IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO
CIVIL DIVISION

CLASSIC DINING GROUP LLC, ET AL.	**:**	
Plaintiff,	**:**	**Case No. 20 CV 004107**
v.	**:**	**JUDGE CARL A. AVENI**
STATE AUTO INSURANCE COMPANIES	**:**	
Defendant.	**:**	

DECISION AND ENTRY GRANTING DEFENDANT STATE AUTO INSURANCE COMPANIES' MOTION TO FOR JUDGMENT ON THE PLEADINGS FILED JULY 20, 2021

I. Introduction

This matter is before the Court on Defendant State Auto Insurance Companies' Motion for Judgment on the Pleadings filed July 20, 2021. On September 2, 2021, with leave of court, Plaintiff Classic Dining Group, LLC filed a Memorandum in Opposition to Defendant's Motion for Judgment on the Pleadings. On September 16, 2021, Defendant filed a Reply. On September 29, 2021, Defendant filed a Notice of Supplemental Authority. The Motion is ripe for decision.

II. Factual Background

Plaintiffs allege they suffered covered insurance losses related to the COVID-19 pandemic and that Defendant owes Plaintiffs coverage under the insurance policies issued. For purposes of resolving the parties' coverage dispute, the Court takes the following factual allegations as true and construes them in Plaintiffs' favor at this stage of the proceedings.

Plaintiff is a business that operates a group of franchised Denny's and Ruby Tuesday restaurants in Indiana, Illinois, and Wisconsin. (Am. Compl. ¶ 1.) Defendant is an insurance company with its principal place of business in Franklin County, Ohio, and is in the business of

selling insurance policies around the country, including throughout Indiana, Illinois, and Wisconsin. (*Id*. ¶ 57.) Plaintiff's complaint alleges that Defendant sold it Policy Nos. SPP2501221 (the "Classic Dining Policy) and 289281703 (the "RT Policy"). (*Id.* ¶¶ 19, 21.) The Classic Dining Policy and the RT Policy promised to indemnify the Plaintiffs for losses resulting from occurrences, including any "slow down or cessation" of business operations during the period of business interruption caused by "direct physical loss of or damage to covered property" at the insured's premises. (*Id.* ¶ 66.) In addition, the policies include "Civil Authority" coverage, pursuant to which Defendant promised to pay for the loss of Business Income and necessary Extra Expense sustained by Plaintiffs "caused by action of civil authority that prohibits access" to Plaintiffs' insured premises. (*Id.* ¶ 71.) This Civil Authority coverage is triggered when any non-excluded cause results in "damage to property other than property" at the Plaintiffs' premises. (*Id.* ¶ 72.) (emphasis added).

In March of 2020, COVID-19 became a global pandemic. As a result, Indiana, Illinois, and Wisconsin declared states of emergencies and enacted orders impacting the business operation of restaurants. (*Id.* ¶¶ 5, 6, 7.) Plaintiffs claim it lost business income because of the COVID-19 pandemic, and that the insurance policies cover such loss. (*Id.* ¶ 80.) Plaintiffs allege that Defendant has wrongfully denied insurance claims for those losses. As a result, Plaintiff asserts the following claims for relief: (1) declaratory judgment, (2) breach of contract, and (3) bad faith denial of insurance.

III. Standard of Review

A dismissal under Civ. R. 12(C) is appropriate "where a court (1) construes the material allegations in the complaint, with all reasonable inferences to be drawn therefrom, in favor of the nonmoving party as true, and (2) finds beyond doubt, that the plaintiff could prove no set of facts

in support of his claim that would entitle him to relief." *Hester v. Dwivedi*, 89 Ohio St.3d 575, 585-578, 2000-Ohio-230, 733 N.E.2d 116. "A motion for judgment on the pleadings is the same as a motion to dismiss filed after the pleadings are closed and raises only questions of law." *Bowles v. Ohio Dept. of Transp.*, 10th Dist. Franklin No. 89AP-1426, 1990 Ohio App. LEXIS 2692 (June 28, 1990). "The pleadings must be construed liberally and in a light most favorable to the party against whom the motion is made, and every reasonable inference in favor of the party against whom the motion is made should be indulged." *Id.*

IV. Discussion

A. Introduction

Defendant makes the following arguments in support of its Motion for Judgment on the Pleadings. First, Defendant asserts that Plaintiffs are not entitled to coverage under the Business Income, Extra Expense, and Civil Authority provisions of the Policies because Plaintiffs have not alleged a "direct physical loss of property". Second, Defendant contends that the absence of a virus exclusion is irrelevant because Plaintiffs' claims failed to satisfy the Polices' insuring agreements. Finally, Defendant asserts that Plaintiffs' Bad Faith claim fails as a matter of law.

B. Plaintiffs are not entitled to coverage under the Policies because Plaintiffs have failed to allege a direct physical loss of property.

Plaintiff seeks coverage under Business Income, Extra Expense, and Civil Authority policy provisions[1]. These provisions share the common prerequisite that the provisions only apply when Plaintiffs present facts of a "direct physical loss of or damage to property" which was so

[1] As a point of procedure, the Court finds it makes no difference whether Ohio or Illinois substantive law applies to the Court's analysis below. *See Troy Stacy Ents. v. Cincinnati Ins. Co.*, S.D.Ohio No. 1:20-cv-312, 2021 U.S. Dist. LEXIS 183442, at *12 (Sep. 24, 2021) (finding that the laws of Illinois and Ohio embrace traditional principles of insurance contract interpretation such that applying either law yielded the same result.)

pervasive at each covered location that Plaintiffs were forced to suspend operations. (Ans., Exh. 9 at SAP0000147, 187-88, 214-16; Ans., Exh. 10 at SAP000616-17, 619-21). Plaintiffs seek to satisfy the aforementioned prerequisite by alleging that the government orders in issue restricted public gatherings at certain businesses during the pandemic, thereby limiting Plaintiffs' "Operate the insured locations as intended." (Am. Compl. ¶ 14.)

Defendant seeks judgment on the pleadings on the grounds that the COVID government restrictions on business do not satisfy the coverage prerequisites of a "direct physical loss of property". The Court is persuaded by the analysis and reasoning set forth in two recent federal cases that addressed substantially similar cases as the case *sub judice*. On Sept. 21, 2021, in the case of *Santo's Italian Café LLC v. Acuity Ins. Co.*, 6th Cir. No. 21-3068, 2021 U.S. App. LEXIS 28720 (Sep. 22, 2021), the Sixth Circuit Court of Appeals unanimously affirmed the District Court's dismissal in favor of the insurance carrier. The Court held that the terms of the policy did not provide coverage for business interruption as a result of government orders which prohibited businesses from operating. The Court found that despite the business lost to COVID and shutdowns, the "restaurant has not been tangibly destroyed, whether in part or in full." Stating that the policy language of "direct physical loss" is the "North Star of this property insurance policy from start to finish," the Court held that "a loss of use is simply not the same as a physical loss."

Similarly, on September 24, 2021, the United States District Court for the Southern District of Ohio dismissed yet another analogous COVID-19 business interruption lawsuit in *Troy Stacy Ents. v. Cincinnati Ins. Co.,* S.D.Ohio No. 1:20-cv-312, 2021 U.S. Dist. LEXIS 183442 (Sep. 24, 2021). In that case, the insureds, also like Plaintiffs, alleged that their properties experienced direct physical loss and physical damage due to ***both*** governmental shutdown orders *and* the

presence of the virus at their businesses. *Id.* at *15. The plaintiffs, like here, claimed coverage under the policies' Business Income, Extra Expense, and Civil Authority provisions. *Id.* at *5.

The court then analyzed the policy language and held that *direct physical loss* "unambiguously refers to a loss that has a hard physicality to it," *(Id.)* or "some kind of hard physical change or ruin to the covered property." *Id.* at *30.

Based on this interpretation, the Court rejected the plaintiffs' argument that the governmental shutdown orders caused direct physical loss to their properties, noting that the orders "did not damage or change the property in such a way that required repair or precluded future use." *Id.* at *21. Similarly, the court rejected the plaintiffs' conclusory allegations that the mere presence of the virus at their properties cause direct structural alterations or property damage, noting that "it defies common sense to hold that a microscopic virus structurally alters or tangibly damages physical property." *Id.* at *16. The court also distinguished the same "fumes" cases that Classic Dining relied upon in briefing State Auto Property's pending motion, noting that "SARS-CoV-2 is not like asbestos, pesticides, or smoke" because "the latter contaminates may seriously impair or destroy a property's function and value" while "the virus by contrast is easily eliminated with routing cleaning procedures." *Id.* at *24. Finally, the Court acknowledged that the reality that, even assuming the virus was present at the plaintiffs' businesses, it was not the virus that closed their businesses or stopped customers from visiting, "it was the executive orders meant to slow the spread of the virus." *Id.* Therefore, the court held that neither the government closure mandates nor the presence of the virus constitutes a direct physical loss of or damage to property, as necessary to trigger coverage. *Id.* at *30.

In the case at bar, Plaintiffs assert that the words “loss” and “damage” have different meanings as used in the phrase “direct physical loss of or damage to property”, and therefore the

term "loss" must include mere "loss of use". The Court rejects Plaintiffs' argument. Guided by the aforementioned cases, this Court finds that "direct physical loss of or damage to property" unambiguously refers to a loss that has a physical change or ruin to the covered property. Here, under the circumstances of this case, Plaintiffs fail to make such allegation in their Amended Complaint and thus Plaintiffs fail to state a claim that would entitle them to coverage under the Policies.

C. Plaintiffs fail to allege facts sufficient to satisfy the Policies' Civil Authority Coverage.

The Policies at issue provide additional coverage for Civil Authority claims where (1) direct physical loss or damage to property other than property at the described premises (2) caused a civil authority to issue an order, which (3) prohibits all access to the insured premises. (Am. Compl. at ¶¶ 71-72; Ans., Exh. 9 at SAP000187-188; Ans. at Exh. 10 at SAP000621). Upon review, the Court finds Plaintiffs failed to plead the aforementioned. In addition, the Court notes that courts have determined that civil authority coverage does not apply where a governmental action specifically allows for access to the insured premises. *See Riverside Dental of Rockford, Ltd. v. Cincinnati Ins. Co.*, N.D.Ill. No. 20 CV 50284, 2021 U.S. Dist. LEXIS 20826 (Jan. 19, 2021) (finding that there was no coverage under the Civil Authority provision of a policy where the complaint did not plausibly suffest that the Governor's Orders forbade or prevented the ability to enter plaintiff's establishment; *Mhg Hotels v. Emcasco Ins. Co.*, S.D.Ind. No. 1:20-cv-01620-RLY-TAB, 2021 U.S. Dist. LEXIS 190867 (Mar. 8, 2021) (same). Courts have also found that an insured's ability to continue limited takeout and delivery operations at its insured premises precluded civil authority coverage due to lack of a prohibition to access. See *Legal Sea Foods, LLC v. Strathmore Ins. Co.*, 523 F. Supp. 3d 147 (D.Mass.2021). Here, Plaintiffs fail to allege prohibition of access to their premises. Instead, Plaintiffs concede that none of the governmental

orders at issue prevented restaurants from selling food for carry-out or delivery. (*See* Am. Compl. ¶ 9.) As a result, the Court finds that Plaintiffs failed to plead prohibition of access and Plaintiffs cannot state a claim for relief under the pertinent Civil Authority provisions of the polices at issue.

D. The absence of a virus exclusion is irrelevant because Plaintiffs' claims failed to satisfy the Polices' insuring agreements.

Plaintiffs assert that because the Policies do not contain a virus or pandemic exclusion, the absence of such exclusions evidences an intent to cover such events. However, courts have addressed this argument. For instance, in *Dino Drop, Inc. v. Cincinnati Ins. Co.*, E.D.Mich. No. 20-12549, 2021 U.S. Dist. LEXIS 114891 (June 21, 2021) the court found that "[b]ecause Plaintiffs have not shown that they are entitled to coverage in the first instance under the business income, extra expense, or civil authority provisions, the absence of a virus exclusion is immaterial." *Id.* at *25-26; *see also L&J Mattson's Co. v. Cincinnati Ins. Co.*, N.D.Ill. No. 20 C 7784, 2021 U.S. Dist. LEXIS 107585, at *17 (Apr. 29, 2021); *Bel Air Auto Auction, Inc. v. Great N. Ins. Co.*, D.Md. Civil Action No. RDB-20-2892, 2021 U.S. Dist. LEXIS 72154 (Apr. 14, 2021); and *Select Hosp., LLC v. Strathmore Ins. Co.*, D.Mass. Civil Action No. 20-11414-NMG, 2021 U.S. Dist. LEXIS 68343, at *9 (Apr. 7, 2021). As such, the Court finds lack of virus exclusion is irrelevant since the Court finds above that Plaintiff cannot demonstrate direct physical loss.

D. Plaintiff's Bad Faith claim fails as a matter of law.

Finally, the Court finds Plaintiff's bad faith claim fails as a matter of law. To prevail on a bad faith claim an insured must be entitled to coverage. See *Dental Experts, LLC v. Massachusetts Bay Ins. Co.*, N.D.Ill. No. 20 C 5887, 2021 U.S. Dist. LEXIS 83726, at *13 (May 1, 2021). Here, the Court has found Plaintiff is not entitled to coverage. Therefore, Plaintiff's bad faith claim fails as a matter of law.

V. Decision

For the reasons discussed above, the Court finds Defendant's Motion well taken. As a result, Plaintiff's Amended Complaint is hereby **DISMISSED WITH PREJUDICE**.

****THIS IS A FINAL APPEALABLE ORDER****

IT IS SO ORDERED.

Copies to all counsel via electronic filing system.

Franklin County Court of Common Pleas

Date: 11-09-2021

Case Title: CLASSIC DINING GROUP LLC -VS- STATE AUTO INSURANCE COMPANIES

Case Number: 20CV004107

Type: ENTRY

It Is So Ordered.

/s/ Judge Carl A. Aveni II