No. HHD-CV-21-6147037-S	:	SUPERIOR COURT
MOHEGAN TRIBAL GAMING AUTHORITY	:	COMPLEX LITIGATION DOCKET
v.	:	AT HARTFORD
FACTORY MUTUAL INSURANCE COMPANY	:	JUNE 8, 2022

MEMORANDUM OF DECISION RE MOTION TO STRIKE, # 117

Before the court, pursuant to Practice Book § 10-39, is the motion of the defendant, Factory Mutual Insurance Company (FM), to strike the complaint of the plaintiff, the Mohegan Tribal Gaming Authority (the Authority). The complaint seeks damages for breach of an insurance contract, as well as for FM's bad faith in failing to pay for economic loss, occasioned by the closure of the Authority's operations due to the immediately impending presence of coronavirus at its insured property. The following facts and procedural history are relevant to this decision.

The present action was commenced on June 15, 2021, by complaint dated June 9, 2021, which was subsequently amended on November 4, 2021. The amended complaint (complaint) remains the operative complaint. The court accepts the following allegations set forth in the complaint as true.

The Authority is the instrumentality of the Mohegan Tribe of Indians of Connecticut (Mohegan Tribe), a sovereign, federally recognized Indian tribe. The Authority conducts gaming activities for the Mohegan Tribe by ownership and operation of an integrated entertainment resort (Resort) in Uncasville, Connecticut, that includes, inter alia, hotels, gaming operations, restaurants, and a convention center. On March 17, 2020, because of the virtually guaranteed risk

#125.00

of the spread of COVID-19[1] from visitors to the Resort, the Authority shut down all its operations at the Resort until March 31, 2020. The cessation of operations was done pursuant to a declaration of the Mohegan Tribe at a time when "there was an immediately impending risk that persons infected with COVID-19 would enter the Resort and that those persons, in turn, would cause the actual presence of communicable disease at the Resort." (Emphasis omitted.) Compl., ¶ 59. The closure was done "[t]o prevent the immediately impending actual presence of communicable disease at the Resort . . . ."[2] (Emphasis omitted; footnote added.) Id., ¶ 61.

FM sold the Authority a policy of insurance covering the real and personal property of the Authority, in effect from March 1, 2020, through March 2021, that "covers property . . . against ALL RISKS OF PHYSICAL LOSS OR DAMAGE, except as hereinafter excluded . . . ." Id., Ex. C, p. 1. The Policy was attached in full to the complaint, allowing the court to consider its terms in ruling on FM's motion to strike. See *Dlugokecki* v. *Vieira*, 98 Conn. App. 252, 258 n.3, 907 A.2d 1269, cert. denied, 280 Conn. 951, 912 A.2d 483 (2006) (for purposes of a motion to strike, a complaint includes all attached exhibits).

The Policy contains the following Contamination Exclusion:

> "This Policy excludes the following unless directly resulting from other physical damage not excluded by this Policy: 1) **contamination,** and any cost due to **contamination** including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy. If **contamination** due only to the actual not suspected presence of **contaminant**(s) directly results from other physical damage not excluded

[1] "COVID-19 (coronavirus disease 2019) is a disease caused by a virus named SARS-CoV-2 and was discovered in December 2019 in Wuhan, China. It is very contagious and has quickly spread around the world." Center for Disease Control and Prevention, "Basics of COVID-19," (last modified November 4, 2021), available at https://www.cdc.gov/coronavirus/2019-ncov/your-health/about-covid-19/basics-covid-19.html (last visited June 7, 2021).

[2] The procedural steps taken by the Authority were effected by a "Declaration of Emergency on the Mohegan Reservation in Response to COVID-19 Disease" by the Mohegan Tribe and a Resolution by the Authority confirming the application of the declaration of Emergency to the Resort by the Management Board of the Authority. Both were attached to the Complaint as exhibits A and B respectively.

> by this Policy, then only physical damage caused by such **contamination** may be insured. . . ." (Emphasis in original.) Compl., Ex. C, p. 20.

Contamination is defined by the Policy as "any condition of property due to the actual or suspected presence of any foreign substance . . . toxin, pathogen or pathogenic organism, bacteria, virus, disease causing or illness causing agents . . . ." Id., p. 72.

The Policy provides in section 6, captioned "ADDITIONAL COVERAGES," that it "includes the following Additional Coverages for *insured physical loss or damage*." (Emphasis added). Id., p. 23. The Additional Coverages "are subject to the Policy provisions, including applicable exclusions and deductibles, all as shown in this section and elsewhere in [the] Policy." Id. Immediately following the ADDITIONAL COVERAGES section, the Policy identifies two coverages for "A. DATA RESOTRATION," covering "physical loss or damage to electronic data, programs or software;" (emphasis omitted) id, pp. 23-24; and "B. DATA SERVICE PROVIDER PROPERTY DAMAGE" covering "physical loss or damage to insured property when such physical loss or damage results from the interruption of off-premises data processing or data transmission services . . . ." (Emphasis omitted.) Id., pp. 24-25.

Following these two coverages is an unnumbered heading entitled "OTHER ADDITIONAL COVERAGES," after which follow twenty-five alphabetically delineated coverages starting with "A. ACCIDENTAL INTERRUPTION OF SERVICES" coverage and ending with "Y. TRANSPORTATION" coverage. Id., pp. 26-41. There is no prefatory language after the "OTHER ADDITIONAL COVERAGES" caption. Thus, the "OTHER ADDITIONAL COVERAGES" section of the Policy does not contain that language following the prior "ADDITIONAL COVERAGES" caption indicating that it "includes the following Additional Coverages for insured physical loss or damage." Relevant to the Authority's claim of coverage,

are two coverages set forth in the "OTHER ADDITIONAL COVERAGES" section that provides coverage for "F. Communicable Disease Response" and "U. Protection and Preservation of Property."

The Communicable Disease Response provision affords coverage for enumerated insured response activity if an insured location "has the actual not suspected presence of communicable disease and access to such location is limited, restricted or prohibited by: 1) an order of an authorized governmental agency regulating the actual not suspected presence of communicable disease; or 2) a decision of an Officer of the Insured as a result of the actual not suspected presence of communicable disease."[3] (Emphasis omitted; footnote added.) Id., p. 28. The phrase "communicable disease" is defined by the Policy as "disease which is transmissible from human to human by direct or indirect contact with an individual or the individual's discharges." Id., p. 72. There is no dispute between the parties that COVID-19 falls within the definition of a communicable disease.

The "Protection and Preservation of Property" provision provides coverage for "reasonable and necessary costs incurred for actions to temporarily protect or preserve insured property; provided such actions are necessary due to actual, or to prevent immediately impending, insured physical loss or damage to such insured property." Id., p. 36.

Time Element Coverage extension provisions are present in the Policy. Relevantly, subsection "E. Interruption by Communicable Disease" provides that "[i]f a location owned, leased or rented by the Insured has the actual not suspected presence of communicable disease and access to such location is limited, restricted or prohibited by: . . . 2) a decision of an Officer of the Insured as a result of the actual not suspected presence of communicable disease, this

[3] The Communicable Disease coverage is subject to a separate $1 million annual aggregate limit of liability.

Policy covers the Actual Loss Sustained and EXTRA EXPENSE incurred by the Insured during the PERIOD OF LIABILITY at such location with the actual not suspected presence of communicable disease." (Communicable Disease Time Element). (Emphasis omitted.) Id., p. 61. Subsection "G. Protection and Preservation of Property Time Element," (PPP Time Element) provides coverage for "the Actual Loss Sustained by the Insured for a period of time not to exceed 48 hours prior to and 48 hours after the Insured first taking reasonable action for the temporary protection and preservation of property insured by this Policy provided such action is necessary to prevent immediately impending insured physical loss or damage to such insured property."[4] (Footnote added.) Id., p. 62.

At the time of the declaration by the Authority, the Authority asserts in its complaint, there was an immediately impending risk that persons infected with COVID-19 would enter the Resort and that those persons, in turn, would cause the actual presence of communicable disease at the Resort.

In response to a demand for coverage by the Authority, FM denied coverage by way of a letter dated October 29, 2020, in which it asserted that the Policy's PPP Time Element coverage extension does not apply because "the presence of COVID-19 at an insured location does not constitute 'physical damage of the type insured' as required by the Policy." Id., Ex. D, p. 1. The present action followed. The Authority alleges in its first count that FM breached its contract by its declination of coverage, and its second that by declining coverage its conduct was in bad faith.

FM asserts in its motion to strike that the plaintiff has failed to plead facts showing that COVID-19 causes "physical loss or damage" to property, the language of the "Communicable

[4] Coverage under the PPP Time Element is subject to a $1,200,000,000 limit of liability.

Disease" provision does not establish that COVID-19 causes "physical loss or damage" and the plaintiff has not adequately alleged facts sufficient to trigger coverage for Communicable Disease. Moreover, FM argues, the Authority's claim falls within the Contamination Exclusion provision, thus foreclosing coverage. The Authority demurs on the basis that because the Policy classifies Communicable Disease Response Coverage as an additional coverage "for insured physical loss or damage;" coverage is afforded to it under the PPP Time Element Coverage for necessary reasonable action, which it took "to prevent immediately impending insured physical loss or damage to such insured property." The court agrees with FM.

"The purpose of a motion to strike is to contest . . . the legal sufficiency of the allegations of any complaint . . . to state a claim upon which relief can be granted." (Internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC* v. *Alves*, 262 Conn. 480, 498, 815 A.2d 1188 (2003). In ruling on a motion to strike, the court must accept as true the facts alleged in the pleading and construe them in the manner most favorable to sustaining their legal sufficiency. See *HSBC Bank USA, National Assn.* v. *Nathan*, 195 Conn. App. 179, 193, 224 A.3d 1173 (2020). "Although the court is required to read the pleadings broadly and in the light most favorable to sustaining the legal sufficiency of the claim, it cannot read additional allegations into the pleading . . . ." *Pike* v. *Bugbee*, 115 Conn. App. 820, 828 n.5, 974 A.2d 743, cert. granted on other grounds, 293 Conn. 923, 980 A.2d 912 (2009).

Although this court construes the allegations broadly and views them in the light most favorable to sustaining their legal sufficiency, it "must take the facts to be those alleged in the complaint . . . and cannot be aided by the assumption of any facts not therein alleged." (Citations omitted; internal quotation marks omitted.) *Liljedahl Bros., Inc.* v. *Grigsby*, 215 Conn. 345, 348, 576 A.2d 149 (1990). While it is true that in deciding a motion to strike the court is limited to the

allegations of the complaint, the complaint includes exhibits attached thereto which may properly be considered by the court in deciding the motion. *Altama, LLC* v. *Napoli Motors, Inc.*, 181 Conn. App. 151, 156, 186 A.3d 78 (2018).

This court's analysis is further informed by familiar principles of the interpretation of insurance policies. "[C]onstruction of a contract of insurance presents a question of law . . . . The [i]nterpretation of an insurance policy . . . involves a determination of the intent of the parties as expressed by the language of the policy . . . [including] what coverage the . . . [insured] expected to receive and what the [insurer] was to provide, as disclosed by the provisions of the policy. . . . [A] contract of insurance must be viewed in its entirety, and the intent of the parties for entering it derived from the four corners of the policy . . . [giving the] words . . . [of the policy] their natural and ordinary meaning . . . [and construing] any ambiguity in the terms . . . in favor of the insured . . . ." (Internal quotation marks omitted.) *Capstone Building Corp.* v. *American Motorists Ins. Co.*, 308 Conn. 760, 773, 67 A.3d 961 (2013), citing *Hartford Casualty Ins. Co.* v. *Litchfield Mutual Fire Ins. Co.*, 274 Conn. 457, 462-63, 876 A.2d 1139 (2005).

"[A]ny ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms. . . . As with contracts generally, a provision in an insurance policy is ambiguous when it is reasonably susceptible to more than one reading. . . . Under those circumstances, any ambiguity in the terms of an insurance policy must be construed in favor of the insured because the insurance company drafted the policy." (Internal quotation marks omitted.) *Johnson* v. *Connecticut Ins. Guaranty Assn.*, 302 Conn. 639, 643, 31 A.3d 1004 (2011). However, "a court will not torture words to import ambiguity, where the ordinary meaning leaves no room for ambiguity and words do not become ambiguous simply because lawyers or laymen contend for different meanings. . . . The fact that the parties advocate

different meanings of the exclusion clause does not necessitate a conclusion that the language is ambiguous." (Citation omitted; internal quotation marks omitted.) *Buell Industries, Inc.* v. *Greater New York Mutual Ins. Co.,* 259 Conn. 527, 545, 791 A.2d 489 (2002). "In construing an insurance policy, the court must not ignore or disregard any provision that can be reconciled with other parts of the policy nor should a court interpret a single provision or sentence in a policy and attach to it a greater significance than is intended by the whole terms of a policy." *Schultz* v. *Hartford Fire Ins. Co.,* 213 Conn. 696, 704, 569 A.2d 1131 (1990).

As the Authority clearly asserts in its objection to FM's motion to strike, and so asserted in its oral argument, its claim for coverage is limited to that under the PPP Time Element coverage extension. This coverage is afforded for "the Actual Loss Sustained by the Insured [resulting from] reasonable action for the temporary protection and preservation of property insured by this Policy provided such action is necessary to prevent immediately impending insured physical loss or damage to such insured property." Compl., Ex. C, p. 62. The PPP Time Element coverage by its express language is tethered to "physical loss or damage to" insured property. The Authority asks the court to discern the meaning of "physical loss or damage" not from an analysis of the constituent words as combined in the phrase, but from the location of the Policy provision affording Communicable Disease coverage.[5] Instead, the Authority relies on the placement of the provision providing Communicable Disease coverage under section 6 of the Policy entitled "Additional Coverages" and which contains the prefatory language: "This Policy

[5] The decision to eschew a direct, isolated, interpretation of the phrase "physical loss or damage" may well be due to the "overwhelming consensus in state and federal courts nationwide is that . . . COVID-19 . . . [does not] cause or constitute property loss or damage for purposes of insurance coverage." (Internal quotation marks omitted.) *Zedan Outdoors, LLC* v. *Ohio Security Ins. Co.*, United States District Court, Docket No. 3:21-CV-00407 (YY), 2022 WL 298337, at *5 (D. Or. January 10, 2022), report and recommendation adopted by United States District Court, Docket No. 3:21-CV-00407 (YY), 2022 WL 294953 (D. Or. February 1, 2022) (collecting cases, including six federal circuit courts).

includes the following Additional Coverages *for insured physical loss or damage.*" (Emphasis added.) Id., p. 23. In the Authority's view, the prefatory language operates to classify all following coverages as "insured physical loss or damage," including that for Communicable Disease. The court is not persuaded.

While it is true that the sentence immediately following the "Additional Coverages" heading provides that the following "Additional Coverages for insured physical loss or damage" are included in the Policy, nevertheless, the argument ignores the next sentence which provides that the Additional Coverages "are subject to the Policy provisions including applicable exclusions . . . ." Id. Clearly, the plain language following the phrase "Additional Coverages for insured physical loss of damage" modifies the prefatory language by alerting the reader that the meaning of the "Additional Coverages" is dependent on the language of the following Policy provisions.[6]

It is further true, that the two coverages[7] following the above prefatory language do involve "physical loss or damage." The next coverage is for "Data Restoration" which covers "physical loss or damage to electronic data, programs or software." The following coverage, "Data Service Provider Property Damage," covers "physical loss or damage to insured property at an insured location when such physical loss or damage results from the interruption of off-premises data processing or data transmission services . . . ." (Emphasis omitted.) Id., p. 24. These coverages are consistent with the prefatory language identifying forthcoming coverages that emanate from "physical loss or damage."

---

[6] As previously noted, the Authority does not argue that the phrase "physical loss or damage" construed on its own incorporates COVID-19 related losses.

[7] The two coverages are the only coverage provisions that follow the "Additional Coverages" heading before the "Other Additional Coverages" heading.

A continued reading of the Policy, however, results in the unraveling of the Authority's argument. Immediately following the "Data Service Provider Property Damage" provision is a new heading, "Other Additional Coverages," following which there is conspicuously absent any qualifying language such as that present after the initial Additional Coverages heading, which refers to the "following Additional Coverages for insured physical loss or damage." Id., p. 26. It is under this subheading that the Communicable Disease Response coverage appears. There is thus a clear demarcation of two different types of "additional coverages;" one following which are coverage provisions making specific reference to "physical loss or damage,"[8] and the subsequent "Other Additional Coverages," which has no prefatory language characterizing the proceeding coverages as relating to "physical loss or damage." In this latter category is the subsection E. coverage for "Interruption by Communicable Disease," pursuant to which coverage is triggered by the "actual not suspected presence of communicable disease" on the insured premises resulting in the decision of an Officer of the Insured to limit, restrict or prohibit access to the insured location. There is thus no logical inconsistency, or ambiguity, between the prefatory language following the "Additional Coverages" heading, and the policy provisions immediately appearing thereafter, and the "Other Additional Coverages" heading and the coverages found thereunder. The court finds that the Authority's argument would result in a distortion of the Policy to discern a meaning of "communicable disease" other than that evidently intended by the parties, which this court may not do. See *Nichols* v. *Salem Subway Restaurant*, 98 Conn. App. 837, 843-44, 912 A.2d 1037 (2006).[9]

---

[8] See "Data Restoration" and "Data Service Provider Property Damage" provisions. Compl., Ex. C, pp. 23-25.

[9] Moreover, the clear language present in "the Communicable Disease coverage applies only when the disease is present, distinguishing it from the Time Element provisions, which require physical loss or damage. That the Communicable Disease provision may be applicable in circumstances when the disease is present at an insured premises, such coverage" does not trigger the Time Element provisions. *Stant USA Corp.* v. *Factory Mutual Ins. Co.*, United States District Court, Docket No. 1:21-CV-00253 (SEB-TAB), 2022 WL 326493, *6 (S.D. Ind.

Thus, absent the central premise of the Authority's argument for coverage, dependent as it is on the methodology by which the meaning of "physical loss or damage" is discerned, and the absence of any claim that the direct interpretation of the phrase "physical loss or damage" results in a finding that it includes communicable diseases as COVID-19 (or vice versa), the court can only conclude that the plain and unambiguous language of the policy does not provide coverage for COVID-19 related "actual losses."

The Authority argues that ambiguity exists considering the interplay of the Contamination Exclusion and the Communicable Diseases coverage. This is so because the Contamination Exclusion precludes coverage for "contamination," which is defined to include "viruses," while the Communicable Diseases coverage expressly covers, by definition, the actual or suspected presence of any virus. A similar argument, that the Contamination Exclusion and the Communicable Disease coverage are inconsistent, was rejected by the United States District Court for the District of Washington at Seattle, which observed that a harmonious construction of these two provisions was possible, to wit, "(1) COVID-19 does not trigger coverage because of a lack of physical loss or damage; (2) even if it did, the Contamination exclusion would exclude coverage; (3) but, [once] the terms of the Communicable Disease provisions are met,

---

February 3, 2022) (examining an identical Communicable Policy provision). This is so because the actual or suspected presence of a virus is simply not "physical loss or damage." As noted by the United States District Court for the Western District of Virginia, "[t]he issue of insurance coverage for physical loss or damage in the context of the COVID-19 pandemic is being debated and decided by courts throughout the country in thousands of federal and state cases. Eight federal circuit courts of appeals have considered this issue over the past six months, and in all of these cases the federal appellate courts have concluded that property insurance policies providing coverage for direct physical loss of or damage to property do not cover property damage and business interruption losses stemming from the SARS-CoV-2 virus and the COVID-19 pandemic. While none of these eight federal appellate decisions involved the . . . Policy at issue here, each addressed whether the SARS-CoV-2 virus and the COVID-19 pandemic caused various businesses direct *physical loss of or damage* to property under the terms of similar commercial property insurance policies." (Emphasis added.) *Carilion Clinic* v. *American Guarantee & Liability Ins. Co.*, United States District Court, Docket No. 7:21-CV-00168, 2022 WL 347617, *4 (W.D. Va. February 4, 2022). The court agrees that the actual or suspected presence of any virus on the Premises does not constitute "physical loss or damage."

coverage is available under these provisions alone." *Nguyen* v. *Travelers Casualty Ins. Co. of America*, 541 F. Supp. 3d 1200, 1227 n.32 (W.D. Wash. May 28, 2021), appeal dismissed sub nom. *Vancouver Clinic Inc., PS* v. *Affiliated FM Ins. Co.*, United States Court of Appeals, Docket No. 21-35499 (9th Cir. December 1, 2021).

Finally, FM argues that the Authority has failed to sufficiently plead coverage under the Communicable Disease Time Element coverage. This is so because it did not allege the "actual not suspected presence" of COVID-19 on its premises, nor does it allege that any order, whether by the government or an officer of the Authority, responded to such "actual not suspected presence" on the property of COVID-19 as required to trigger coverage under the Communicable Disease provision. The court agrees.

The Authority alleged in its complaint that the closure of the Resort property was done "[t]o *prevent* the immediately impending actual presence of communicable disease at the Resort, [by preventing] guests who were infected with COVID-19 from entering the premises." (Emphasis added.) Compl., ¶ 61. The court has carefully reviewed the "Declaration of Emergency on the Mohegan Reservation in Response to the COVID-19 Disease" issued by the Mohegan Tribe and the Authority's Management Board's resolution confirming the application of the declaration to the Resort. The former references the "*potential* for widespread exposure to an infectious agent" and the need to prepare for "the impact that COVID-19 *may* have on the Mohegan Reservation and in the community and take all necessary steps to *prevent* widespread impact." (Emphasis added.) Id., Ex. A. The latter explains that its resolution confirming the applicability of the Declaration was done "in order to *prepare* for the impact that COVID-19 *may* have on the gaming and associated operations and [to] take all necessary steps *to prevent* widespread impact." (Emphasis added.) Id. These decisions by the Mohegan Tribe and the

Authority were done to prevent or prepare for the actual presence of COVID-19, not because of its "actual not suspected presence." For this reason, the Authority has failed to state a legally sufficient claim for coverage under the Communicable Disease Time Element coverage.

Because the Authority's complaint does not allege "physical loss or damage" as required for coverage under the "Protection and Preservation of Property Time Element" coverage and its assertion that the placement of the Communicable Disease coverage in section 6, "Additional Coverages," compels the conclusion that the Policy defines communicable disease as "physical loss or damage" is erroneous, no coverage is provided by the Policy under the "Protection and Preservation of Property Time Element" coverage. Further, because the Authority has failed to sufficiently allege that the cessation of its operations was due to the "actual not suspected presence" of COVID-19 at the Resort, FM's motion to strike is granted in its entirety. [10]

THE COURT

435707
Cesar A. Noble
Judge, Superior Court

[10] As to the claim asserted for bad faith in the second count, the court's conclusion that the breach of contract claim fails due to lack of coverage is fatal to the bad faith claim because "violations of express duties are necessary to maintain a bad faith cause of action." *Capstone Building Corp.* v. *American Motorists Ins. Co.,* 308 Conn. 760, 797, 67 A.3d 961 (2013).