SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LOUIS L. NOCK **PART** 38M

Justice

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NORTH AMERICAN ELITE INSURANCE COMPANY,

Plaintiff,

- v -

MAC PARENT LLC,

Defendant.

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INDEX NO. 655193/2020

MOTION DATE 06/17/2021

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, and 112

were read on this motion for DISMISSAL.

LOUIS L. NOCK, J.

Upon the foregoing documents, it is hereby ordered that plaintiff's motion to dismiss defendant's counterclaims and affirmative defenses is granted in part and denied in part, based upon the following memorandum decision.

Background

In this declaratory judgment action, plaintiff North American Elite Insurance Company ("plaintiff") seeks a declaration that there is no coverage under various provisions of the insurance policy it issued to defendant Mac Parent LLC ("defendant"), for defendant's asserted losses due to physical alterations to defendant's various restaurant locations occasioned by the Executive Orders issued in response to the coronavirus pandemic. Plaintiff also alleges a breach of contract due defendant's actions in preemptively suing plaintiff in Illinois State Court, in violation of the venue, choice of law, and jurisdiction provisions of the insurance policy. Defendant, in its answer and counterclaims, seeks a declaratory judgment that "the Shutdown

and Partial Reopening Executive Orders caused direct physical loss or damage to [defendant's] insured properties" (NYSCEF Doc. No. 47, ¶ 125). Defendant also asserts counterclaims for breach of contract and unjust enrichment due to plaintiff's failure to provide coverage under the policy. Plaintiff now moves, pursuant to CPLR 3211, to dismiss the counterclaims, as well as defendant's affirmative defenses.

Pursuant to a "Leading Edge All-Risk Form" insurance policy, plaintiff provided insurance to defendant for "all risks of *direct physical loss or damage* to INSURED PROPERTY while on INSURED LOCATION(S) provided such *physical loss or damage* occurs during the" policy term (NYSCEF Doc. No. 75, SP 10 561 1117 at 1, § A[1] [emphasis added]). More specifically, the policy "insures TIME ELEMENT loss, during the Period of Liability directly resulting from direct physical loss or damage insured by this POLICY" (*id.* at 30, § V[A][1]). The Period of Liability is defined as the period of time "starting on the date of physical loss or damage insured by this POLICY to INSURED PROPERTY; and ending when with due diligence and dispatch the building and equipment could be repaired or replaced . . . and made ready for operations" (*id.* at 32, § V[D][1][a]). This coverage also includes any "actual not suspected presence of COMMUNICABLE DISEASE" at one of defendant's locations where access thereto is "limited, restricted or prohibited by an order of an authorized governmental agency . . . or a decision of an Officer of [defendant]" (*id.* at 38, § V[H][8]). Communicable disease is defined as "Disease which is transmissible from human to human by direct or indirect contact with an affected individual or the individual's discharges, or Legionellosis."

As with countless other businesses, defendant's restaurant locations were adversely affected by the coronavirus pandemic. Specifically, as a result of the shutdown and partial reopening orders issued by the Governor's office (9 NYCRR 8.202.1; 9 NYCRR 8.202.3; 9

NYCRR 8.202.38; 9 NYCRR 8.202.39), defendant asserts it was required to reduce service, and then to make extensive changes to the physical layout of its restaurants (NYSCEF Doc. No. 47, ¶¶ 98, 106). These changes have led to reduced capacity and square footage available for service, to the extent that as of the date of defendant's answer and counterclaims, defendant asserts that it is not currently operating any locations in New York State (*id.*, ¶¶ 107-112). Defendant asserts that the changes it made to its restaurants in an attempt to continue operations caused a direct physical loss or damage to its restaurants through "physical changes for the worse," and should be covered under the policy (*id.*, ¶¶ 121-123; NYSCEF Doc. No. 75 at 1-3).

Plaintiff commenced this action by filing a summons and complaint on October 12, 2020 (NYSCEF Doc. No. 1). Defendant appeared and initially filed a pre-answer motion to dismiss, which it later withdrew (NYSCEF Doc. No. 45). Defendant then filed an answer and counterclaims (NYSCEF Doc. No. 47). Plaintiff now makes the instant motion to dismiss the answer and counterclaims.

Standard of Review

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). "[The court] accept[s] the facts as alleged in the complaint as true, accord[ing] plaintiffs the benefit of every possible favorable inference, and determin[ing] only whether the facts as alleged fit within any cognizable legal theory" (*id.* at 87-88). Ambiguous allegations must be resolved in plaintiff's favor (*JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015]). "The motion must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [internal citations omitted]). "[W]here ... the allegations

consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, they are not entitled to such consideration" (*Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994]).

Discussion

"The unambiguous provisions of an insurance policy, as with any written contract, must be afforded their plain and ordinary meaning" (*Broad St., LLC v Gulf Ins. Co.*, 37 AD3d 126, 130-31 [1st Dept 2006]). The policy should be read as a whole, and no particular words or phrases should receive undue emphasis (*Bailey v Fish & Neave*, 8 NY3d 523, 528 [2007]). Courts should give effect to every clause and word of an insurance contract (*Northville Indus. Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 89 NY2d 621, 633 [1997]). An interpretation is incorrect if "some provisions are rendered meaningless" (*County of Columbia v Continental Ins. Co.*, 83 NY2d 618, 628 [1996]). It is the insured's burden to show that the provisions of a policy provide coverage (*Consolidated Edison Co. of N.Y., Inc. v Allstate Ins. Co.*, 98 NY2d 208 [2002]). "Labeling the policy as 'all risk' does not relieve the insured of its initial burden of demonstrating a covered loss under the terms of the policy" (*Roundabout Theatre Co., Inc. v Continental Cas. Co.*, 302 AD2d 1, 6 [1st Dept 2002]). Moreover, where the policy language offers no reasonable basis for a difference of opinion, the court should not find it ambiguous (*Breed v Insurance Co.*, 46 NY2d 351, 355 [1978], *rearg denied* 46 NY2d 940 [1979]). Provisions in a contract are not ambiguous merely because the parties interpret them differently (*Mount Vernon Fire Ins. Co. v Creative Housing Ltd.*, 88 NY2d 347, 352 [1996]).

Here, the parties dispute the meaning and application of several different provisions of the policy, but the first dispute that must be resolved concerns whether defendant has adequately alleged "direct physical loss or damage." All other relevant provisions of the policy require a

finding of such damage. As both parties recognize, *Roundabout Theater Co. v Continental Cas. Co.* (302 AD2d 1 [1st Dept 2002]) is the controlling case on interpreting this language in the First Judicial Department. In *Roundabout Theater Co.*, the plaintiff sought coverage from its insured after the City of New York closed the street on which its theater was located due to a collapsed external elevator at a nearby building on the same block (*id.* at 2-3). The relevant policy included a limitation on coverage to "all risks of direct physical loss or damage to the property described in Paragraph I" (*id.* at 3). In interpreting the phrase "direct physical loss or damage," the Appellate Division concluded that "the business interruption coverage is limited to losses involving physical damage to the insured's property" (*id.* at 7). Moreover, the Appellate Division dismissed the idea that a direct physical loss included "loss of use of" covered property (*id.* at 8 [holding that provisions of the policy "would also make little sense were there no requirement of physical damage to the insured's premises"]).

Since the onset of the coronavirus pandemic, both the state courts and federal courts within this state have interpreted the meaning of this policy language in light of the changes to how public accommodations do business occasioned by the various Executive Orders issued to combat the spread of COVID-19. While the Appellate Division, First Department, has yet to weigh in on this issue, the trial courts, many relying on *Roundabout Theater Co.*, have uniformly denied claims of direct physical loss or damage where the insured does not allege actual physical damage to its property (*see Wellpath Holdings, Inc. v XL Ins. Am., Inc.*, 2021 NY Slip Op 32093[U] at **7 [Sup Ct, Westchester County 2021] ["numerous courts applying New York law have recently considered whether the presence of COVID-19 constitutes direct physical loss of or damage to property and uniformly answer this question in the negative"] [internal citations and quotation marks omitted]; *Island Gastroenterology Consultants, PC v General Cas. Co.*, 72

Misc 3d 1221[A] [Sup Ct, Suffolk County 2021] ["the loss of use of premises due to COVID-19 related government orders does not trigger business-income coverage based on physical loss to property"]; *Benny's Famous Pizza Plus Inc. v Security Natl. Ins. Co.*, 72 Misc 3d 1209[A] [Sup Ct, Kings County 2021] ["all New York courts applying New York law have . . . soundly rejected the argument that business closures due to the presence of the COVID-19 virus or due to New York State Executive Orders constitute physical loss or damage to property"]; *6593 Weighlock Dr., LLC v Springhill SMC Corp.*, 71 Misc 3d 1086, 1095-96 [Sup Ct, Onondaga County 2021] ["While plaintiffs argue the virus spreads through droplets and aerosols and can, according to scientists, live on surfaces for up to several days, there is no physical loss of or damage to property when an item or structure ... merely needs to be cleaned"] [internal citations and quotation marks omitted]; *Visconti Bus Serv., LLC v Utica Natl. Ins. Group*, 71 Misc 3d 516, 533 [Sup Ct 2021] ["There is no allegation of any physical harm whatsoever to Visconti's premises — Visconti has unequivocally asserted that its premises are not infected with the Covid-19 virus"]).

These cases are only a sampling of more than 30 cases in which the exact policy language found in defendant's policy, or language substantially similar to it, has been found not to provide coverage due to loss of business income or other damages caused by the coronavirus pandemic. Defendant does not assert any materially new or different arguments that would compel a contrary result in this case. Defendant's novel assertion that the physical alterations to its spaces are sufficient for a claim of direct physical loss or damage relies heavily on out-of-state cases that do not interpret New York law and are not binding on this court. Defendant's reliance on *Newman Myers Kreines Gross Harris, P.C. v Great N. Ins. Co.* (17 F Supp 3d 323 [SDNY 2014]) is similarly unavailing. In *Newman Meyers*, the court, relying in part on *Roundabout*

Theater Co., held that mere loss of use is insufficient to trigger coverage where there has been no "actual, physical damage to the insured premises" (*id.* at 331). The phrase "physical change for the worse in the premises," cited repeatedly by defendant, relates to the Court's discussion of several out-of-state cases not interpreting New York law, and was explicitly rejected by the Court as a basis for coverage under New York law (*id.* at 329-331). Also inapposite is *Schlamm Stone & Dolan, LLP v Seneca Ins. Co.* (6 Misc 3d 1037[A] [Sup Ct NY County 2005]), in which the policy at issue, unlike the relevant policy here, did not condition business interruption coverage on actual physical damage or loss.

As an alternative, defendant also asserts that the policy may be interpreted so that "physical loss" encompasses loss of possession or functionality of the insured premises. This argument is foreclosed by *Roundabout Theater Co.,* as set forth above (*Roundabout Theater Co.*, 302 AD2d at 8; *see also Island Gastroenterology Consultants, PC, supra*; *Benny's Famous Pizza Plus Inc., supra*). The cases cited by defendant are, again, largely from outside New York and do not interpret New York law. Those New York cases cited by defendant in support of this proposition are inapposite; one has no clear relevance to the dispute in this matter at all (*Certain Underwriters at Lloyd's London Subscribing to Policy No. PGIARK01449-05 v Advance Tr. Co., Inc.*, 188 AD3d 523 [1st Dept 2020]); and the other concerns physical loss related to the merchantability of beverages, which again has no bearing on this case (*Pepsico, Inc. v Winterthur Intern. Am. Ins. Co.*, 24 AD3d 743, 744 [2d Dept 2005]).

Finally, defendant claims that it may be entitled to coverage under the Communicable Disease provisions. The policy provides coverage for Communicable Disease Response and Interruption by Communicable Disease where access to any of defendant's insured properties is limited by the "actual not suspected presence of communicable disease" therein (NYSCEF Doc.

No. 75, SP 10 561 1117 at 38, § V[H][8]). Defendant alleges in its counterclaims that there was never any occurrence of COVID-19 at its insured properties NYSCEF Doc. No. 47, ¶ 96) and, accordingly, coverage is not available under this provision (*see Visconti Bus Serv., LLC*, 71 Misc 3d at 533).

Because defendant has not alleged direct physical loss or damage to its property or the actual or suspected presence of COVID-19 at any of its insured properties, there is no coverage available under the policy, and the court need not determine whether any of the policy exclusions raised by plaintiff apply to bar coverage. Defendant is not entitled to a declaratory judgment that the Executive Orders issued in response to the coronavirus pandemic caused "direct physical loss or damage" to its properties. Further, defendant's claims for breach of contract and unjust enrichment assert that plaintiff has unjustly failed to provide coverage. As plaintiff sufficiently alleged, and by the terms of the policy, there is no coverage for defendant's alleged losses, and thus plaintiff has not breached the policy (*Harris v. Seward Park Housing Corp.*, 79 AD3d 425 [1st Dept 2010]). Moreover, as the subject matter of the parties' dispute is covered by the policy, and defendant does not argue that the policy is invalid or unenforceable, the unjust enrichment claim must be dismissed (*Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.,* 70 NY2d 382, 388 [1987]).

Turning to defendant's affirmative defenses, "plaintiff bears the burden of demonstrating that the defenses are without merit as a matter of law" (*534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick*, 90 AD3d 541, 541 [1st Dept 2011]). The complaint sufficiently states causes of action for declaratory relief and breach of contract, and defendant's claim that the compliant fails to do so (first affirmative defense) is without merit. The court's finding that there is no coverage under the provisions of the policy disposes of defendant's assertions that plaintiff failed to

perform under the policy (third affirmative defense) and that defendant is entitled to a setoff (fourth affirmative defense). Moreover, the complaint sufficiently alleges that plaintiff incurred specifically identified damages due to defendant's decision to bring suit contrary to the policy's jurisdiction, venue, and choice of law provisions (NYSCEF Doc. No. 51, ¶¶ 50-57) and, accordingly, defendant's claim that plaintiff's damages are speculative and unrecoverable (fifth affirmative defense) must be dismissed. However, because plaintiff's damages have yet to be established, defendant's claim that plaintiff has not suffered any damages at all (second affirmative defense) must remain (*534 E. 11th St. Hous. Dev. Fund Corp.*, 90 AD3d at 541 ["A defense should not be stricken where there are questions of fact requiring trial"]).

Finally, defendant asserts a defense of equitable estoppel and unclean hands (sixth affirmative defense), based upon plaintiff's failure to provide coverage. "The doctrine of unclean hands applies when the complaining party shows that the offending party is guilty of immoral, unconscionable conduct and even then only when the conduct relied on is directly related to the subject matter in litigation and the party seeking to invoke the doctrine was injured by such conduct" (*Kopsidas v Krokos*, 294 AD2d 406, 407 [2d Dept 2002]). Defendant has not sufficiently alleged that plaintiff engaged in immoral or unconscionable conduct in failing to provide coverage. Further, where an insurer denies a claim because it falls outside of the policy's terms and thus no coverage is available, "estoppel may not be used to create coverage" (*Matter of Liberty Mut. Ins. Co. v McDonald*, 6 AD3d 614, 615 [2d Dept 2004]). Accordingly, the sixth affirmative defense is also without merit.

Accordingly, it is hereby

ORDERED that the branch of plaintiff North American Elite Insurance Company's motion that seeks dismissal of defendant Mac Parent LLC's counterclaims is granted and the counterclaims are dismissed; and it is further

ADJUDGED and DECLARED that the Executive Orders issued in response to the coronavirus pandemic did not cause direct physical loss or damage to defendant's insured properties; and it is further

ORDERED that the branch of plaintiff's motion that seeks dismissal of defendant's affirmative defenses is granted to the extent that the first, third, fourth, fifth, and sixth affirmative defenses are dismissed; and it is further

ORDERED that the balance of the action is severed and continued.

This constitutes the decision and order of the court.

ENTER:

Louis L. Nock

3/23/2022
DATE

LOUIS L. NOCK, J.S.C.

CHECK ONE:	☐	CASE DISPOSED			☒	NON-FINAL DISPOSITION	
	☐	GRANTED	☐	DENIED	☒	GRANTED IN PART	☐ OTHER
APPLICATION:	☐	SETTLE ORDER			☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN			☐	FIDUCIARY APPOINTMENT	☐ REFERENCE