

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

Royale Bezjian Bros, Inc.,

Plaintiff,

v.

Pekin Insurance Company,

Defendant.

Case No. 2020 CH 4954

Calendar 2

ORDER

RAYMOND W. MITCHELL, Circuit Judge.

Defendant Pekin Insurance Company moves to dismiss Plaintiff Royale Bezjian Bros, Inc.'s complaint pursuant to section 2-615 of the Illinois Code of Civil Procedure.

I.

The facts alleged in the complaint are taken as true for the purpose of ruling on a motion to dismiss. Plaintiff Royale Bezjian Bros, Inc. operates a carpet cleaning business. On March 20, 2020, Illinois Governor J.B. Pritzker issued an executive order in response to the outbreak of COVID-19, ordering non-essential businesses to cease operation. This order was extended until May 29, 2020, when Governor Pritzker allowed non-essential businesses to resume operation. Royale, a carpet cleaning business, was a non-essential business and ceased its operation from March 21, 2020 until May 29, 2020 in compliance with Governor Pritzker's executive orders.

From December 1, 2019 to December 1, 2020, Royale was insured under a commercial lines insurance policy issued by Defendant Pekin Insurance Company. The Policy contains a business income coverage form which provides that Pekin will pay for the actual loss of business income sustained due to the necessary suspension of the insured's "operations" during the "period of restoration," that is caused by "direct physical loss of or damage to property . . . caused by or resulting from any Covered Cause of Loss." The term "period of restoration" is defined in part as "the period of time that begins with the date of direct physical loss or damage caused by or resulting from any Covered Cause of Loss." The Policy provides for "extra expense" and "civil authority" additional coverages.

The Policy defines "Covered Causes of Loss" to mean "risks of direct physical loss unless the loss is excluded . . . or limited." It excludes from coverage loss or damage caused by or resulting from "acts or decisions, including the failure to act or decide, of any person, group, organization or governmental body," but again promises to pay "if loss or damage by a Covered Cause of Loss results."

Royale filed a two-count complaint on July 15, 2020, seeking a declaratory judgment of insurance coverage and damages for breach of contract, which Pekin now moves to dismiss.¹

II.

A motion to dismiss pursuant to section 2-615 challenges the legal sufficiency of a complaint based upon defects apparent on its face. *Beacham v. Walker*, 231 Ill. 2d 51, 57 (2008). The critical inquiry is whether the well-pleaded facts of the complaint, taken as true and construed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief may be granted. *Loman v. Freeman*, 229 Ill. 2d 104, 109 (2008). The complaint need only set forth the ultimate facts to be proved—not the evidentiary facts tending to prove such ultimate facts. *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 369 (2004). In ruling on a section 2-615 motion, exhibits attached to the complaint are included as part of the complaint and control over inconsistent factual allegations therein. *Lipinski v. Martin J. Kelly Oldsmobile, Inc.*, 325 Ill. App. 3d 1139, 1147 (1st Dist. 2001).

An insurance policy is a contract, and the general rules governing the interpretation of contracts also govern the interpretation of insurance policies. *Hobbs v. Hartford Ins. Co.*, 214 Ill. 2d 11, 17 (2005). The primary objective is to ascertain and give effect to the intention of the parties, as expressed in the policy language. *Id.* If the policy language is unambiguous, the policy will be applied as written. *Id.* A policy provision is not rendered ambiguous simply because the parties disagree as to its meaning. *Founders Insurance Co. v. Munoz*, 237 Ill. 2d 424, 433 (2010).

Under the language of the Policy, it is "direct physical loss of or damage to property . . . caused by or resulting from any Covered Cause of Loss" that triggers business income coverage, additional extra expense coverage, and additional civil authority coverage. Pekin argues that there is no direct physical loss of or damage to Royale's property that would trigger coverage. As an initial matter, Pekin contends that the alleged loss or damage is not "direct" because the shutdown orders did not themselves directly alter Royale's property. However, it seems

¹ Both Pekin and Royale have also filed motions for leave to cite additional authority. Those motions have been GRANTED and I have considered not only the cases additionally cited by the parties, but also those that were recently rendered by courts nationwide.

abundantly clear that the governmental shutdown orders are the direct response to the spread of COVID-19 virus threatening the operation of businesses. Thus, Royale's alleged loss—that is, the loss of use of the insured property—is directly related to the shutdown orders.

Next, Pekin argues that there is no “physical” loss of or damage to the property. The Illinois Supreme Court in *Traveler's Insurance Company v. Eljer Manufacturing, Inc.* is instructive in determining what the plain and ordinary meaning of the term “physical loss” or “physical damage” should be. The *Eljer* Court held that the term “physical injury” connotes “damage to tangible property causing an alteration in appearance, shape, color or in other material dimension.” 197 Ill. 2d 278, 312 (2001). It also concluded that the term does not include intangible damage to property, such as economic loss. *Id.* While the term interpreted in *Eljer* is not identical to the term at issue here—“direct physical loss of or damage to property”—what the *Eljer* Court focused on was the term “physical” that limits the word “injury” in the policy definition. Similarly, both terms “loss” and “damage” here are modified by the term “physical.” Therefore, *Eljer* is the apposite authority for the case at bar. This interpretation is consistent with the well-respected legal treatise, *Couch on Insurance*, which recognizes that “[t]he requirement that the loss be ‘physical,’ given the ordinary definition of that term, is widely held to exclude alleged loss that are intangible or incorporeal . . . when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property.” 10A Steven Plitt et al., *Couch on Insurance* § 148:46 (3d ed. 2021).

Here, there is no allegation by Royale that the insured property was in any way altered in appearance, shape, color or in other material dimension. In fact, the alleged loss is solely the loss of use of its business premises. Absent any “physical” alteration, the Policy cannot be said to provide coverage for mere loss of use that is intangible and economic in nature. Thus, Royale's argument that the term “direct physical loss of or damage to property” can be reasonably interpreted to cover mere loss of use of the property—and that such interpretation must be a controlling one as favorable to the policyholder—fails.

This construction of the Policy is also in line with the definition of “period of restoration.” For business income coverage and extra expense coverage, Pekin promises to pay for the lost income and necessary expenses incurred during the “period of restoration,” necessitating this period to ensue to trigger coverage. The term “period of restoration” is defined in the Policy as the period of time that:

- a. Begins with the date of direct physical loss or damage caused by or resulting from any Covered Cause of Loss at the described premises; and

- b. Ends on the date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality.

Specifically, the ending date of a "period of restoration" as defined reinforces the notion that direct physical loss or damage contemplates more than mere loss of use. It entails a degree of physicality such that it is necessary for the property to be "repaired, rebuilt or replaced." Here, there were no physical alteration caused to the property that it had to be repaired, rebuilt, or replaced. The property was simply closed.

Furthermore, Royale's reliance on the asbestos cases is misplaced. In *Board of Education v. International Insurance Co.*, cited by Royale, the First District appellate court relied on *United States Fidelity & Guaranty Co. v. Wilkin Insulation Co.*, an Illinois Supreme Court case. See 144 Ill. 2d 64 (1991); 308 Ill. App. 3d 597, 600 (1st Dist. 1999). Faced with the issue of whether asbestos fiber contamination constitutes physical injury to tangible property, the *Wilkin* Court held that it does constitute physical injury, observing that the essence of the allegations was that the buildings have been rendered uninhabitable "to the point where correction action, under the law, must be taken." *Wilkin*, 144 Ill. 2d at 75-76. Put differently, "physical loss or damage" occurs only if an actual release of asbestos fibers results in contamination such that the property function is "nearly eliminated or destroyed, or the structure is made useless or uninhabitable." *Port Authority v. Affiliated FM Insurance Co.*, 311 F.3d 226, 236 (3d Cir. 2002) (comparing the effect of asbestos fibers at enough level to come within coverage to the effect of fire, water, or smoke on a structure's use and function). The mere presence of asbestos, or the general threat of future damage is simply not enough to trigger coverage. Consistently, this reasoning does not support Royale's claim.

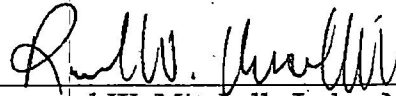
As observed, business income coverage, additional extra expense coverage, and additional civil authority coverage all require that there be "direct physical loss of or damage to property." For the reasons stated, the Policy does not provide coverage for Royale's claim. Accordingly, Royale's complaint is dismissed with prejudice.

III.

It is hereby ORDERED:

1. Defendant Pekin Insurance Company's motion to dismiss Plaintiff Royale Bezjian Bros, Inc.'s complaint is GRANTED. The case is dismissed with prejudice.
2. This is a final order that disposes of the case in its entirety.

ENTERED,



Raymond W. Mitchell, Judge No. 1992

Judge Raymond W. Mitchell

JUL 16 2021

IRIS Y. MARTINEZ
Circuit Court-1992