemnity Company ("ASIC") for the period October 1, 2001 to October 1, 2002.

On May 21, 1999 Portola Meadows Townhomes Association ("Portola Association") gave a construction defect notice to Davidon pursuant to California Civil Code Section 1375 ("Calderon Notice") complaining of a wide variety of defects, including plumbing, electrical, framing and grading defects. (Joint Exh. J at 194.) On April 10, 2001 the Portola Association filed a construction defect lawsuit against Davidon ("Portola Action") complaining of the same defects. (Pl.'s Req. for Judicial Notice Exh. A at 3-4.) Bay Area was not a named party in that action. (*See id*. & Joint Exh. M (first am. compl.).) On June 11, 2001 Davidon filed a cross-complaint against Bay Area and other subcontractors. (Joint Exh. N.) Plaintiff defended Bay Area in the Portola Action. Defendants declined coverage. On March 4, 2003 the Portola Association filed a second amended complaint and added more alleged defects to the action. (Pl.'s Req. for Judicial Notice Exh. D.) Amendments to the second amended complaint were filed in April 7 and May 23, 2003. (*Id*. Exh. E & F.) On August 16, 2004 Plaintiff settled the Portola Action on Bay Area's behalf for $510,000. (*See* Joint Exh. P.) On August 26, 2004, the court in the Portola Action issued an Order Determining Good Faith Settlement. (Joint Exh. Q.)

Plaintiff filed a complaint in state court against Defendants for indemnity, contribution and declaratory relief under California law. The case was removed to federal court based on diversity jurisdiction. Ultimately, the parties filed cross-motions for summary judgment.

Federal Rule of Civil Procedure 56 empowers the court to enter summary judgment on factually unsupported claims or defenses, and thereby "secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 327 (1986). If summary judgment is not rendered on the whole action, the court "may enter an order stating any material fact – including an item of damages or other relief – that is not genuinely in dispute and treating the fact as established in the case." Fed. R. Civ. Proc. 56(g).

Summary judgment or adjudication of issues is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment

as a matter of law. Fed. R. Civ. P. 56(c). A fact is material when it affects the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A "genuine issue" of material fact arises if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

The burden on the party moving for summary judgment depends on whether it bears the burden of proof at trial. "When the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case." *See C.A.R. Transp. Brokerage Co., Inc. v. Darden Restaurants, Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted). When the moving party would not bear the burden at trial, then it can meet the burden on summary judgment by pointing out the absence of evidence with respect to any one element of the claim or defense. *See Celotex*, 477 U.S. at 325.

If the movant meets its burden, the burden shifts to the nonmovant to show summary adjudication is not appropriate. *Celotex*, 477 U.S. at 317, 324. The nonmovant does not meet this burden by showing "some metaphysical doubt as to material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The nonmovant must go beyond the pleadings to designate specific facts showing there are genuine factual issues which "can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson*, 477 U.S. at 250.

When ruling on a summary judgment motion, the nonmovant's evidence is to be believed, and all justifiable inferences are to be drawn in its favor. *Anderson*, 477 U.S. at 255. "A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence." Fed. R. Civ. Proc. 56(c)(2). Determinations regarding credibility, the weighing of evidence, and the drawing of legitimate inferences are jury functions, and are not appropriate for resolution by the court on a summary judgment motion. *Anderson*, 477 U.S. at 255.

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The mere fact that the parties filed cross-motions "does not necessarily mean there are no disputed issues of material fact and does not necessarily permit the judge to render judgment in favor of one side or the other." *Starsky v. Williams*, 512 F.2d 109, 112 (9th Cir. 1975). "[E]ach motion must be considered on its own merits." *Fair Hous. Council of Riverside County, Inc. v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001). Furthermore, the court must consider evidence submitted in support of and in opposition to both motions before ruling on either one. *Id*.

ASRRG argues that summary judgment should be entered in its favor based on the doctrine of retraxit. On June 29, 2004 Bay Area filed a complaint against ASSRG[1] for breach of the insurance contract, declaratory relief and insurance bad faith stemming from ASSRG's denial of coverage relative to the Portola Action. It is undisputed that the action was voluntarily dismissed with prejudice on January 18, 2006. ASRRG contends that Bay Area's dismissal with prejudice of that action bars Plaintiff's current action against ASRRG for equitable contribution.

Common law retraxit is what is now called a dismissal with prejudice. *Rice v. Crow*, 81 Cal. App. 4th 725, 733 (2000). It is "a judgment on the merits preventing a subsequent action on the dismissed claim" and "invok[es] the principles of res judicata." *Id*. A judgment issued by a California court is entitled to the same preclusive effect in this court as it would be accorded in a California court. *See NAACP v. Los Angeles Unified Sch. Dist.*, 750 F.2d 731, 736 (9th Cir. 1984) (citing 28 U.S.C. § 1738). Furthermore, federal courts apply the law of the state where the judgment was rendered to determine the preclusive effect of a state court judgment. *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 481-82 (1981). Under California law, the doctrine of res judicata has two aspects – res judicata or claim preclusion and collateral estoppel or issue preclusion. *Rice*, 81 Cal. App. 4th at 734.

"Res judicata is applicable only to the same causes of action between the same parties or their privies." Here, the first action was filed by Bay Area, the insured, and the present action

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[1] The named defendant is ASIC; however, the substantive allegations apparently relate to ASRRG's policy. (*See* Joint Exh. R at 252.) Defendants contend that ASRRG was the defendant in that action. (*See* Defs' Opp'n at 17.) Plaintiff does not dispute this.

was filed by the insurer. Defendants argue that Plaintiff is in privity with Bay Area. They rely on *Barney v. Aetna Casualty and Surety Company*, 185 Cal. App. 3d 966 (1986), for the proposition that an insured and its insurer are in privity for purposes of retraxit. Although the factual background in *Barney* notes that an insured plaintiff's related action was dismissed on the grounds of retraxit, the cited opinion did not review that dismissal or in any way discuss retraxit or its element of privity. Accordingly, Defendants' reliance on *Barney* is misplaced.

Plaintiff argues that it is not in privity because "[a] privy is one who, after rendition of the judgment, has acquired an interest in the subject matter affected by the judgment through or under one of the parties, as by inheritance, succession or purchase." (Pl.'s Reply at 17, quoting *Rice*, 81 Cal. App. 4th at 736.) Plaintiff claims that it does not fit this description, and Defendants do not dispute it. (*See* Defs' Reply.)

Furthermore, Plaintiff contends that the causes of action asserted in Bay Area's complaint and in this action are different. The rights asserted by Bay Area belonged to it exclusively based on its insurance contract with ASRRG, while the right asserted by Plaintiff against ASRRG in this action is based on a rule of equity and exists independently, as opposed to derivatively, of the insured's rights. (Pl.'s Opp'n at 17-18, citing *Fireman's Fund Ins. Co. v. Maryland Cas. Co.*, 65 Cal. App. 4th 1279, 1293-94.) Again, Defendants do not dispute this. (*See* Defs' Reply.) Based on the foregoing, Plaintiff's action against ASRRG is not barred under the doctrine of claim preclusion.

"Collateral estoppel is applicable to bar relitigation of *issues* previously litigated between the same parties on a different cause of action if the issues for which collateral estoppel is sought in the second action: (1) are identical to those litigated in the first action; (2) were actually litigated and necessarily decided in determining the first action; (3) are asserted against a participant in the first action or one in privity with that party; and (4) the former decision was final on the merits." *Rice*, 81 Cal. App. 4th at 735 (emphasis in original, citation omitted). Plaintiff argues that collateral estoppel does not apply here because the issues raised in this case were not "necessarily decided" in Bay Area's action. (Pl.'s Opp'n at 18.) Defendants do not dispute this. (*See* Defs' Reply.) When a case is voluntarily dismissed or settled, but a consent or

stipulated judgment is not entered, and a trial is avoided, collateral estoppel does not bar litigating any issue in the underlying action. *Rice*, 81 Cal. App. 4th at 736-37 & n.1. Accordingly, Plaintiff's action against ASRRG is not barred by collateral estoppel.

Retraxit is a defense on which ASRRG bears the burden of proof. To meet its burden on summary judgment, it has the initial burden of establishing the absence of a genuine issue of fact. *See C.A.R. Transp. Brokerage Co.*, 213 F.3d at 480. Defendants have failed to present sufficient evidence to warrant a summary judgment in favor of ASRRG based on the doctrine of retraxit. In this regard, their motion is **DENIED**.

Defendants next argue that summary judgment should be entered in favor of ASIC because Plaintiff's claims are time-barred. The parties agree that California Code of Civil Procedure Section 339 provides for a two-year statute of limitations applicable to Plaintiff's claims. (Defs' Mot. at 21; Pl's Opp'n at 27.) An action based on a duty to defend is timely commenced if its is filed within two years after the underlying action is terminated by final judgment. *Lambert v. Commonwealth Land Title Ins. Co.*, 53 Cal.3d 1072, 1077 (1991); *see also Preferred Risk Mut. Ins. Co. v. Reiswig*, 21 Cal.4th 208, 213 (1999) (equitable indemnity). The parties do not dispute that the statute accrued when Plaintiff paid for the settlement of the Portola Action. (Defs' Opp'n. at 21-22; Pl.'s Opp'n at 27.) Defendants argue that this action is time barred because Plaintiff did not name ASIC as a defendant until an amended complaint was filed on February 7, 2008. Plaintiff argues that the action is timely because the action was filed on May 22, 2006.

ASIC has already raised the statute of limitations defense in its motion to dismiss. The court rejected its argument because it appeared, based on the record, that the amended complaint related back to the initial May 22, 2006 complaint. (Order Denying American Safety Indemnity Company's Motion to Dismiss, filed Mar. 3, 2010, at 2-6.) Two factual issues were identified which could potentially be raised at the summary judgment stage – whether Plaintiff knew prior to the filing of the initial complaint that ASIC had a separate identity from ASRRG and whether Plaintiff was dilatory after discovering ASIC's separate identity. (*Id*. at 4-6.)

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On summary judgment, ASIC did not address any of the factual issues regarding the relation-back doctrine. Accordingly, it has failed to present sufficient evidence to warrant summary judgment in its favor. To the extent Defendants' summary judgment motion is based on the statute of limitations, it is **DENIED**.

Defendants also argue that ASSRG is entitled to a partial summary judgment limiting the amount of damages Plaintiff could potentially recover to only those amounts it incurred within two years before commencing this action against ASSRG. This argument is based on case law pertaining to installment contracts. (*See* Defs' Opp'n at 20.) Defendants cited no authority to show that this case law is applicable in equitable indemnity actions. In fact, the right to equitable contribution is not contractual. *Fireman's Fund Ins. Co.*, 65 Cal. App. 4th at 1295 (1998). Accordingly, Defendants' motion for partial summary judgment to limit the amount of damages is **DENIED**.

Both sides argue that they are entitled to summary judgment based on Defendants' duty to defend Bay Area in the Portola Action. Although it is undisputed that Plaintiff defended and settled the Portola Action on behalf of Bay Area and that Defendants refused to participate in the defense or settlement, Defendants dispute that they had a duty to defend.

California substantive law applies in this diversity action. *See Intri-Plex Technol., Inc. v. Crest Group, Inc.*, 499 F.3d 1048, 1052 (9th Cir. 2007) & *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). "In the insurance context, the right to contribution arises when several insurers are obligated to indemnify or defend the same loss or claim, and one insurer has paid more than its share of the loss or defended the action without any participation by the others." *Monticello Ins. Co. v. Essex Ins. Co.*, 162 Cal. App. 4th 1376, 1385 (2008). Accordingly, as a part of its claim for equitable contribution, Plaintiff must show that Defendants had a duty to defend Bay Area.

"[T]he duty to defend is broader than the duty to indemnify, and it may apply even in an action where no damages are ultimately awarded." *Scottsdale Ins. Co. v. MV Transportation*, 36 Cal. 4th 643, 654 (2005).

> Determination of the duty to defend depends, in the first instance, on a comparison between the allegations of the complaint and the terms of the policy. But the duty also exists where extrinsic facts known to the insurer suggest that the claim may be

covered. Moreover, that the precise causes of action pled in the third-party complaint may fall outside policy coverage does not excuse the duty to defend where, under the facts alleged, reasonably inferable, or otherwise known, the complaint could fairly be amended to state a covered liability.

Id. (citations omitted). The duty to defend is excused only where "the third party complaint *can by no conceivable theory raise a single issue which could bring it within the policy coverage*. *N. Am. Bldg. Maint.*, 137 Cal. App. 4th at 640 (quoting *Montrose Chem. Corp. v. Super. Ct. (Can. Universal Ins. Co., Inc.)*, 6 Cal. 4th 287, 300 (1993)) (internal quotation marks and brackets omitted, emphasis in original). "The insured has the burden of showing that the claim falls within the scope of coverage and the insurer has the burden of proving that an otherwise covered claim is barred by a policy exclusion." *Davis v. Farmers Ins. Group*, 134 Cal. App. 4th 100, 104 (2006).

"On a motion for summary judgment regarding its duty to defend, the insurer must be able to negate any potential coverage as a matter of law." *N. Am. Bldg. Maint.*, 137 Cal. App. 4th at 640. Consistently, the parties bear an asymmetrical burden:

To prevail, the insured must prove the existence of a *potential for coverage*, while the insurer must establish *the absence of any such potential*. In other words, the insured need only show that the underlying claim *may* fall within policy coverage; the insurer must prove that it *cannot*. Facts merely tending to show that the claim is not covered, or may not be covered, but that are insufficient to eliminate the possibility that resultant damages (or nature of the action) will fall within the scope of coverage, therefore add no weight to the scales. Any seeming disparity in the respective burdens merely reflects the substantive law.

Id. at 637-38 (quoting *Montrose*, 6 Cal. 4th at 300)) (internal quotation marks and brackets omitted). "Any doubt as to whether the facts give rise to a duty to defend is resolved in the insured's favor." *Horace Mann Ins. Co. v. Barbara B.*, 4 Cal. 4th 1076, 1081 (1993). Accordingly, on a summary judgment motion, the insurer arguing it had no duty to defend "faces an uphill battle from the beginning." *Hudson Ins. Co. v. Colony Ins. Co.*, 624 F.3d 1264, 1267 (9th Cir. 2010) (equitable contribution action).

The analysis is not different if the duty to defend is triggered by more than one insurer's policy. "Each insurer's duty to defend must be assessed independently, since the duty of each is independent of whatever duty another might have." *Wausau Underwriters Ins. Co. v. Unigard*

Sec. Ins. Co., 68 Cal. App. 4th 1030, 1033 (1998). "An insurer's duty to provide defense services inures to the benefit of other obligated insurers and an insurer breaching the defense duty should not be allowed to profit at the expense of an insurer faithfully discharging its obligation." *Md. Cas. Co. v. Nat'l Am. Ins. Co.*, 48 Cal. App. 4th 1822, 1829 (1996) (citing *Cont'l Cas. Co. v. Zurich Ins. Co.*, 57 Cal. 2d 27, 37 (1961)). "When a duty to defend is shown, nonparticipating coinsurers are presumptively liable for both the costs of defense and settlement." *Safeco Ins. Co. of Am. v. Super. Ct. (Century Surety Co.)*, 140 Cal. App. 4th 874, 880 (2006).

It is undisputed that the pertinent policy provisions are the same in ASSRG's and ASIC's policies. Both policies provide that they "appl[y] only to property damage which "occurs during the policy period." (Joint Exh. H at 107.) They define "property damage" as "[p]hysical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; . . .." (*Id*. at 119.) "Occurrence" is defined as

> an accident, including continuous or repeated exposure to substantially the same general harmful conditions that happens during the term of the insurance. "Property damage" . . . which commenced prior to the effective date of this insurance will be deemed to have happened prior to, and not during, the term of the insurance.

(*Id*. at 128.) In addition, the policies contain a Pre-Existing Injury or Damage Exclusion, which provides:

> This insurance does not apply to:
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> 1. Any "occurrence," incident or "suit" whether known or unknown to any officer of the Named Insured:
>
>   a. which first occurred prior to the inception date of this policy . . .; or
>
>   b. which is, or is alleged to be, in the process of occurring as of the inception date of this policy . . ., even if the "occurrence" continues during this policy period.
>
> 2. Any damages arising out of or relating to . . . "property damage" . . . which are known to any officer of any insured, which are in the process of settlement, adjustment or "suit" as of the inception date of this policy . . ..

(*Id*. at 132.)

Defendants do not dispute that the type of property damage alleged in the Portola Action falls within their policy coverage. The dispute is whether any property damage caused by Bay Area's work occurred during either Defendant's policy period.

Defendants argue that any potential for coverage is precluded because Bay Area's work on the Project was completed long before the inception date of either policy. This argument is based on the premise that the property damage at issue was a continuous injury which began with Bay Area's allegedly negligent work and continued thereafter. Defendants rely on *Pepperell v. Scottsdale Insurance Company*, 62 Cal. App. 4th 1045 (1998). Based on the policy language in *Pepperell*, the court held that coverage under the policy was triggered by,[2] among other things, continuous property damage during the policy period. Whether the property damage at issue was in fact continuous was a disputed issue of fact, which the court reserved for the trier of fact. *Id.* at 1056. The court did not rely upon or formulate any particular legal standard to determine whether property damage is continuous for purposes of the continuous injury trigger. Accordingly, *Pepperell* offers no support to Defendants' proposition that the property damage in this case was continuous, and therefore excluded from coverage. Moreover, *Pepperell* addressed a policy with a continuous injury trigger. Defendants' policy did not contain a continuous injury trigger. *Penn. Gen. Ins. Co. v. Am. Safety Indem. Co.*, 185 Cal. App. 4th 1515, 1532 (2010).

The relevant language of Defendants' policies was recently interpreted in *Pennsylvania General Insurance Company v. American Safety Indemnity Company*. It interpreted the same policies which are at issue here to decide "whether 'occurrence,' which must happen during the policy year to trigger coverage under ASIC's policy, is the *first manifestation of damage* rather than [the insured's] *causal conduct*." *Id*. at 1530 (emphases added). It held that the policy, including the Pre-Existing Injury of Damage Exclusion, was "reasonably susceptible to the

[2] "'Trigger of coverage' is a term of convenience used to describe that which, under the specific terms of an insurance policy, must happen in the policy period in order for the *potential* of coverage to arise. The issue is largely of timing – what must take place *within the policy's effective dates* for potential of coverage to be 'triggered'?" *Pepperell*, 62 Cal. App. 4th at 1050.

interpretation that resulting damage, not the causal conduct, is . . . a defining characteristic of the occurrence that must take place during the policy period to take coverage." *Id.* at 1526; *see also id.* at 1527, 1534.[3]

To the extent Defendants rely on the fact that Bay Area completed its work, *i.e*, that causal conduct occurred, long before the inception dates of Defendants' policies, their argument that the policies negate any potential for coverage is rejected based on *Pennsylvania General*. The relevant inquiry to determine whether there was potential for coverage under Defendants' policies is whether, as alleged in the Portola Action, there was a possibility that any property damage first manifested itself during either of Defendants' policies.

Defendants point to various events to argue that the property damage first manifested before the inception dates of their respective policies. They point to the Calderon Notice, which was given to Davidon before either of Defendants' policies incepted, and the Portola Action, which was filed before the inception of ASIC's policy. The Calderon Notice and the Portola Action complaint and amended complaint refer to some framing defects and could therefore potentially implicate property damage caused by Bay Area's work. (*See* Joint Exh. J at 195; Joint Exh. M at 214 & Pl's Req. for Jud. Notice Exh. A at 3-4.) However, they did not negate the possibility that other property damage resulting from Bay Area's work would first manifest itself at a later time.

Defendants next argue that the Calderon Notice, as a matter of law, had to identify all the construction defects, and would therefore preclude the possibility of later-discovered defects. This argument is unsupported. The applicable statute does not require the notice to contain a definitive list of all defects or their resulting damages. Cal. Civ. Code § 1375(b) (requiring "[a]n initial list of defects sufficient to appraise the respondent of the general nature of the defects and

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[3] *Pennsylvania General* also disposed of Defendants' arguments based on the definition of property damage, which deems property damage which commenced prior to the inception date of the policy to have happened prior to and not during the policy, the so-called "deemer provision" and Defendants's reliance on *USF Insurance Company v. Clarendon America Ins. Co.*, 452 F. Supp. 2d 972 (2006). *Cf. Penn. Gen. Ins. Co.*, 185 Cal. App. 4th at 1530-32 & Defs' Opp'n at 26-27. The court rejects these arguments for the same reasons they were rejected in *Pennsylvania General*.

issue," and "[a] description of the results of the defects if known"). The text of the Calderon Notice itself states that the list of "observed damages" was only "preliminary." (Joint Exh. J at 195).

Furthermore, the Calderon Notice and the Portola Action complaint and amended complaint do not conclusively preclude coverage. The description of the allegedly defective work and damages is very general, and none of the documents identifies any particular framing subcontractor or residential unit. In addition to Bay Area, three other framing companies worked on the Project. (Decl. of Stacy R. Goldscher at 2 & Exh. B, C & D.)[4] It is impossible to tell which of the framing contractors worked on the units which exhibited any of the framing defects referenced in these documents.

Defendants' evidence is therefore at best inconclusive on the issue of coverage. "Facts merely tending to show that the claim is not covered, or may not be covered, but that are insufficient to eliminate the possibility that resultant damages (or nature of the action) will fall within the scope of coverage, therefore add no weight to the scales." *N. Am. Bldg. Maint.*, 137 Cal. App. 4th at 637-38. Accordingly, Defendants' evidence is insufficient to raise a genuine issue of fact.

On the other hand, Plaintiff points to evidence of property damage which was potentially first manifested during Defendants' policy periods. For example, homeowner questionnaires regarding construction defects at the Project were filled out from June, 1999 through August, 2001. (Goldscher Decl. at 3.) Accordingly, some new property damage may have been identified in the responses which had first manifested since the May 21, 1999 Calderon Notice or

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[4] Defendants profusely objected to nearly every part of this declaration. (Evidentiary Objections to the Decl. of Stacy R. Goldscher Filed in Supp. of Defs' Opp'n to Pl.'s Mot. for Summ. J.) Plaintiff responded to the objections. (Reply to Opp'n to Decl. of Stacy R. Goldscher in Supp. of Pl. Acceptance Ins. Co.'s Notice of Mot. and Mot. for Summ. J. Pursuant to Rule 56.) The main objections are lack of personal knowledge, lack of authentication for the attached exhibits, and that the exhibits are hearsay. The declarant is an attorney working for the firm representing Plaintiff. The same firm represented Bay Area in the Portola Action. The exhibits attached to the declarations are documents which were produced in discovery in the Portola Action or were used as evidence therein. These documents were kept by the law firm in the normal course of its business. Accordingly, unless expressly stated otherwise herein, Defendants' evidentiary objections are overruled.

the April 10, 2001 Portola Action complaint. ASRRG's policy was in effect during a part of this time period – from August 15, 2000 to October 1, 2001. On June 14, 2002, Portola's expert prepared a letter of findings detailing property damage discovered between December 2001 and January 2002, including damage potentially on residences framed by Bay Area. (*Id.* & Exh. E.) This damage was discovered during ASIC's policy, which was in effect from October 1, 2001 to October 1, 2002. Plaintiff provided subsequent letters of findings from the Portola Action detailing additional property damage. (*See id*. at 3-5 & Exh. F-I.) Finally, the Portola Action complaint was amended on March 4, 2003, April 7, 2003 and June 26, 2003, each time adding Plaintiffs who purchased units framed by Bay Area and alleging damage which may have first manifested during Defendants' policy periods. (*Id*. at 5-6 & Exh. J-M.)

Defendants point to no evidence to counter Plaintiff's evidence of possibility of coverage.[5] Instead, they argue that even if damage were discovered during their policy periods, this was manifestation of property damage which was already in the process of occurring as of the policy inception dates, and was therefore excluded from coverage by the Pre-Existing Injury or Damage Exclusion. Defendants bear the burden of proof at trial on the issue whether coverage is precluded by an exclusion. *See Davis*, 134 Cal. App. 4th at 104. The complaint and letters of findings in the Portola Action evidence a wide variety of framing defects, such as, for example, roof problems, stucco problems, and door and window problems. (*See, e.g.,* Goldscher Decl. Exh. E.) Defendants do not elaborate on the basis for their assertion that all of these defects were already in the process of occurring on every residence framed by Bay Area as of the policy inception dates. While it is generally possible for property damage to be a later manifestation of damage which was already in the process of occurring, this is not necessarily so. Defendants have provided no evidence to show or even suggest that this was the case here. They base their argument on the general proposition that because some construction defects were present at the Project as of the policy inception dates, all of the subsequently manifested

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[5] Defendants do not argue that any of Plaintiff's evidence was known to them at the relevant time. The duty to defend is based on the complaints and facts known to the insurer at the time of tender only. *We Do Graphics, Inc. v. Mercury Cas. Co.*, 124 Cal. App. 4th 131, 136 (2004). Accordingly, the court does not address this issue.

damage was already in the process of occurring as of the policy inception dates. This unsupported assertion is not sufficient. *See Pepperell*, 62 Cal. App. 4th at 1056 (issue of fact whether damage is continuous); *Chu v. Canadian Indem. Co.*, 224 Cal. App. 3d 86 (1990) (not all defects on the same project are necessarily related). Defendants have therefore failed to raise a genuine issue whether any of the damage discovered after the policy inception dates was already in the process of occurring as of the inception dates.

Defendants alternatively argue that no potential for coverage existed because the claims at issue were already in the process of "settlement, adjustment or 'suit' as of the inception" dates of Defendants' policies. (*See* Joint Exh. H at 132 (Pre-Existing Injury or Damage Exclusion ¶ 2.) Because this argument is based on an exclusion, Defendants bear the burden of proof. *See Davis*, 134 Cal. App. 4th at 104.

The exclusion refers to "any damages arising out of or relating to . . . 'property damage'." (*Id.*) Defendants argue that the term "arising out of" is broadly interpreted. *See Davis*, 134 Cal. App. 4th at 107. However, in Defendants' policies the term "arising out of" is limited by "property damage." To the extent any property damage first manifested after the inception date of either policy, it is not subject to exclusion. As discussed above, Defendants presented no evidence to support the contention that no property damage first manifested after either of the policy inception dates. For the same reason, Defendants' reliance on Plaintiff's liability losses and loss runs in the sum of $30,000 relative to the "Portola Meadows HOA", which were disclosed to ASRRG in March and May 2000, is also unavailing. (*See* Decl. of Jean D. Fisher in Supp. of Defs' Combined Mot. for Summ. J. and/or Partial Summ. J.; and Opp'n to Pl.'s Mot. for Summ. J. at 2-3 & Exh. AA - CC.) Defendants presented no evidence that the property damage related to those losses was the same damage which continued into the policy periods. Moreover, the liability loss statement and the loss runs do not indicate whether the losses were incurred on behalf of Bay Area or Davidon, who was an additional insured on Defendants' policies. This distinction is relevant because each of its insureds, whether Bay Area or Davidon, is considered separately under Defendants' policies. (Joint Exh. H at 116.)

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Based on the foregoing, Defendants' arguments that there was no potential for coverage under their policies, and therefore no duty to defend, are rejected. Defendants' assertion that the property damage which first manifested after the inception of their policies was merely a manifestation of continuing or previously occurring damage, is unsupported by any evidence. Accordingly, they failed to raise a genuine issue that there was no potential for coverage of Bay Area's claim.[6]

Plaintiff presented evidence showing there was potential for coverage. Although Plaintiff's evidence does not conclusively show that any property damage first manifested after the inception dates of Defendants' policies, Plaintiff is not required to make such a showing. Plaintiff is only required to show that there existed a *potential* for such damage and therefore potential for coverage. *See N. Am. Bldg. Maint.*, 137 Cal. App. 4th at 637-38. Plaintiff has shown that at the relevant time there was at least potential for coverage under Defendants' policies and that Defendants therefore owed Bay Area a duty to defend in the Portola Action. Summary judgment for Plaintiff "is required unless [Defendants] are able . . . conclusively to negate coverage as a matter of law." *See Anthem Electr., Inc. v. Pac. Employers Ins. Co.*, 302 F.3d 1049, 1060 (9th Cir. 2002). Defendants have failed to meet this burden. Accordingly, to the extent Plaintiff seeks summary adjudication of the duty to defend issue, its summary judgment motion is **GRANTED**. Defendants' motion for summary adjudication of this issue is **DENIED**.

"When a duty to defend is shown, nonparticipating coinsurers are presumptively liable for both the costs of defense and settlement." *Safeco Ins. Co. of Am.*, 140 Cal. App. 4th at 880.

> [I]n an action for equitable contribution by a settling insurer against a nonparticipating insurer, the settling insurer has met its burden of proof when it makes a prima facie showing of coverage under the nonparticipating insurer's policy – the same showing of potential coverage necessary to trigger the nonparticipating insurer's duty to defend – and . . . the burden of proof then shifts to the recalcitrant insurer to prove the absence of actual coverage.

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[6] Even if Defendants raised a genuine issue of fact about the ultimate issue of coverage, this would not be sufficient to successfully oppose Plaintiff's summary judgment motion on the duty-to-defend issue. *See Anthem Electr., Inc. v. Pac. Employers Ins. Co.*, 302 F.3d 1049, 1060 (9th Cir. 2002).

Id. at 877 & 881. "[T]he alleged absence of *actual* coverage under the nonparticipating coinsurer's policy is a defense [to equitable contribution for the settlement] which the coinsnurer must raise and prove." *Id.* at 879; *see also id.* n.2 (emphasis in original). As discussed in the context of their duty to defend, Defendants failed to raise a genuine issue of fact that there was no actual coverage under their policies – an issue as to which they bear the burden of proof at trial. Plaintiff's motion is therefore **GRANTED** on the issue of Defendants' duty to contribute to the Portola Action settlement on Bay Area's behalf.

Plaintiff has demonstrated that Defendants had a duty to defend Bay Area in the Portola Action. Because Defendants did not present evidence to negate actual coverage, Plaintiff has also met its burden to show that they had a duty to contribute to the settlement. It is undisputed that Plaintiff defended Bay Area and settled the action on its behalf, and that Defendants did not contribute to the defense or the settlement. Accordingly, Plaintiff has paid more than its fair share of the defense and settlement costs and is therefore entitled to equitable contribution from Defendants. *See Safeco Ins. Co. of Am.*, 140 Cal. App. 4th at 881; *Scottsdale Ins. Co. v. Century Surety Co.*, 182 Cal. App. 4th 1023, 1035-36 (2010). Nevertheless, the court is not in a position to enter judgment on this claim. Plaintiff does not maintain that Defendants should bear all of the defense and indemnity costs. However, it has not provided any basis on which the court could allocate the defense and indemnity costs among the parties. *See Scottsdale Ins. Co.*, 182 Cal. App. 4th 1023. Plaintiff's motion for summary judgment is therefore **DENIED** in this regard.

Based on the foregoing, Plaintiff's motion for summary judgment is **GRANTED** to the extent that Defendant had a duty to defend Bay Area and contribute to the settlement of the Portola Action. It is **DENIED** in all other respects. Defendants' motion for summary judgment and/or partial summary judgment is **DENIED**.

IT IS SO ORDERED.

DATED: August 8, 2011

M. James Lorenz
United States District Court Judge

COPY TO:

HON. WILLIAM McCURINE, Jr.
UNITED STATES MAGISTRATE JUDGE

ALL PARTIES/COUNSEL