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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

FIREMAN'S FUND INSURANCE)
COMPANY,)
)
Plaintiff,)
)
v.)
)
UNITED STATES FIDELITY AND)
GUARANTY COMPANY; ST PAUL)
MARINE AND FIRE INSURANCE)
COMPANY; TRAVELERS CASUALTY)
AND SURETY COMPANY; and)
TRAVELERS PROPERTY CASUALTY)
INSURANCE COMPANY,)
)
Defendants.)

No. CV-09-263-HU

OPINION & ORDER

James M. Hillas
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851 S.W. Sixth Avenue, Suite 1500
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/ / /
/ / /

1 - OPINION & ORDER

1 Nicholas L. Dazer
BULLIVANT HOUSER BAILEY PC
2 300 Pioneer Tower
888 S.W. Fifth Avenue
3 Portland, Oregon 97204-2089

4 Attorney for Defendants

5 HUBEL, Magistrate Judge:

6 Plaintiff Fireman's Fund Insurance Company brings this
7 equitable indemnity, contribution, and subrogation action against
8 defendants United States Fidelity & Guaranty Company, St. Paul
9 Marine & Fire Insurance Company, Travelers Casualty & Surety
10 Company, and Travelers Property Casualty Insurance Company
11 (collectively "Travelers" or defendants). Defendants move for
12 summary judgment on all claims. All parties have consented to
13 entry of final judgment by a Magistrate Judge in accordance with
14 Federal Rule of Civil Procedure 73 and 28 U.S.C. § 636(c). I grant
15 the motion.

16 BACKGROUND

17 Plaintiff was the insurance company for the owner of an
18 apartment project called "Stadium Station," located at 737
19 Southwest 17th Ave, in Portland (referred to as "the Project"), for
20 the term beginning July 1, 2000. The owner of the Project was
21 Grayco, LLC. Previously, Grayco had obtained property insurance
22 coverage on the Project from defendants under the following three
23 policies:

- 24 (1) Policy No. USF&G 1MP30138209200 (7/1/97 to 6/30/98);
25 (2) Policy No. USF&G 1MP30138209201 (7/1/98 to 6/30/99);
26 (3) Policy No. St Paul CK 08701606 (7/1/99 to 6/30/00).

27 The Project was completed in early 1998. Grayco observed
28 water intrusion following completion of the Project and enlisted

1 the general contractor of the Project to correct the water
2 intrusion problems. Grayco also hired a consultant to perform
3 destructive testing on the Project building. In 2003, Grayco's
4 consultant determined that water damage had been taking place
5 "since construction." The consultant opined that the water
6 intrusion "had deteriorated portions of the Project to the point of
7 imminent collapse."

8 On November 24, 2003, Grayco reported the loss to both
9 plaintiff and defendants. Exh. 5 to Dazer Declr. Defendants
10 responded to the loss notice on December 3, 2003, and indicated
11 they were starting an investigation of the claim. Exh. 6 to Dazer
12 Declr. at pp. 1-2. Plaintiff responded to the loss notice on
13 December 12, 2003, also indicating that it was starting an
14 investigation of the claim. Id. at pp. 3-5.

15 Evidence in the record includes correspondence from
16 defendants' accountant to a representative of Grayco's indicating
17 that in a January 6, 2004 telephone conversation between the
18 accountant and a representative of Grayco, the accountant
19 understood that Grayco had instructed that any claim against USF&G
20 was to be put on the "back burner." Exh. 10 to Dazer Declr. Later
21 correspondence in January 2004 from defendants' Executive General
22 Adjuster Charles Murray to Grayco's representatives acknowledged
23 what Murray described as Grayco's wishes that USF&G and St. Paul
24 "stand down" from investigating the cause and origin of the damages
25 to the Project. Exh. 8 to Dazer Declr.

26 Grayco collected money from its general contractor and then
27 joined its general contractor in an arbitration proceeding against
28 others for damages arising out of construction defects and

1 resulting water intrusion. Exh. 13 to Dazer Declr. (copy of
2 arbitration demand). A settlement conference was held in November
3 2004. Defendants declined Grayco's request that defendants attend.

4 In February 2005, plaintiff paid Grayco \$589,000 to settle the
5 claim. Exh. 15 to Dazer Declr. Plaintiff obtained an assignment
6 of Grayco's rights against defendants as part of the settlement.
7 Other relevant facts and policy provisions are discussed below.

8 STANDARDS

9 Summary judgment is appropriate if there is no genuine issue
10 of material fact and the moving party is entitled to judgment as a
11 matter of law. Fed. R. Civ. P. 56(c). The moving party bears the
12 initial responsibility of informing the court of the basis of its
13 motion, and identifying those portions of "'pleadings, depositions,
14 answers to interrogatories, and admissions on file, together with
15 the affidavits, if any,' which it believes demonstrate the absence
16 of a genuine issue of material fact." Celotex Corp. v. Catrett,
17 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)).

18 "If the moving party meets its initial burden of showing 'the
19 absence of a material and triable issue of fact,' 'the burden then
20 moves to the opposing party, who must present significant probative
21 evidence tending to support its claim or defense.'" Intel Corp. v.
22 Hartford Accident & Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991)
23 (quoting Richards v. Neilsen Freight Lines, 810 F.2d 898, 902 (9th
24 Cir. 1987)). The nonmoving party must go beyond the pleadings and
25 designate facts showing an issue for trial. Celotex, 477 U.S. at
26 322-23.

27 The substantive law governing a claim determines whether a
28 fact is material. T.W. Elec. Serv. v. Pacific Elec. Contractors

1 Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). All reasonable doubts as
2 to the existence of a genuine issue of fact must be resolved
3 against the moving party. Matsushita Elec. Indus. Co. v. Zenith
4 Radio, 475 U.S. 574, 587 (1986). The court should view inferences
5 drawn from the facts in the light most favorable to the nonmoving
6 party. T.W. Elec. Serv., 809 F.2d at 630-31.

7 If the factual context makes the nonmoving party's claim as to
8 the existence of a material issue of fact implausible, that party
9 must come forward with more persuasive evidence to support his
10 claim than would otherwise be necessary. Id.; In re Agricultural
11 Research and Tech. Group, 916 F.2d 528, 534 (9th Cir. 1990);
12 California Architectural Bldg. Prod., Inc. v. Franciscan Ceramics,
13 Inc., 818 F.2d 1466, 1468 (9th Cir. 1987).

14 DISCUSSION

15 As indicated above, plaintiff brings three claims: common law
16 indemnity, equitable contribution, and equitable subrogation.

17 In an action for common law indemnity, the claimant
18 must allege and prove that (1) he or she has discharged
19 a legal obligation owed to a third party; (2) the
20 defendant was also liable to the third party; and (3) as
between the claimant and the defendant, the obligation
should be discharged by the latter.

21 Safeco Ins. Co. of Am. v. Russell, 170 Or. App. 636, 639, 13 P.3d
22 519, 520 (2000).

23 An "insurer's rights against its co-insurer for contribution
24 arise[] out of the equitable doctrine which holds that one who pays
25 money for the benefit of another is entitled to be reimburse[d.]"
26 Carolina Cas. Ins. Co. v. Oregon Auto. Ins. Co., 242 Or. 407, 417,
27 408 P.2d 198, 203 (1965). "Such rights do not arise by way of
28 subrogation." Id.; see also TIG Ins. Co. v. Travelers Ins. Co.,

1 No. CV-00-1780-ST, 2003 WL 24051560, at *4 (D. Or. Mar. 24, 2003)
2 (Oregon law permits an insurer to seek contribution from another
3 insurer for its respective share of a covered loss); Guild v.
4 Baune, 200 Or. App. 397, 403, 115 P.3d 249, 253 (2005) (action for
5 contribution is normally an equitable remedy used to prevent unjust
6 enrichment; noting that contribution has been defined as "'the
7 right of a person who has discharged a common liability or burden
8 to recover of another, who is also liable, the portion he or she
9 ought to bear.'") (quoting Contribution, 18 Am. Jur. 2d § 1
10 (2004)).

11 Subrogation is an equitable doctrine that is based
12 on a theory of restitution and unjust enrichment. . . .
13 It enables a secondarily liable party who has been
14 compelled to pay a debt to be made whole by collecting
15 that debt from the primarily liable party who, in good
16 conscience, should be required to pay. . . . In the
insurance context, subrogation permits an insurer in
certain instances to recover what it has paid to its
insured by, in effect, standing in the shoes of the
insured and pursuing a claim against the wrongdoer. . .

17 The subrogated party acquires precisely the same
18 rights as the party for whom it substitutes, and no more
19 than that. . . . Thus, in the insurance context, an
20 insurer may pursue a subrogation claim only if its
21 insured could have pursued the underlying claim, and the
insurer's claim is subject to all of the defenses that
could have been asserted if the insured had pursued the
underlying claim.

22 Koch v. Spann, 193 Or. App. 608, 612, 92 P.3d 146, 148 (2004)
23 (citations omitted).

24 In support of their motion, defendants make the following
25 arguments: (1) plaintiff cannot establish that it discharged any
26 obligation that was owing by defendants at the time plaintiff paid
27 money to Grayco, because at that time (a) Grayco had abandoned its
28 claim as to defendants; and (b) Grayco had failed to file suit

1 within the two-year contractual limitation period even if it had
2 not abandoned its claim; and (2) plaintiff cannot demonstrate that
3 Grayco sustained a loss that would have been covered by defendants'
4 policies because there is no evidence of a covered cause of loss
5 during defendants' policy periods, which is a predicate to
6 plaintiff's claims for recovery.

7 The summary judgment record demonstrates that a genuine issue
8 of fact exists on the question of whether Grayco abandoned its
9 claim as to defendants. However, I agree with defendants that the
10 two-year contractual limitation period prevents plaintiff from
11 obtaining relief on any of its claims. Thus, I do not discuss the
12 coverage argument. Additionally, I do not discuss defendants'
13 objection to, and request to strike, the testimony of plaintiff's
14 expert Clemens Rossell because none of his testimony is relevant to
15 the abandonment or contractual limitation issues.

16 Both of the USF&G policies and the St. Paul policy contained
17 contractual limitation of suit provisions. The first two policies
18 provided as follows:

19 **D. LEGAL ACTION AGAINST US**

20 No one may bring a legal action against us under this
21 Coverage part unless:

22 **1.** There has been full compliance with all of the terms
of this Coverage Part; and

23 **2.** The action is brought within 2 years after the date
24 on which the direct physical loss or damage occurred.

25 Exh. 2 to Dazer Declr. at p. 10. The third policy, issued by St.
26 Paul, provided:

27 **Lawsuits Against Us**

28 No one can sue us to recover under this policy unless all
of its terms have been lived up to.

1 **If your policy includes property insurance.** Any lawsuit
2 to recover on a property claim must begin within 2 years
3 after the date on which the direct physical loss or
4 damage occurred . . .

5 Exh. 4 to Dazer Declr. at p. 6.

6 Both of these provisions are consistent with Oregon Revised
7 Statute § (O.R.S.) O.R.S. 742.240, which provides that

8 [a] fire insurance policy shall contain a provision as
9 follows:

10 No suit or action on this policy for the recovery of any
11 claim shall be sustainable in any court of law or equity
12 unless all the requirements of this policy shall have
13 been complied with, and unless commenced within 24 months
14 next after inception of the loss.

15 O.R.S. 742.240. Oregon courts have applied this provision outside
16 of the fire insurance context. See Herman v. Valley Ins. Co., 145
17 Or. App. 124, 126 n.1, 928 P.2d 985, 987 n.1 (1996) (in case
18 involving a homeowner's insurance policy, court noted that "[b]y
19 its terms, ORS 742.240 applies only to fire insurance policies. As
20 construed, it applies to homeowner's insurance policies as well.")
21 (citing Hatley v. Truck Ins. Exchange, 261 Or. 606, 494 P.2d 426,
22 495 P.2d 1196 (1972) (property insurance policy with vandalism
23 endorsement required by O.R.S. 742.240 to contain suit limitation
24 provision)). Additionally, the Oregon Supreme Court has held that
25 the suit limitation provision in O.R.S. 742.240 is to be strictly
26 interpreted and is not subject to a discovery rule. Moore v.
27 Mutual of Enumclaw Ins. Co., 317 Or. 235, 244-50, 855 P.2d 626,
28 632-35 (1993).

 According to the plain language of these provisions, any suit
by Grayco under the policies and against defendants would have been
commenced by July 2002. Grayco originally tendered its claim to
defendants in November 2003, alleging damages arising out of water

1 intrusion beginning in early 1998. The November 2003 tender was
2 more than three years after the most recent Travelers policy ended
3 in June 2000, and more than one year after any suit by Grayco
4 against Travelers was required to have commenced.

5 Defendants argue that as a matter of law, the Travelers
6 policies that are the basis for plaintiff's claims are subject to
7 the two-year contractual suit limitation provisions set forth in
8 the policies pursuant to O.R.S. 742.240. At the time plaintiff
9 made its settlement payment to Grayco, in February 2005, defendants
10 contend that they had no legally enforceable obligation toward
11 Grayco on which plaintiff could predicate any of its claims.
12 Because Grayco would have had no claim against defendants when
13 plaintiff settled Grayco's claim, there is no equitable, or other,
14 basis under which plaintiff may claim any reimbursement from
15 defendants. I agree with defendants.

16 Each of plaintiff's claims presumes an underlying obligation
17 by defendants to Grayco. Most obvious is the subrogation claim in
18 which the insurer (plaintiff) stands in the shoes of the insured
19 (Grayco) to recover what the insurer paid the insured. The insurer
20 obtains only the rights possessed by the insured. Here, at the
21 time Grayco tendered its claim to defendants in November 2003, any
22 suit Grayco could have brought under its policies with defendants
23 was already untimely.

24 The indemnity and contribution claims suffer the same fate.
25 In the contribution claim, plaintiff's payment must be found to
26 have been for the benefit of defendants. But, if at the time
27 plaintiff made that payment, defendants could not have been
28 obligated to Grayco for any claim given the suit limitation

1 provision, as a matter of law plaintiff was not making a payment
2 for defendants' benefit. The indemnity claim requires that
3 plaintiff prove that it discharged a legal obligation owed to
4 Grayco which was also owed by defendants. As explained, at the
5 time plaintiff made the payment to Grayco, defendants had no legal
6 obligation to Grayco.

7 Although not binding, the case cited by defendants is on point
8 and offers a thorough explanation of why defendants prevail here.
9 In Great American West, Inc. v. Safeco Insurance Company of
10 America, 226 Cal App. 3d 1145, 277 Cal. Rptr. 349 (1991),
11 plaintiff, a homeowners' insurance carrier, sought contribution
12 and/or indemnity from defendant, the previous homeowners' carrier,
13 after plaintiff paid a claim to the insureds for subsidence damage.
14 The defendant was the insurer for a period of years before the
15 plaintiff became the insurer. During the period when the defendant
16 was the insurer, the insured noticed cracks in the driveway and an
17 entry sidewalk to his home. Later, when the plaintiff was the
18 insurer, the increased damage to the home's structure and
19 foundation triggered a claim by the insured against the plaintiff.
20 The plaintiff settled the claim with the insured and then brought
21 the action against the defendant.

22 The trial court granted summary judgment to the defendant on
23 the basis that the action was actually one for subrogation, despite
24 the express claims for contribution and indemnity, and because the
25 insured had failed to make a claim within one year of the damage as
26 required by the defendant's policy. 226 Cal App. 3d at 1148, 277
27 Cal. Rptr. at 350-51. The appellate court concluded it need not
28 resolve whether the nature of the claim was one of subrogation,

1 indemnity, or contribution because the policy's contractual
2 limitation period rendered the plaintiff's claim untimely
3 regardless of the theory of recovery. Id. at 1149, 277 Cal. Rptr.
4 at 351.

5 The court first rejected the plaintiff's argument that
6 plaintiff's only responsibility was to file suit within two years
7 of paying the insured's claim. The court explained that this
8 "argument improperly seeks to strip Great American's indemnity
9 claim from the Safeco insurance policy on which it is based." Id.
10 at 1150, 277 Cal Rptr. at 352. Noting the time limitation in the
11 defendant's insurance policy, and further noting that the
12 defendant's only responsibility to its insured is limited to the
13 terms of the contractual insurance policy, the court explained that
14 where an insurer like the plaintiff "seeks indemnity based on
15 another party's (Safeco's) contractual responsibilities, provisions
16 of the contract imposing time constraints - like any other
17 provision of the contract - cannot be ignored. To do so would be
18 to impose liability no longer based on the contract." Id.

19 The court then recognized, however, that while "contractual
20 time limitations cannot be ignored by a party seeking indemnity,"
21 it was unclear how such limits related to an indemnity action
22 brought by a third party insurer. Id. at 1151, 277 Cal. Rptr. at
23 352. The court noted that a simple rule would be to hold that any
24 action relying on the insurance policy must be brought within the
25 suit limitation period provided for in most policies. Id. at 1151,
26 277 Cal Rptr. at 353. But, the court further noted, such a rule
27 "eliminates any distinction between the direct and indirect
28 action." Id.

1 The court, citing to an insurance law treatise, suggested that
2 while subrogation claims are controlled by the statute of
3 limitations that would have been applicable had the insured brought
4 suit in his or her own behalf, and are deemed to run starting from
5 the date of the insured's loss, that is not the case with an
6 indemnity claim which is an independent cause of action where the
7 statute of limitations "'does not begin to run until the insurance
8 company has provided policy benefits to the insured.'" Id. at
9 1152, 277 Cal. Rptr. at 353 (quoting Allan D. Windt, Insurance
10 Claims and Disputes 554 (2d ed. 1988)).

11 Continuing to cite to Windt, the court noted that claims of
12 contribution and indemnity do not accrue until the time of payment,
13 and the statute of limitations does not begin to run until that
14 time. Id. But, while generally an insurer is not barred from
15 pursuing a contribution or indemnity reimbursement claim against
16 another insurer "'on the grounds that the statute of limitations
17 had run as to the insured's cause of action against such other
18 insurers[,]'" the insurer seeking such reimbursement must still
19 show that "'the insured had a viable cause of action against such
20 insurers at the time the contribution or indemnity claim came into
21 existence.'" Id. (quoting Windt at p. 562). Thus, the "critical
22 question" is

23 "not whether the limitations period had run prior to
24 institution of the lawsuit, but whether it had run prior
25 to payment of the insured's claim. If the limitations
26 period had run by the time of the payment, the paying
27 insurer would not have paid a debt that was concurrently
28 owed by the other insurer. By virtue of the expiration
of the limitations period, the other insurer's policy
would no longer have provided any coverage. In that
event, therefore, the paying insurer's contribution claim
would never have come into existence."

1 Id. (quoting Windt at p. 563).

2 The court then explained that assuming the homeowner's loss
3 was "first manifest" on the last day of the Safeco policy period in
4 1981, the plaintiff would possess an enforceable claim for
5 contribution or indemnity under Windt's analysis only if, at the
6 time it paid the claim, Safeco remained contractually liable to the
7 insured homeowner. Id. at 1152-53, 277 Cal. Rptr. at 353. The
8 facts, however, showed that the plaintiff had paid the claim in
9 June 1986, almost four years after the one-year contractual
10 limitations period on the defendant's obligations, expired. Id.

11 The court concluded by stating that it was
12 unnecessary for us to decide whether an action for
13 indemnity or contribution by a third party against an
14 insurer must be filed within the one-year limitations
15 period provided for in the contract, or whether it is
16 sufficient if the one year had not yet expired at the
time the third party made payment to the insured and the
indemnity or contribution rights arose. Under either
theory here, Great American's action against Safeco was
too late.

17 Id. at 1153, 277 Cal. Rptr. at 353-54.

18 The same result occurs here. In the subrogation claim,
19 plaintiff's claim is barred because, stepping into Grayco's shoes,
20 suit was not filed on or before July 1, 2002, the end of the two-
21 year contractual limitations period in the third policy. And, for
22 the indemnity or contribution claims to be viable, defendants must
23 have remained contractually liable to Grayco at the time plaintiff
24 paid Grayco in February 2005. Because defendants no longer had any
25 contractual liability to Grayco at that time, plaintiff's indemnity
26 and contribution claims are untimely.

27 / / /

28 / / /

CONCLUSION

Defendants' motion for summary judgment (#27) is granted.

IT IS SO ORDERED.

Dated this 17th day of May, 2010.

/s/ Dennis James Hubel
Dennis James Hubel
United States Magistrate Judge