SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU – Commercial Division Part 8
Present: Hon. Sharon M.J. Gianelli

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ANTHONY LOLLI,

Plaintiff,

-against-

WESCO INSURANCE COMPANY, THOSE CERTAIN UNDERWRITERS AT LLOYD'S, LONDON SUBSCRIBING TO POLICY NUMBER 31-7580150427-S-00, and NATIONAL FIRE & MARINE INSURANCE COMPANY,

Defendants.

_____X

Index No: 603421/2021

Motion Seq. 002, 003, 004

Decision and Order

XXX

Papers submitted:

Motion Seq. 002-
Plaintiff's Notice of Motion, Affidavit of Facts, Affirmation and Exhibits in Support _____X

Motion Seq. 003-
Defendants CERTAIN UNDERWRITERS AT LLOYD'S, LONDON SUBSCRIBING TO POLICY NUMBER 31-7580150427-S-00, And NATIONAL FIRE & MARINE INSURANCE COMPANY's Notice of Motion, And Memo of Law in Support _____X
Plaintiff's Affirmation, Memorandum of Law and Exhibits in Opposition _____X
Defendants' Memo of Law in Reply _____ X

Motion Seq. 004-
Defendant WESCO INSURANCE COMPANY's Notice Of Cross-Motion, Affirmation, Affidavit, Exhibits and Memo of Law in Support and in Opposition _____X
Plaintiff's Affirmation and Exhibits in Opposition __X

This action was commenced by the filing of a Summons and Complaint on March 21, 2021. By virtue of a So-Ordered stipulation dated August 24, 2021, the caption was

amended and the Complaint was amended. An Answer on behalf of Defendant WESCO INSURANCE COMPANY (hereinafter referred to as "Defendant WESCO") was filed on November 24, 2021.

This action arises from a claim for insurance benefits for damage to Plaintiff's properties.

Motion Seq. 002

Plaintiff moves this Court for an Order pursuant to CPLR § 3215, finding Defendant WESCO INSURANCE COMPANY, to be in default in failing to answer or otherwise appear in this action, and directing that this matter be scheduled for an Inquest to assess damages.

Motion Seq. 003

Defendants CERTAIN UNDERWRITERS AT LLOYD'S, LONDON SUBSCRIBING TO POLICY NUMBER 31-7580150427-S-00 AND NATIONAL FIRE & MARINE INSURANCE COMPANY (hereinafter referred to as "the Lloyd's Defendants") move this Court for an Order dismissing the Second and Third Cause of Action as alleged against them on the grounds that documentary evidence refutes Plaintiff's factual allegations; and the Amended Complaint fails to state a cause of action against them.

Motion Seq. 004

Defendant WESCO INSURANCE COMPANY cross moves the Court for an Order dismissing Plaintiff's Amended Complaint in its entirety.

Factual History

This matter arises from disputes regarding two (2) sets of properties. Subject premises #1 is owned by a series of limited liability corporations for whom Plaintiff is the managing member, and consists of the following properties:

670 4th Ave, Brooklyn NY 11232
668 4th Ave, Brooklyn NY 11232
76-17 Myrtle Ave, Glendale NY 11385
498 Vermont St, Brooklyn NY 11207
1234 Flatbush Ave, Brooklyn NY 11226
370 Butler St, Brooklyn NY 11217
216 23rd St, Brooklyn NY 11232

Subject premises #2 is owned by a series of limited liability corporations, for whom Plaintiff is the managing member, consisting of the following properties:

220 Targee St, Staten Island NY 10304
700A 5th Ave, Brooklyn NY 11215
681 4th Ave, Brooklyn NY 11232
63 Duffield St, Brooklyn NY 11201

Also included in Subject premises #2 is 40 Sharrotts Lane, Staten Island NY 10309, which Plaintiff owns outright.

Plaintiff claims that on or about June 26, 2019, Defendant WESCO issued a policy of Commercial insurance, number WPP 1570403-02 (hereinafter the "WESCO policy #1"), effective from August 10, 2019 to and including August 10, 2020, insuring, inter alia, "subject premises #1, the property of Plaintiff located at or about subject premises #1, and Plaintiffs business income derived from said premises."

Plaintiff further claims that on or about August 8, 2019, Defendant WESCO issued a policy of Commercial insurance, number WPP 1648780 (hereinafter the "WESCO policy #2"), effective from September 28, 2019 to and including September 28, 2020, insuring, inter alia, "subject premises #2, the property of Plaintiff located at or about subject premises #2, and Plaintiffs business income derived from said premises."

Plaintiff alleges that on or about March 19, 2020, both WESCO policy #1 and WESCO policy #2 were in full force and effect.

Plaintiff argues that a series of Executive Orders issued by the Governor of the State of New York, starting March 19, 2020, resulted in a loss of rent from subject premises #1 and subject premises #2. Plaintiff has submitted a spreadsheet from his accounting department detailing a loss in rental income from subject premises #1 in the amount of $288,014.20 and for subject premises #2 in the amount of $202,951.20 for a total loss of $490,965.40. Plaintiff states that both premises #1 and #2 were affected by COVID contamination.

Plaintiff states that the insurance policies applicable to both subject premises contain a Business Income (And Extra Expense) Coverage Form, form CP00301012, in which there is a section entitled "Additional Coverages" that provides:

5. Additional Coverages

a. Civil Authority

In this Additional Coverage, Civil Authority, the described premises are premises to which this Coverage Form applies, as shown in the Declarations.

When a Covered Cause of Loss causes damage to property other than property at the described premises, we will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises, provided that both of the following apply:

(1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within one mile from the damaged property; and

(2) The action of the civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

Civil Authority Coverage for Business Income will begin 72 hours after the time of the first action of civil authority that prohibits access to the described premises and will apply for a period of up to four consecutive weeks from the date on which such coverage began.

Civil Authority Coverage for Extra Expense will begin immediately after the time of the first action of civil authority that prohibits access to the described premises and end:

(1) Four consecutive weeks after the date of that action; or

(2) When your Civil Authority Coverage for Business Income ends; whichever is later.

(Wesco policy number 157040302 NYCEF Doc. No. 32, Page 108)
(Wesco policy number 164878001 NYCEF Doc. No. 33, Page 155)

Plaintiff argues that under this provision, Plaintiff is entitled to reimbursement for loss of income sustained by the Executive Orders issued by the Governor of the State of New York starting March 19, 2020, which resulted in a loss of rent.

Plaintiff further argues that each policy contains a provision entitled "Exclusions" which do not apply to this matter.

Further, Plaintiff states that WESCO policy #1 also contains an Endorsement, form CG21320509, entitled "COMMUNICABLE DISEASE EXCLUSION", and WESCO policy #2 contains an Endorsement, form CP01780808 entitled "NEW YORK - EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA", (hereinafter the "Virus Endorsements") which provide, inter alia, that losses caused by virus-borne illnesses are excluded from coverage. Said exclusion provides:

> A. The exclusion set forth in Paragraph B. applies to all coverage under all forms and endorsements that compromise Coverage Part, including but not limited to forms or endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority.
> B. We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.
> However, this exclusion does not apply to loss or damage caused by or resulting from "fungus", wet rot or dry rot. Such loss or damage is addressed in a separate exclusion in the Coverage Part.
> C. The terms of the exclusion in Paragraph B., or the inapplicability of this exclusion to a particular loss, do not serve to create coverage for any loss that would otherwise be excluded under this Coverage Part.

(Wesco policy number 157040302 NYCEF Doc. No. 32, Page 124)
(Wesco policy number 164878001 NYCEF Doc. No. 33, Page 172)

However, Plaintiff argues that the "Virus Endorsements" do not state that they negate or exclude coverage under the additional coverage for action of civil authority, nor does either policy contain an anti-concurrent causation clause.

Based on Plaintiff's claim that a loss of business was sustained under a provision covered by the insurance policies at issue, Plaintiff filed a Notice of Loss under each policy.

Defendant WESCO issued a Denial of Coverage letter in response to Plaintiff's Notice of Loss dated April 27, 2020, which stated, in pertinent part:

> As the acts or decision of a governmental body is excluded, we are unable to make any payments for your loss due to the decisions of the government that affect or limit your business.

Further,

> As noted above, the policy excludes loss or damage caused by or resulting from any virus, bacterium or micro-organism that induces or is capable of inducing physical distress, illness or disease. Accordingly, we are disclaiming coverage.

And,

> Your (sic) reported a claim for loss of rental income caused by Corona Virus Pandemic. We discussed the fact that there was no direct physical loss at your premises or to property other than at the described premises and this was not a situation of a civil authority mandatory closures from a covered cause of loss. We hereby disclaim coverage for the loss of business income, as the cause of the income loss was not caused by covered direct damage to your business rental properties.

Motion Seq. 002

On September 9, 2021, Plaintiff filed a motion seeking a default judgment against Defendant WESCO. Plaintiff argues that on April 7, 2021, service of the Summons, Complaint and Notice of Electronic Filing was made on Defendant WESCO via the Superintendent of Insurance, New York State Department of Financial Services. Plaintiff argues that Defendant WESCO failed to timely Answer or appear in this action.

In opposition, Defendant WESCO denies receipt of the Summons and Complaint and claims that immediately after becoming aware of the action through service of the motion for default judgment, he contacted Plaintiff's counsel and began settlement negotiations, which were ultimately unsuccessful. An Answer was filed by Defendant WESCO on November 24, 2021.

In further support of its motion to dismiss, Plaintiff argues that Defendant WESCO failed to prove a reasonable excuse for its default or a meritorious defense to the action, and therefore, this Court must award Plaintiff judgment on default.

Motion Seq. 003

The Lloyd's Defendants move, pre-answer, for dismissal of the Second and Third Cause of Action as alleged against them, on the ground that documentary evidence refutes Plaintiff's factual allegations, and the Amended Complaint fails to state a cause of action against them.

The Lloyd's Defendants state that the Amended Answer must be dismissed, as the policy's Business Income coverage requires "direct physical loss of or damage to the insured property." The Lloyd's Defendants argue that since there is not even the allegation that there was a physical loss or damage to the property, the Amended Complaint should be dismissed.

Further, the Lloyd's Defendants claim that there is no coverage under the Civil Authority provision of the policy as that provision is only considered when there is proof that a "civil authority prohibited access to insured property because of direct physical damage to nearby property."

The Lloyd's Defendants also argue that the policies at issue specifically and expressly preclude any losses caused directly, or indirectly by biological or pathogenic agents or materials. The Lloyd's Defendants claim that this applies to "viruses such as the novel coronavirus, also known as SARS-CoV-2."

In Opposition, Plaintiff argues that "the term 'Direct Physical Loss', although used in numerous places in the LLOYD'S policy, is nowhere defined therein." Plaintiff further argues that the applicable provisions of the policies are ambiguous and that, "under the doctrine of *expressio unis est exclusio alterius*, as well as the well-known doctrine of *contra proferentem* favoring the insured when interpreting ambiguous terms contained in insurance policies," the Court must read the ambiguous terms as not requiring physical loss or damage to the property.

Plaintiff further argues that requirements of the policies were met as the existence of the SARS-CoV-2 virus constitutes physical damage to the property. Accordingly, Plaintiff alleges it has proven that the suspension of its operations was caused by direct physical loss of or damage to property.

Plaintiff argues that it is Defendants' burden to establish the applicability of an exclusion. Plaintiff states that the Lloyd's Defendants have failed to meet that burden, and that in fact, that burden cannot be met on a motion to dismiss, as the exclusion is ambiguous.

Plaintiff advances the argument that "in the case at bar, the 'Biological Hazards' exclusion states that it is applicable to loss caused by an 'agent, material, product or substance.' Again, the term "agent" is undefined in the policy, and it is unclear whether it applies to organism, such as viruses."

Further, Plaintiff argues that the Lloyd's Defendants never formally denied the claim.

In summary, Plaintiff argues "under an all risk policy such as the Subject Policy, the insured Plaintiff merely has to show that there was a loss i.e. physical damage causing the business interruption due to, e.g., action of civil authority. Applicability of the exclusion is the carrier's burden, and this is something that cannot establish on a motion to dismiss due to the exclusion having previously been held ambiguous in other states."

Plaintiff argues that the Lloyd's Defendants have failed to meet the burden of establishing that Plaintiff did not sufficiently plead a basis for its claim for breach of contract and that the Lloyd's Defendants' motion must be denied.

In Reply, the Lloyd's Defendants reiterate the position that "For coverage to apply here, Plaintiff must plead and then prove that it suffered direct physical loss of or damage to property."

The Lloyd's Defendants argue that the Court must adopt the plain, unambiguous language of the policy and find that there was no direct physical loss of or damage to the property.

The Lloyd's Defendants assert that Plaintiff has neither a proper claim under the Civil Authority provision, as there was no physical damage to property and that governmental orders did not prevent access to the property.

Finally, the Lloyd's Defendants argue that the Policy's Biological Exclusion clearly excludes coverage in this matter.

The Lloyd's Defendants accuse Plaintiff of relying on outlier decisions, and allege that "New York state and federal courts that have interpreted 'direct physical loss of or damage to' property in the COVID-19 context under New York law have all ruled in favor of insurers and dismissed policyholders' claims for failure to show a 'direct

physical loss of or damage'." The Lloyd's Defendant point out that the Second Circuit has joined every other appellate court in finding that loss of property is not the same as direct physical loss of or damage to property.

Motion Seq. 004

Defendant WESCO moves for an Order dismissing Plaintiff's Complaint in its entirety. Defendant WESCO argues that the Amended Complaint fails to allege the requisite damage to property.

Further, Defendant WESCO argues that a loss caused by a virus is not covered by the policies at issue, and that the Amended Complaint acknowledges this fact.

In Opposition, Plaintiff argues that the Amended Complaint alleges that a COVID virus contamination can be considered property damage, under the terms of the Contract.

Further, Plaintiff states that Defendant WESCO burdens the burden of proof with respect to establishing the applicability of an exclusion.

Plaintiff also argues that the terms at issue are vague and that a policy must be read in favor of the insured.

Analysis

CPLR § 3215 provides:

When a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the plaintiff may seek a default judgment against him.

CPLR § 3012(d) permits the Court to compel acceptance of an untimely served pleading "upon such terms as may be just and upon a showing of reasonable excuse for the delay."

The Court has discretion to deny a motion for default judgment and excuse a Defendant's default in answering. Public policy calls for permitting parties to litigate on the merits. Schmidt v. City of New York, 50 AD3d 664 (2d Dept. 2008); Trimble v. SAS Taxi Co. Inc., 8 AD3d 557 (2d Dept. 2004); Lichtman v. Sears, Roebuck & Co., 236 A.D.2d 373 (2nd Dept. 1997); Meyer v. Rose, 160 AD2d 565 (1st Dept. 1990); Lindo v. Evans, 98 AD2d 765 (2d Dept. 1983).

In this matter, not only has Defendant WESCO answered during the pendency of the motion, Plaintiff has entered into two (2) separate stipulations to extend the briefing schedules of the underlying pending motions, demonstrating that Defendant WESCO has been actively participating in this action and that Plaintiff will suffer no prejudice.

Accordingly, Plaintiff's motion for a judgment on default, against WESCO is denied.

In determining a pre-answer motion to dismiss, the court must accept the facts as alleged in the complaint as true, accord Plaintiff every possible inference, and determine whether the facts as alleged fit within any cognizable theory. Mintz v. American Tax Relief, 16 Misc. 3d 517 (N.Y. Sup. Ct. 2007).

To survive a motion to dismiss pursuant to Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. A complaint's "[f]actual allegations must be enough to raise the right to relief above the speculative level." Twombly, 550 U.S. at 555, 127 S.Ct. 1955.

Under New York law, "a policyholder bears the burden of showing that the insurance contract covers the loss." Morgan Stanley Grp. Inc. v. New Eng. Ins. Co., 225 F.3d 270, 276 (2d Cir. 2000). "The initial interpretation of a contract is a matter of law for the court to decide." Id. at 275. "Insurance contracts must be interpreted according to common speech and consistent with the reasonable expectation of the average insured". Dean v. Tower Ins. Co. of N.Y., 19 N.Y.3d 704, 708, 955 N.Y.S.2d 817, 979 N.E.2d 1143 (2012). Courts must "give effect to the intent of the parties as expressed in the clear language of the contract," Parks Real Estate Purchasing Grp. v. St. Paul Fire & Marine Ins. Co., 472 F.3d 33, 42 (2d Cir. 2006) giving "unambiguous provisions of an insurance

contract ... their plain and ordinary meaning." Fed. Ins. Co. v. Am. Home Assurance Co., 639 F.3d 557, 567 (2d Cir. 2011). See Essex Ins. Co. v. Laruccia Constr., Inc. 71 A.D.3d 818, 898 N.Y.S.2d 558, 559 (2010). "If the provisions are clear and unambiguous, courts are to enforce them as written." Vill. of Sylvan Beach, N.Y. v. Travelers Indem. Co., 55 F.3d 114, 115 (2d Cir. 1995). If provisions are ambiguous, courts must construe them in the insured's favor and against the insurer. Dean, 19 N.Y.3d at 708, 955 N.Y.S.2d 817, 979 N.E.2d 1143.

In a matter that is strikingly similar to the case at bar, including the cited policy provisions and arguments made therein, the United States District Court, Eastern District recently held "New York courts have consistently understood identically worded insurance clauses to exclude business interruption losses from coverage when the losses were not caused by real, tangible damage to or loss of the property." See, e.g., Roundabout Theatre Co. v. Cont'l Cas. Co., 302 A.D.2d 1, 6-7, 751 N.Y.S.2d 4 (1st Dep't 2002); Howard Stores Corp. v. Foremost Ins. Co., 82 A.D.2d 398, 401, 441 N.Y.S.2d 674 (1st Dep't 1981), aff'd, 56 N.Y.2d 991, 453 N.Y.S.2d 682, 439 N.E.2d 397 (1982)." DeMoura v. Cont'l Cas. Co., 523 F. Supp. 3d 314, 321 (E.D.N.Y. 2021)

Further, the Court in *DeMoura* held that, in applying this standard, the Plaintiff failed to sufficiently allege that there is coverage under the Business Income and Extra Expenses provisions of the policy without real, tangible damage to or loss of property.

The Court notes that there are multiple matters with consistent findings in the Southern District as well.

"The Complaint fails to plead that the area surrounding Sparks suffered damage or that a civil authority order completely barred access to Sparks and the area immediately surrounding any neighboring damaged area. As with the Policy's business income and extra expense provisions, Sparks has failed to allege sufficient facts to establish its entitlement to the sought declaratory relief or to present a plausible breach of contract claim as to the civil authority provision. Counts Three and Four are therefore dismissed." Michael Cetta, Inc. v. Admiral Indem. Co., 506 F. Supp. 3d 168, 185 (S.D.N.Y. 2020), appeal withdrawn, No. 21-57, 2021 WL 1408305 (2d Cir. Mar. 23, 2021). "The Complaint does not plausibly allege losses under the Civil Authority provisions. The Complaint claims that 'a Covered Cause of Loss [a risk of direct physical loss] cause[d] damage to property near the insured premises, the civil authority prohibit[ed] access to property near the insured premises, and the civil authority action [was] taken in response to dangerous physical conditions.' It is plausible that the risk of COVID-19 being physically present in neighboring properties caused state and local authorities to prohibit access to those properties. But the Complaint does not allege that these closures of neighboring properties "direct[ly] result[ed]" in closure of Plaintiff's own premises, as the Civil Authority provisions require. Instead, the Complaint alleges that Plaintiff was forced to close for the same reason as its neighbors – the risk of harm to individuals on its own premises due to the pandemic. Put differently, the Complaint does not plausibly allege that the potential presence of COVID-19 in neighboring

properties directly resulted in the closure of Plaintiff's properties; rather, it alleges that closure was the direct result of the risk of COVID-19 at Plaintiff's property." See United Air Lines, 439 F.3d 128, 134–35 (2d Cir. 2006) (denying recovery because nationwide shutdown of airport facilities due to risk of terrorism did not directly result from physical damage to neighboring properties). 10012 Holdings, Inc. v. Sentinel Ins. Co., Ltd., 507 F. Supp. 3d 482, 488–89 (S.D.N.Y. 2020), aff'd, 21 F.4th 216 (2d Cir. 2021).

In this matter, there is no new or different evidence or argument made that would cause this Court to deviate from the clearly established binding precedent that presently exists in numerous identical cases. Accordingly, without any allegation of real, tangible damage to or loss of property, Plaintiff has failed to state a claim to relief that is plausible on its face.

As Plaintiff failed to state a Cause of Action, applicability of the "Virus" provisions is moot.

Accordingly,

It is

ORDERED, that Plaintiff's motion for a default judgment against Defendant WESCO INSURANCE COMPANY, is Denied; and

It is

ORDERED, that Defendants THOSE CERTAIN UNDERWRITERS AT LLOYD'S, LONDON SUBSCRIBING TO POLICY NUMBER 31-7580150427-S-00, and NATIONAL FIRE & MARINE INSURANCE COMPANY's motion for an Order dismissing the Second and Third Cause of Action as alleged as against those Defendants, is Granted; and

It is

ORDERED, that Defendant WESCO INSURANCE COMPANY's motion for an Order dismissing Plaintiff's Amended Complaint, is Granted.

All applications not specifically addressed herein are denied.

This constitutes the Order of the Court.

Dated: Mineola, New York
April 12, 2022

Sharon M.J. Gianelli
Justice of the Supreme Court