UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

ZURICH AMERICAN INSURANCE COMPANY,

Plaintiff,

v. **Case No: 6:20-cv-1295-PGB-EJK**

TAVISTOCK RESTAURANTS GROUP, LLC,

Defendant.
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ORDER

This cause is before the Court on Plaintiff/Counter-Defendant Zurich American Insurance Company's ("**Zurich**") Motion to Dismiss the Counter-Complaint. (Doc. 85 (the "**Motion**")). Defendant/Counter-Plaintiff Tavistock Restaurants Group, LLC ("**Tavistock**") responded in opposition. (Doc. 88). With the Court's leave, Zurich replied in support of its Motion. (Doc. 96). Upon consideration, the Motion is due to be granted.

I. BACKGROUND

Zurich, an insurer, initiated this action on July 21, 2020. (Doc. 1). Thereafter, Tavistock, the insured and the owner and operator of restaurants in Texas, California, Tennessee, Oklahoma, Florida, Massachusetts, Illinois, Nevada, and Georgia, filed a one-count counterclaim under the Declaratory Judgment Act,

28 U.S.C. § 2201. (Doc. 82 (the "**Counterclaim**")).[1] The Counterclaim requests the Court to declare that Zurich improperly denied Tavistock's claim under the all-risk commercial property insurance policy at issue (the "**Policy**"). (*Id.* ¶¶ 1–6, 165–72).

As is relevant, the Policy generally insures "against direct physical loss of or damage caused by a Covered Cause of Loss[2] to Covered Property, at an Insured Location." (Doc. 82-1, p. 14) (emphasis in original). The Policy also specifically insures against a variety of events, all of which require a "direct physical loss." (*Id.* at pp. 27, 34, 36, 38).[3] Notable here is the "Civil or Military Authority" provision, which insures against losses in gross earnings and extra expenses incurred "from the necessary Suspension of the Insured's business activities at an Insured Location if the Suspension is caused by order of civil or military authority that prohibits access to the Location" and if the order "result[s] from a civil authority's response to direct physical loss of or damage caused by a Covered Cause of Loss to property not owned, occupied, leased or rented by the Insured or insured under this Policy." (*Id.* at pp. 33–34) (emphasis in original). Consequently, the existence

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[1] Tavistock originally filed its counterclaim on March 31, 2021. (Doc. 55). Tavistock amended its counterclaim with the Court's leave on July 2, 2021. (Docs. 79, 80, 82).

[2] "Covered Cause of Loss" means "All risks of direct physical loss of or damage from any cause unless excluded." (Doc. 82-1, p. 61). Because this term requires a "direct physical loss," it is not necessary for the Court to describe the Policy's exclusions and endorsements.

[3] The Counterclaim mentions the "Time Element," "Contingent Time Element," "Decontamination Costs," and "Ingress/Egress" provisions. (Doc. 82-1, ¶¶ 155–57, 160, 169). Because all of these coverages require "direct physical loss," it is not necessary for the Court to describe them in more detail.

of a "direct physical loss" is a requirement for coverage, but the Policy does not define this term.

The Counterclaim alleges that Tavistock suffered two types of "direct physical loss." First, the Counterclaim asserts that the COVID-19 pandemic forced Tavistock to temporarily close all its restaurants' dining rooms and, upon reopening, to increase sanitation measures, disburse personal protection equipment to employees, install barriers, and redesignate interior spaces for the promotion of social distancing. (Doc. 82, ¶¶ 19–70). Second, the Counterclaim states that government mandates issued by the governors of Texas, California, Tennessee, Oklahoma, Florida, Massachusetts, Illinois, Nevada, and Georgia in response to this deadly airborne virus required Tavistock to shut down dine-in facilities during the height of the pandemic. (*Id.* ¶¶ 71–84). In support of these allegations, the Counterclaim details how COVID-19 spreads through the respiration of infected individuals, making the air itself "unsafe for breathing," and how it adheres to physical objects, which "become vectors of disease" or "fomites," particularly as routine cleaning of these surfaces does not eliminate the risk of transmission. (*Id.* ¶¶ 19–70).

Zurich now moves to dismiss Tavistock's Counterclaim, and the matter is ripe for review.

II. STANDARD OF REVIEW[4]

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(1). Thus, to survive a motion to dismiss made pursuant to Rule 12(b)(6), the 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 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is plausible on its face 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.* Moreover, the court is "not bound to accept as true a legal conclusion couched as a factual allegation," and the court must view the complaint in the light most favorable to the plaintiff and resolve any doubts as to the sufficiency of the complaint in the plaintiff's favor. *Papasan v. Allain*, 478 U.S. 265, 286 (1986); *Hunnings v. Texaco, Inc.*, 29 F.3d 1480, 1484 (11th Cir. 1994) (per curiam). Notably, "[a] motion to dismiss for failure to state a claim merely tests the sufficiency of the complaint; it does not decide the merits of the case." *Gay-Straight All. of Okeechobee High Sch. v. Sch. Bd. of Okeechobee Cnty.*, 477 F. Supp. 2d 1246, 1249 (S.D. Fla. 2007) (citing *Milburn v. United States*, 734 F.2d 762, 765 (11th Cir. 1984)).

In sum, courts must (1) ignore conclusory allegations, bald legal assertions, and formulaic recitations of the elements of a claim; (2) accept well-pled factual

[4] "A motion to dismiss a counterclaim under [FED. R. CIV. P.] 12(b)(6) is evaluated in the same manner as a motion to dismiss a complaint." *Whitney Info. Network, Inc. v. Gagnon*, 353 F. Supp. 2d 1208, 1210 (M.D. Fla. 2005).

allegations as true; and (3) view well-pled allegations in the light most favorable to the plaintiff. *Iqbal*, 556 U.S. at 679.

In the context of a claim under the Declaratory Judgment Act, which allows a district court to "declare the rights and other legal relations of any interested party seeking such declaration" "[i]n a case of actual controversy within its jurisdiction," the complaint must allege the existence of an "actual controversy" between the parties. 28 U.S.C. § 2201(a); *see Mt. Hawley Ins. Co. v. Tactic Sec. Enf't, Inc.*, 252 F. Supp. 3d 1307, 1309 (M.D. Fla. 2017) (citing *Aetna Life Ins. Co. of Harford, Conn. v. Haworth*, 300 U.S. 227, 239–40 (1937)). An "actual controversy" exists if, under the facts alleged, there is "a substantial continuing controversy between parties having adverse legal interests." *Emory v. Peeler*, 756 F.2d 1547, 1551–52 (11th Cir. 1985) (collecting cases).

III. DISCUSSION

Zurich contends that the Counterclaim fails to allege the existence of a "direct physical loss" under Georgia law.[5] (Doc. 85, pp. 16–22). The Court concurs in accordance with the Eleventh Circuit's recent opinion in *Gilreath Fam. & Cosm. Dentistry, Inc. v. Cincinnati Ins. Co.*, No. 21-11046, 2021 WL 3870697 (11th Cir. Aug. 31, 2021).

[5] As a preliminary matter, federal courts construe insurance contracts according to substantive state law. *See Sphinx Int'l, Inc. v. Nat'l Union Fire Ins. of Pittsburgh, Pa.*, 412 F.3d 1224, 1227 (11th Cir. 2005) (citation omitted). In Florida, "the law of the jurisdiction where the contract was executed governs the rights and liabilities of the parties in determining an issue of insurance coverage." *State Farm Mut. Ins. Co. v. Roach*, 945 So. 2d 1160, 1163 (Fla. 2006) (citation omitted); *see LaTorre v. Conn. Mut. Life. Ins. Co.*, 38 F.3d 538, 540 (11th Cir. 1984). This Court previously determined that the parties executed the Policy in Georgia, and neither party contests this finding. (Doc. 54, pp. 11–12; Doc. 85, pp. 7–8; Doc. 88, pp. 11–12).

In *Gilreath*, the insured postponed routine and elective dentistry procedures due to the COVID-19 pandemic and the executive shelter-in-place mandates issued by the governor of Georgia. *Id.* at *1. The insured filed a claim under its insurance policy's "Business Income" and "Extra Expense" provisions, which insured against the necessary suspension of business activities and the extra expenses sustained during such suspension caused by a "Covered Cause of Loss," defined as a "direct physical loss." *Id.* The insured also filed under the policy's "Civil Authority" provision, which insured against a civil authority's prohibition of access to the covered premises and the immediately surrounding area in response to damage caused by a "Covered Cause of Loss" to third-party property. *Id.* The insurer denied the insured's claim, finding that the insured failed to assert any "direct physical loss" to the covered premises or to third-party property, and the district court agreed. *Id.* at *2.

On appeal, the Eleventh Circuit first noted that "Georgia courts interpret an insurance policy like any other contract: they begin with its text." *Id.* It emphasized that Georgia courts read the text of an insurance policy "'as a layman would'" and, "if that text 'unambiguously governs the factual scenario before the court,' the policy applies 'as written, regardless of whether doing so benefits the carrier or the insured.'" *Id.* (quoting *Nat'l Cas. Co. v. Ga. Sch. Bds. Ass'n—Risk Mgmt. Fund*, 818 S.E.2d 250, 253 (Ga. 2018); *Reed v. Auto-Owners Ins. Co.*, 667 S.E.2d 90, 92 (Ga. 2008)). It then stated that "the Georgia Court of Appeals has already explained the 'common meaning' of 'direct physical loss or damage,' holding that

there must be 'an actual change in insured property' that either makes the property 'unsatisfactory for future use' or requires 'that repairs be made.'" *Id.* (quoting *AFLAC Inc. v. Chubb & Sons, Inc.*, 581 S.E.2d 317, 319 (Ga. Ct. App. 2003)).

Applying this jurisprudence, the *Gilreath* court affirmed the district court's decision, stating:

> Gilreath has alleged nothing that could qualify, to a layman or anyone else, as physical loss or damage. Here, the shelter-in-place order that Gilreath cites did not damage or change the property in a way that required its repair or precluded its future use for dental procedures. In fact, though the practice postponed routine and elective procedures, Gilreath still used the office to perform emergency procedures. Gilreath finds it problematic that its office is an enclosed space where viral particles tend to linger, and where patients and staff must interact with each other in close quarters. Even so, we do not see how the presence of those particles would cause physical damage or loss to the property. Gilreath thus has failed to state a claim that Cincinnati Insurance breached the policy's "Business Income" or "Extra Expense" provisions.

Id. It also rejected the insured's claim under the policy's "Civil Authority" provision: "But that provision too is contingent on a 'Covered Cause of Loss' damaging property—albeit, as relevant here, property off the business premises. The allegations about off-premises property are no different than those about the property at the dental practice—Gilreath offers no allegation of physical loss or damage." *Id.*

Thus, the Eleventh Circuit held that the COVID-19 pandemic and the government mandates do not constitute a "direct physical loss" to insured or third-

party property under Georgia law, validating the majority of district court opinions on this issue.[6] And because *Gilreath* resolved the same question presented here, this Court holds the same.

Tavistock insists that the presence of COVID-19 on property causes that object to become a "fomite" and that the term "direct physical loss" does not require a structural change to property, ignoring *Gilreath* and citing to non-binding authorities that do not apply Georgia law.[7] (Doc. 88, pp. 20–27). Tavistock

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[6] *See, e.g.*, *Karmel Davis and Assocs., Attorneys-at-Law, LLC v. Hartford Fin. Servs. Grp., Inc.*, 515 F. Supp. 3d 1351, 1357 (N.D. Ga. 2021) ("[T]he 'likely' presence of COVID-19 cannot be regarded as a physical change, as it does not and has not physically altered the insured property. Although the virus is transmitted through the air and may adhere to surfaces briefly, there is no indication that it causes any sort of physical change to the property it touches."); *Johnson v. Hartford Fin. Servs. Grp., Inc.*, 510 F. Supp. 3d 1326, 1334 (N.D. Ga. 2021) ("Any 'actual change' is instead premised on the omnipresent specter of COVID-19, a generalized 'alteration' experienced by every home, office, or business that welcomes individuals into an indoor setting across the globe. But absent from the Amended Complaint are any allegations that Plaintiffs' offices have sustained any modicum of physical damage that renders them unsatisfactory in any way. To accept Plaintiffs' broad interpretation of the Policies' language at face value would be to render the term 'physical' a nullity, a result directly counter to Georgia law."); *AIKG, LLC v. Cincinnati Ins. Co.*, NO. 1:20-CV-4051, 2021 WL 4061542, at *4 (N.D. Ga. Sept. 7, 2021) (noting that COVID-19 "does not physically alter the appearance, shape, color, structure, or other material dimension of the property" and that "[i]t can be eliminated by disinfecting surfaces or dies naturally within hours to days depending on temperature and sunlight exposure"); *Rest. Grp. Mgmt., LLC v. Zurich Am. Ins. Co.*, NO. 1:21-CV-4782, 2021 WL 1937314, at *6 (N.D. Ga. Mar. 16, 2021) (finding that property contamination due to COVID-19 does not constitute "an actual physical change" under Georgia law); *Lemontree Academy, LLC v. Utica Mut. Ins. Co.*, NO. 3:20-CV-126, 2021 WL 1940627, at *2 (M.D. Ga. Mar. 11, 2021) (applying Georgia law and stating that "the mere presence of the COVID-19 virus would not constitute direct physical damage necessary to trigger coverage").

[7] *See, e.g.*, *Henderson Rd. Rest. Sys., Inc. v. Zurich Am. Ins. Co.*, 513 F. Supp. 3d 808 (N.D. Ohio 2021), *vacated and remanded by In re Zurich Am. Ins. Co.*, No. 21-0302, 2021 WL 4473398 (6th Cir. Sept. 29, 2021) ("In granting summary judgment to Plaintiffs on Counts I and III, the district court reasoned that the COVID-19-related interruption of Plaintiffs' dine-in operations amounted to direct physical loss of or damage to [Plaintiffs'] property under Ohio law. We have since held, however, that a pandemic-triggered government order, barring in-person dining at a restaurant does not qualify as 'direct physical loss of or damage to the property' under Ohio law." (internal quotations omitted)).

also argues the Counterclaim adequately alleges that COVID-19 and the government mandates rendered its restaurants unsatisfactory for future use and necessitated repairs, such as the "installation of partitions." (*Id.*).[8]

However, Tavistock's restaurants are satisfactory for future use, as evidenced by the alleged resumption of operations and the increased sanitation measures, disbursement of personal protection equipment, redesignation of interior spaces, and placement of barriers to account for patrons' and employees' health and safety. As stated above, neither COVID-19 nor the government mandates cause a physical change to Tavistock's restaurants that prevents Tavistock from using them now or in the future.[9] Moreover, social distancing measures do not constitute "repairs." The word "repair" contemplates the restoration of a damaged item to its prior condition. But, as previously explained,

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[8] Notably, Tavistock defines "direct physical loss" as a "material loss of use, or diminution of use, of its property" or "a material harm to its property" and argues that its Counterclaim alleges (1) the government mandates caused a "material loss of use, or diminution of use, of its property" and (2) the presence of COVID-19 materially harmed its property and made it uninhabitable. (Doc. 88, pp. 20–23). However, Tavistock also recognizes that the Georgia Court of Appeals already defined this term in *AFLAC*, rendering its arguments obsolete. (*Id.* at pp. 23–24). Furthermore, Tavistock distorts *AFLAC* to imply a "dearth of case law in Georgia" construing the "direct physical loss" phrase. (*Id.* at p. 23). As Zurich correctly notes, "*AFLAC* is the seminal case defining [this] term," and the Eleventh Circuit explicitly quotes this case in *Gilreath*. (Doc. 96, p. 7).

[9] Tavistock factually distinguishes its case from *Mama Jo's Inc. v. Sparta Ins. Co.*, which held that "an item or structure that merely needs to be cleaned has not suffered a 'loss' which is both 'direct' and 'physical.'" 823 F. App'x 868, 879 (11th Cir. 2020), *cert. denied* 141 S. Ct. 1737 (2021). Regardless of these differences, the Eleventh Circuit's distinction between property that needs *repair* and property that needs *sanitization* still applies here and comports with *Gilreath*. *See G&A Family Enterprises, LLC v. Am. Family Ins. Co.*, NO. 1:20-CV-03192, 2021 WL 1947180, at *4 (N.D. Ga. May 13, 2021) (stating, in a COVID-19-related insurance dispute applying Georgia law, that "[a]lthough [*Mama Jo's*] involved Florida law, the Eleventh Circuit Court of Appeal's definition of 'direct physical loss' in that case did not turn on the interpretation of Florida law, so it is helpful here"). Furthermore, the Court does not need to rely on *Mama Jo's* given the Eleventh Circuit's decision in *Gilreath*.

there is no "direct physical loss" here and, therefore, Tavistock's restaurants do not require any degree of restoration. As Zurich correctly states, Tavistock's social distancing measures are "changes or improvements to meet new regulatory standards imposed by State orders to protect *people*, not to repair *property*." (Doc. 85, p. 22).

Thus, even reading the Counterclaim in the light most favorable to Tavistock, it fails to state a claim for declaratory relief because there is no "actual controversy" regarding the interpretation of "direct physical loss" under Georgia law.[10]

IV. CONCLUSION

Accordingly, it is **ORDERED AND ADJUDGED** as follows:

1. Plaintiff/Counter-Defendant Zurich American Insurance Company's Motion to Dismiss the Counterclaim (Doc. 85) is **GRANTED**;
2. The Counterclaim (Doc. 82) is **DISMISSED WITHOUT PREJUDICE**; and
3. On or before Monday, November 15, 2021, Defendant/Counter-Plaintiff Tavistock Restaurants Group, LLC may file an Amended Counterclaim consistent with the directives of this Order, if it believes it can do so in accordance with Rule 11. Failure to timely file an

[10] Because the existence of a "direct physical loss" is a requirement for coverage, the Court does not need to analyze the Policy's various exclusions and endorsements.

Amended Counterclaim in accordance with the requirements of this Order will result in closure of this action without further notice.[11]

DONE AND ORDERED in Orlando, Florida on November 1, 2021.

PAUL G. BYRON
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Parties

[11] In the alternative, on or before Monday, November 15, 2021, Defendant/Counter-Plaintiff Tavistock Restaurants Group, LLC may request the Court to enter judgment dismissing the Counterclaim with prejudice based on the rulings in this Order to perfect the issue for appeal. Failure to timely file a request to enter judgment dismissing the Counterclaim with prejudice in accordance with the requirements of this Order will result in closure of this action without further notice.