UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

GREEN APPLE EVENT COMPANY, INC., Plaintiff, v. LIBERTY MUTUAL GROUP, INC., et al., Defendants.	Case No. CV 21-6154 FMO (AFMx) **ORDER**

Having reviewed and considered all the briefing filed with respect to Liberty Mutual Group, Inc. and West American Insurance Company's (collectively, "defendants") Motion to Dismiss the First Amended Complaint (Dkt. 17, "Motion"), the court finds that oral argument is not necessary to resolve the Motion, see Fed. R. Civ. P. 78(b); Local Rule 7-15; Willis v. Pac. Mar. Ass'n, 244 F.3d 675, 684 n. 2 (9th Cir. 2001), and concludes as follows.

LEGAL STANDARD

A motion to dismiss for failure to state a claim should be granted if plaintiff fails to proffer "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955, 1974 (2007); Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937, 1949 (2009); Cook v. Brewer, 637 F.3d 1002, 1004 (9th Cir. 2011). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678, 129 S.Ct. at 1949; Cook, 637 F.3d at 1004; Caviness v. Horizon Cmty. Learning Ctr., Inc., 590 F.3d 806, 812 (9th Cir. 2010). The plaintiff must provide "more than labels and conclusions, and a formulaic recitation

of the elements of a cause of action will not do[.]" Twombly, 550 U.S. at 555, 127 S.Ct. at 1965; see also Iqbal, 556 U.S. at 678, 129 S.Ct. at 1949 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."); Cholla Ready Mix, Inc. v. Civish, 382 F.3d 969, 973 (9th Cir. 2004) ("[T]he court is not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged. Nor is the court required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.") (citations and internal quotation marks omitted). However, "[s]pecific facts are not necessary; the [complaint] need only give the defendant[s] fair notice of what the . . . claim is and the grounds upon which it rests." Erickson v. Pardus, 551 U.S. 89, 93, 127 S.Ct. 2197, 2200 (2007) (per curiam) (internal quotation marks omitted); Twombly, 550 U.S. at 555, 127 S.Ct. at 1964 (explaining that "a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations").

In considering whether to dismiss a complaint, the court must accept the allegations of the complaint as true, Erickson, 551 U.S. at 93-94, 127 S.Ct. at 2200, construe the pleading in the light most favorable to the pleading party, and resolve all doubts in the pleader's favor. Jenkins v. McKeithen, 395 U.S. 411, 421, 89 S.Ct. 1843, 1849 (1969); Berg v. Popham, 412 F.3d 1122, 1125 (9th Cir. 2005). Dismissal for failure to state a claim can be warranted based on either a lack of a cognizable legal theory or the absence of factual support for a cognizable legal theory. See Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1104 (9th Cir. 2008). A complaint may also be dismissed for failure to state a claim if it discloses some fact or complete defense that will necessarily defeat the claim. Franklin v. Murphy, 745 F.2d 1221, 1228-29 (9th Cir. 1984).

DISCUSSION[1]

I. MOTION TO DISMISS.

Defendants contend that plaintiff Green Apple Event Company, Inc. ("plaintiff" or "Green Apple"), an event planning company, is not entitled to business income and extra expense

[1] Because the parties are familiar with the factual allegations in the operative complaint, the court will refer to the allegations only as necessary to resolve the Motion.

coverage pursuant to its business property insurance policy ("Policy"). (See Dkt. 17-1, Memorandum of Points and Authorities [] at 1). According to defendants, the First Amended Complaint ("FAC") fails to "allege that [plaintiff's] properties were physically damaged or altered[,]" (id. at 8), and thus plaintiff does not "plausibly allege 'direct physical loss of or damage to' its property[.]"[2] (Id. at 13). Defendants also argue that even if plaintiff could show the Policy provisions apply, plaintiff's claimed losses are barred by the Exclusion of Loss Due to Virus or Bacteria provision ("Virus Exclusion") in the Policy. (See id. at 2, 15-19).

Plaintiff counters that even if the Policy language requiring "'damage to' property may require some type of physical alteration, the 'loss of' that property does not. Rather, it includes the loss of the beneficial use of or possession of the property." (Dkt. 21, Opposition to Defendants' Motion [] ("Opp.") at 2). Specifically, plaintiff argues that government orders restricting gatherings in response to COVID-19 "caused a 'direct physical loss of' [its] property by effectively depriving Green Apple possession and use of its facilities thereby interrupting its business operations." (Id. at 12). However, the Ninth Circuit has rejected plaintiff's interpretation of the policy language at issue here. See Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am., 15 F.4th 885, 892 (9th Cir. 2021) (concluding that "the phrase 'physical loss of or damage to' [] requir[es] an insured to allege physical alteration of its property"); see also id. at 892 (declining to adopt insured's argument that coverage for "direct physical loss of or damage to" should be interpreted "to be synonymous with loss of use") (internal quotation marks omitted). Plaintiff does not dispute that the FAC fails to allege physical alteration of its property. (See, generally, Dkt. 21, Opp.). Accordingly, plaintiff's claimed losses are not covered by the Policy, and plaintiff fails to state claims for breach of contract and breach of the implied covenant of good faith and fair dealing.

Even if plaintiff could allege physical alteration of its property as required by the relevant Policy provisions, see Mudpie, 15 F.4th at 892, the Virus Exclusion would nonetheless bar coverage. Plaintiff's interpretation of "efficient proximate cause," (see Dkt. 21, Opp. at 2 n. 1 and

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[2] Capitalization, quotation and alteration marks, and emphasis in record citations may be altered without notation.

17-18), and its contention that "[w]here a loss can be viewed as the product of two perils acting concurrently (here, the virus and the governmental orders), there is coverage if the predominating cause of the loss is a covered peril regardless of whether it is the 'triggering cause,'" (id. at 2) (footnote omitted), are unavailing. As the Ninth Circuit recently explained, "where there is a concurrence of different causes, the efficient cause – the one that sets others in motion – is the cause to which the loss is to be attributed, though the other causes may follow it, and operate more immediately in producing the disaster." Mudpie, 15 F.4th at 894 (citation and internal quotation marks omitted) (emphasis added). Because plaintiff does not plausibly allege that the efficient cause of its injury was anything other than the spread of the virus, the Policy's Virus Exclusion also bars coverage for its claims. See id. ("Though Mudpie argues it was the government orders that most directly caused its injury, Mudpie does not plausibly allege that 'the efficient cause,' i.e., the one that set others in motion, was anything other than the spread of the virus throughout California, or that the virus was merely a remote cause of its losses.") (citation omitted).

II. LEAVE TO AMEND.

Rule 15 provides that the court "should freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2); see Morongo Band of Mission Indians v. Rose, 893 F.2d 1074, 1079 (9th Cir. 1990) (the policy favoring amendment must "be applied with extreme liberality"). However, "[i]t is settled that the grant of leave to amend the pleadings pursuant to Rule 15(a) is within the discretion of the trial court." Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 330, 91 S.Ct. 795, 802 (1971).

Here, having liberally construed and assumed the truth of the allegations in the FAC, the court is persuaded that plaintiff's claims cannot be saved through amendment.[3] See Lopez v. Smith, 203 F.3d 1122, 1129 (9th Cir. 2000) ("Courts are not required to grant leave to amend if a complaint lacks merit entirely."). "The deficiencies in Plaintiff's complaint result not from poor

[3] Plaintiff also does not request leave to amend or otherwise suggest that it could satisfy the applicable standards through amendment. (See, generally, Dkt. 21, Opp.).

drafting or insufficient detail but from an incurably flawed legal theory." Los Angeles Cty. Museum of Nat. Hist. Found. v. Travelers Indem. Co. of Connecticut, 2021 WL 1851028, *6 (C.D. Cal. 2021); see, e.g., Pez Seafood DTLA, LLC v. Travelers Indem. Co., 514 F.Supp.3d 1197, 1209 (C.D. Cal. 2021) (denying leave to amend because plaintiff could not "establish coverage under the Policy for loss of business income due to COVID-19 or civil authority orders enacted due to COVID-19"); Disc. Elecs., Inc., et al. v. Wesco Ins. Co., et al., 2022 WL 123114, *7 (C.D. Cal. 2022) (noting that "[n]umerous courts have dismissed similar lawsuits without leave to amend" and collecting cases). Accordingly, plaintiff's FAC will be dismissed without leave to amend.

This Order is not intended for publication. Nor is it intended to be included in or submitted to any online service such as Westlaw or Lexis.

CONCLUSION

Based on the foregoing, IT IS ORDERED THAT:

1. Defendants' Motion to Dismiss **(Document No. 17)** is **granted**.
2. Plaintiff's FAC is dismissed with prejudice.
3. Judgment shall be entered accordingly.
4. The parties' L.R. 83-9.2 Joint Request for Decision [] (**Document No. 40**) is **denied** as moot.

Dated this 24th day of January, 2022.

/s/
Fernando M. Olguin
United States District Judge