STATE OF MICHIGAN

SIXTEENTH JUDICIAL CIRCUIT COURT

FOUR SEASONS ROOFING & SHEET METAL, LLC, BILL BURKHARDT, and DONALD LOCKRIDGE,

Plaintiffs,

vs. Case No. 17-3662-CB

WESTFIELD INSURANCE COMPANY,

Defendant.
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OPINION AND ORDER

This matter comes before the Court on Plaintiffs' motion for partial summary disposition under MCR 2.116(C)(10). "Plaintiffs" hereafter refers to Four Seasons Roofing & Sheet Metal, LLC ("Four Seasons"), Bill Burkhardt ("Mr. Burkhardt") and Donald Lockridge ("Mr. Lockridge").

I. Factual and Procedural Background

This case concerns the duty to defend under an insurance contract. Westfield Insurance Company ("Defendant") issued a commercial insurance policy No. TRA0118346 to Four Seasons for the period of December 8, 2014 to December 8, 2015. Answer ¶19. In a case distinct from the present matter, Plaintiffs were sued in this Court. See, "*Cooks--The Lampshaders Co v Four Seasons Roofing & Sheet Metal, LLC et al.* case no. 17-1884-CB ("The Cooks claim"). The Cooks claim arises from alleged negligence or tortious conduct relating to the installation of a roof. Defendant, by counsel, issued a letter to Four Seasons' counsel on August 2, 2017 declining to provide a defense or indemnity on the Cooks Claim on the basis of an

asbestos exclusion in the insurance policy. Answer ¶13, Plaintiffs' Exhibit D. Believing that Defendant has a contractual obligation to defend the claim, Plaintiffs filed their complaint on September 30, 2017 seeking declaratory judgment (Count I) and alleging breach of contract (Count II). The Court heard oral arguments and took the matter under advisement.

II. Standard of Review

A motion under MCR 2.116(C)(10) tests the factual support of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing such a motion, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* The court must only consider the substantively admissible evidence actually proffered in opposition to the motion, and may not rely on the mere possibility that the claim might be supported by evidence produced at trial. *Id.* at 121. Indeed, "an adverse party may not rest upon the mere allegations or denials of his or her pleadings, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial." MCR 2.116(G)(4).

III. Arguments

According to Plaintiffs, on February 15, 2018 Defendant agreed to defend Plaintiffs in the Cooks Claim. Plaintiff's Exhibit F. Plaintiffs argue, however, that during the nine months between the filing of the Cooks Claim complaint and Defendant's decision to defend in that action, Plaintiffs incurred defense fees and costs. Plaintiffs

maintain that although the Cooks Claim Complaint asserted that roofing debris containing contaminants fell onto and damaged its inventory, reliance on the asbestos exclusion was premature or unjustified. That is, Plaintiff argues that any asbestos in the roof was non-friable chrysotile, which may be disposed of by hand without special precautions. Moreover, according to Plaintiffs, the Cooks Claim Complaint also included allegations of property damage not related to damage from asbestos exposure. Therefore, Plaintiffs conclude that while Defendant is presently defending the Cooks Claim, it should have done so from the beginning and therefore should pay those attorneys' fees.

Defendant responds that there are questions of fact as to whether the Cooks Claim involves asbestos. According to Defendants, under Michigan law, the nature of the injury controls whether an insurer has a duty to defend and not mere allegations in a complaint. Defendant argues that it learned about the basis of the damage in the Cooks Claim from a previous lawsuit from 2015, in which the underlying claim was more fully stated as based on asbestos contamination. Defendant claims that it began defending Plaintiffs in the present matter only after it learned that the Cooks Claim also involved claims for a broken alarm system and broken lamp parts. Even if Plaintiffs were entitled to recover defense costs as alleged in their motion, Defendant argues that a minimum of $8,000.00 in fees or costs are not recoverable because they relate to the insurance coverage dispute.

IV. Law and Analysis

An insurer's duty to defend is broader than the duty to indemnify. *Auto-Owners Ins Co v City of Clare*, 446 Mich 1, 15; 521 NW2d 480 (1994) citation omitted. The duty

to defend arises even in instances of arguable coverage or frivolous claims. *Id.* When faced with a complaint that includes covered and uncovered counts, an insurer must defend the entire complaint. *Group Ins Co v Czopek*, 440 Mich 590, 489 NW2d 444 (1992). Courts resolve doubts about whether a claim falls within the policy in favor of the insured. *Polkow v Citizens Ins Co*, 438 Mich 174, 180; 476 NW2d 382 (1991). The duty to defend rests not on the wording of a complaint or "nomenclature" of the claim but upon the "basis for the injury." *Illinois Employers Ins v Dragovich*, 139 Mich App 502, 507; 362 NW2d 767 (1984). The insurer must "look behind the third party's allegations to analyze whether coverage is possible." *Detroit Edison Co v Michigan Mut Ins Co*, 102 Mich App 136, 142; 301 NW2d 832 (1980). Put differently, Courts examine the substance of the allegations as opposed to the mere form. *Allstate Ins Co v Freeman,* 432 Mich 656, 662–663; 443 NW2d 734 (1989). "In determining whether an insurer has a duty to defend its insured" courts "look at the language of the insurance policy and construe its terms." *Allstate Ins Co v Fick*, 226 Mich App 197, 202; 572 NW2d 265 (1997).

"Any clause in an insurance policy is valid as long as it is clear, unambiguous and not in contravention of public policy." *Raska v Farm Bureau Mut Ins Co of Michigan,* 412 Mich 355, 361–362; 314 NW2d 440 (1982). Exclusionary clauses in insurance policies are strictly construed in favor of the insured. *Shelby Mut Ins Co v United States Fire Ins Co,* 12 Mich App 145, 149; 162 NW2d 676 (1968). Clear and specific exclusions must be given effect so as not to hold an insurance company liable for a risk it did not assume. *Kaczmarck v La Perriere,* 337 Mich 500, 506; 60 NW2d 327 (1953). "While it is the insured's burden to establish that his claim falls within the terms

of the policy, the insurer should bear the burden of proving an absence of coverage." *Michigan Battery Equip, Inc v Emcasco Ins Co*, 317 Mich App 282, 284–85; 892 NW2d 456, 458 (2016).

The Cooks Claim complaint avoided express allegations of asbestos contamination but averred only that "debris entered the interior of the building causing damage," that the debris "contained contaminants" and involved "clean-up costs." Complaint ¶9, 12, 29, 42. Defendant argues that it looked beyond the four corners of the Cooks Claim complaint and declined to provide a defense because its investigation revealed the presence of asbestos in the roofing or gypsum material. Defendant cites to an inspection report dated August 2015 that states, "it is apparent that asbestos containing roofing material has impacted various horizontal surfaces within the building interior throughout the entire show room . . ." Defendant's Exhibit 2. Defendant further cites to a previous counterclaim that asserted a claim for asbestos contamination. Defendant's Exhibit 1. Defendant then cites an exclusion in the policy that states,

> This insurance does not apply to . . . property damage arising out of: 1. Inhaling, ingesting or physical exposure to asbestos or goods or products containing asbestos or 2. The use of asbestos in constructing or manufacturing any goods, product or structure, or 3. The removal, repair, encapsulation, enclosure, abatement or maintenance of asbestos in or from any goods, product or structure; or 4. The manufacture, sale, distribution, transportation, storage or disposal of asbestos or goods or products containing asbestos."

Defendant's Exhibit A. Defendant concludes that because the contamination at issue contained asbestos, the loss would fall under an exclusion in the policy.

In support of its refusal to provide a defense, Defendant cites to a line of cases holding that when the court looks beyond the four corners of a complaint and evaluates the substance of a claim, an insurer has no duty to defend if the loss would not be

covered. However, Defendant fails to account for the fact that it has since recognized that it has a duty to defend in the Cooks Claim based on losses that do not include asbestos. When a complaint includes covered and uncovered counts, an insurer must defend the entire complaint. *Group Ins Co*, 440 Mich 590. Given that Defendant has since provided a defense to Plaintiffs in the Cook Claim, the motion for partial summary disposition relates only to the nine month period of time between the filing of the Cooks Claim complaint and Defendant's appointment of counsel.

Therefore, the relevant question before the Court is not whether facts beyond the four corners of the complaint support a duty to defend or whether the alleged contamination actually involved asbestos. Rather, the question before the Court is when an insurer incorrectly concludes that it has no duty to defend an action and later learns that it in fact does have such a duty, is the insurer responsible for the defense costs incurred in the interim period? The parties have not cited cases that directly answer that question--is the duty to defend triggered from the start of an action or only when an insurer learns of its obligation to defend?

Michigan Courts have held that an insurer is liable for reasonable attorney fees that an insured incurs defending an action that the insurer wrongfully refuses to defend. *Cooley v Mid-Century Ins Co*, 52 Mich App 612, 615–16; 218 NW2d 103 (1974) citation omitted. The Court was unable to find authority excusing an insurer from liability where the insurer made a reasonable but mistaken determination regarding its duty to defend. Put differently, a "wrongful" determination may have been made in good faith. In *Detroit Edison Co v Michigan Mut Ins Co*, 102 Mich App 136, 145–46; 301 NW2d 832 (1981), an insurer's failure to provide a defense was wrongful even though it relied on a

declaratory judgment issued by the lower court. The Court of Appeals held that, "[w]hen an insurer relies on a lower court ruling that it has no duty to defend, it takes the risk that the ruling will be reversed on appeal." *Id.* Even though the insurer had a reasonable basis for declining to defend, the Court still applied the precedent that an insurer called upon to defend an action has two options—it can defend under a reservation of rights or refuse to defend and "take its chances that there will be a showing that there is no coverage. . ." *Id.* Here, Defendant took its chances and was mistaken.

Furthermore, the duty to defend includes the duty to investigate and analyze whether a claim against the insured should be covered. *Koski v Allstate Ins Co*, 456 Mich 439, 445; 572 NW2d 636 (1998). The Court finds no authority for the proposition that an insurer may sit out an investigation and only jump in to defend a claim once it becomes reasonably certain of its obligation to do so. Therefore, considering the guidance above, Defendant had a responsibility to provide a defense and failed to do so for nine months thereby causing Plaintiffs to incur defense costs. Plaintiffs' motion for partial summary disposition must be granted.

Finally, Defendant correctly argues that any award of fees should not include costs associated with the insurance coverage dispute. "Although actual attorney's fees for the insured's defense of an action by a third party are recoverable from the insurer which breaches its duty to defend . . . the insured may not be allowed attorney's fees in excess of taxable costs for the declaratory action to enforce insurance coverage. *Shepard Marine Const Co v Maryland Cas Co*, 73 Mich App 62, 65–66; 250 NW2d 541, 543 (1976). Plaintiffs respond, however, that they do not seek attorney's fees for the

insurance declaratory judgment and argue instead that Defendant misconstrues the billing statements. Therefore, the amount of damages requires factual development and remains to be determined.

V. Conclusion

For the reasons set forth above, Plaintiffs' motion is GRANTED. Pursuant to MCR 2.602(A)(3), this *Opinion and Order* neither resolves the last pending claim nor closes this case.

IT IS SO ORDERED.

Date: JUL 27 2018

Kathryn A. Viviano

Hon. Kathryn A. Viviano, Circuit Court Judge