SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY BANNON** **PART 42**

Justice

----------X

632ONHUDSON, LLC,

Plaintiff,

- v -

ASPEN AMERICAN INSURANCE COMPANY, WKFC UNDERWRITING MANAGERS

Defendant.

----------X

INDEX NO. 654042/2020

MOTION DATE 08/02/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 76, 77, 78

were read on this motion to/for DISMISS.

The motion is decided in accordance with the attached Decision and Order.

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

1/19/2022
DATE

CHECK ONE:	X	**CASE DISPOSED**			**NON-FINAL DISPOSITION**		
	X	**GRANTED**		**DENIED**	**GRANTED IN PART**		**OTHER**
APPLICATION:		**SETTLE ORDER**			**SUBMIT ORDER**		
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**			**FIDUCIARY APPOINTMENT**		**REFERENCE**

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HON. NANCY BANNON:

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I.

I. INTRODUCTION

The plaintiff, 632OnHudson, LLC, brings this action to recover under its business interruption insurance policies for revenue lost due to the COVID-19 pandemic and attendant government orders aimed at containing the spread of COVID-19. The defendants, Aspen American Insurance Company and WKFC Underwriting Managers (together, "defendants"), move pursuant to CPLR 3211(a)(7) to dismiss the amended complaint for failure to state a cause of action, contending that the plaintiff's business losses are not covered under the relevant insurance policy language, or, alternatively, are subject to certain exclusions. The plaintiff opposes the motion. For the following reasons, the motion is granted.

II. BACKGROUND

The following allegations are drawn from the plaintiff's amended complaint, unless otherwise noted, and are assumed to be true solely for purposes of this motion. See Grassi & Co. v Honka, 180 AD3d 564 (1st Dept. 2020).

The plaintiff is the owner of a building located at 632 Hudson Street in Manhattan. The building, formerly a sausage factory, was acquired by the plaintiff's sole proprietor in 1992 and converted into a popular event space. In addition to hosting private events such as weddings and holiday parties, parts of the building are available to lease as residential or commercial space.

The plaintiff purchased commercial property insurance from defendant Aspen American Insurance Company ("Aspen") under policy No. WKA FT00375-07 (the "Policy"). The Policy, which was produced, underwritten, and sold by defendant WKFC Underwriting Managers ("WKFC"), was in effect from April 24, 2019, through April 24, 2020. The Policy was renewed for an additional year from April 25, 2020, through April 25, 2021, under policy No. WKA FT00375-08 (the "Renewed Policy," and together with the Policy, the "Policies"). The Policies are identical in their terms, except that the Renewed Policy has additional coverage for equipment breakdown.

The Policies cover certain losses to "Covered Property," defined to include the subject building at 632 Hudson Street, business personal property, and the personal property of others, with certain enumerated exceptions not relevant here. A "Covered Cause of Loss" is defined as "direct physical loss unless the loss is excluded or limited" by the Policies. The Policies contain specific provisions applicable to (1) general coverage, (2) business income coverage, (3) extra expense coverage, and (4) civil authority coverage, as follows:

BUILDING AND PERSONAL PROPERTY COVERAGE FORM

A. Coverage

We will pay for direct physical loss of or damage to the Covered Property at [the insured premises] caused by or resulting from any Covered Cause of Loss.

***

BUSINESS INCOME (AND EXTRA EXPENSE) COVERAGE FORM

A. Coverage

1. Business Income

Business Income means the:

a. Net Income (Net Profit or Loss before income taxes) that would have been earned or incurred; and
b. Continuing normal operating expenses incurred, including payroll.

…

We will pay for the actual loss of Business Income you sustain due to the necessary "suspension" of your "operations" during the "period of restoration." The "suspension" must be caused by direct physical loss of or damage to property at [the insured premises]. The loss or damage must be caused by or result from a Covered Cause of Loss…

…

2. Extra Expense

…

b. Extra Expense means necessary expenses you incur during the "period of restoration" that you would not have incurred if there had been no direct physical loss or damage to property caused by or resulting from a Covered Cause of Loss.

We will pay Extra Expense (other than the expense to repair or replace property) to:

> (1) Avoid or minimize the "suspension" of business and to continue operations at the [insured premises] or at replacement premises or temporary locations … [and]
>
> (2) Minimize the "suspension" of business if you cannot continue "operations." … We will also pay Extra Expense to repair or replace property, but only to the extent it reduces the amount of loss that otherwise would have been payable…

…

5. Additional Coverages

a. Civil Authority

…

> When a Covered Cause of Loss causes damage to property other than property at the [insured 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 [insured 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 [insured premises] are within that area but are not more than one mile from the damaged property; and
>
> (2) The action of 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.

Pursuant to the Policies, "suspension" means "[t]he slowdown or cessation of your business activities" or "[t]hat a part or all of the described premises is rendered untenantable." "Operations" means "[y]our business activities occurring at the [insured premises]" and "[t]he tenantability of the [insured premises]." "Period of restoration" mean the period of time beginning "72 hours after the time of direct physical loss or damage for Business Income Coverage" or "[i]mmediately after the time of direct physical loss or damage for Extra Expense

Coverage" and ending on the earlier of "[t]he date when the property at the [insured premises] should be repaired, rebuilt or replaced with reasonable speed and similar quality" or "[t]he date when business is resumed at a new permanent location."

The Policies exclude coverage in certain instances, even if a loss or cause of loss would otherwise come within the Policies' scope of coverage.

From March 2020 onward, the plaintiff suspended its business operations to comply with executive orders issued by the Governor of New York State and the Mayor of New York City in response to the COVID-19 pandemic. On March 12, 2020, the Governor issued an Executive Order requiring nonessential business such as the plaintiff to operate at no greater than 50% of seating capacity. On the same date, the Mayor declared a state of emergency due to the danger COVID-19 posed to residents of New York City. On March 22, 2020, the Governor issued a further Executive Order ordering the closure of all nonessential businesses and prohibiting nonessential gatherings statewide. The Governor's stay-at-home order was extended through May 2020. In-person property showings were likewise prohibited through June 2020. While the Governor instituted a four-phase reopening plan thereafter, the plan did not include large event spaces such as the plaintiff and continued to limit gatherings to 50 people through early 2021.

The plaintiff avers that it has been forced to close its premises and cancel bookings due to the possible presence of the COVID-19 virus on site and the actions of civil authorities, causing the plaintiff to incur significant losses. By letter dated May 13, 2020, the defendants denied the plaintiff's claim for coverage under the Policies. On August 25, 2020, the plaintiff commenced the instant action contesting such denial and seeking coverage under the general, business income, extra expense, and civil authority coverage provisions of the Policies. The amended

complaint includes two causes of action sounding in breach of contract and breach of implied covenant of good faith and fair dealing.

III. LEGAL STANDARD

When assessing the adequacy of a pleading in the context of a motion to dismiss under CPLR 3211(a)(7), the court's role is "to determine whether [the] pleadings state a cause of action." 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 151-152 (2002). To determine whether a claim adequately states a cause of action, the court must "liberally construe" it, accept the facts alleged in it as true, accord it "the benefit of every possible favorable inference" (id. at 152: see Romanello v Intesa Sanpaolo, S.p.A., 22 NY3d 881 [2013]; Simkin v Blank, 19 NY3d 46 [2012]), and determine only whether the facts, as alleged, fit within any cognizable legal theory. See Hurrell-Harring v State of New York, 15 NY3d 8 (2010); Leon v Martinez, 84 NY2d 83 (1994).

Under New York law, "an insurance contract is interpreted to give effect to the intent of the parties as expressed in the clear language of the contract." Parks Real Estate Purchasing Group v St. Paul Fire and Marine Ins. Co., 472 F3d 33, 42 (2nd Cir. 2006) (applying New York law). Where the terms of the contract are clear and unambiguous, they must be given their "plain and ordinary meaning, and courts should refrain from rewriting the agreement." Roundabout Theatre Co., Inc. v Continental Cas. Co., 302 AD2d 1, 6 (1st Dept. 2002) (internal quotation marks and citations omitted); see Chiarello ex rel. Chiarello v Rio, 152 AD3d 740, 742 (2nd Dept. 2017). "[T]he issue of whether a provision is ambiguous is a question of law" and "focuses on the reasonable expectations of the average insured upon reading the policy."

Hansard v Fed. Ins. Co., 147 AD3d 734 (2nd Dept. 2017) (internal quotation marks and citations omitted).

IV. DISCUSSION

A. Physical Loss or Damage

As described above, each of the general, business income, and extra expense coverage provisions in the Policies predicates coverage on the existence of "direct *physical* loss of or damage" (emphasis added) to the insured property. According to the plaintiff, the physical presence of the COVID-19 virus at a premises causes "property damage" because virus particles "integrate[] into the building surfaces, air, air conditioning, and ventilation for substantial periods of time" and render the premises dangerous, as well as "uninhabitable and unusable in part," until the premises is "decontaminated." Alternatively, the plaintiff avers that the government shutdown orders caused physical loss or damage insofar as they prohibited the plaintiff from operating or limited the use of its property in response to the presence or threat of COVID-19 at the premises. Both arguments are unavailing.

The plaintiff states that it was unable to operate its business or enter the premises because the COVID-19 virus "was present at the insured's location at all relevant times" or otherwise presented an imminent risk of danger at the premises. In response to the defendants' observation that this allegation is speculative, the plaintiff clarifies in its opposition papers that it is "based on the locally ubiquitous nature of the virus, how it spreads, the large number of asymptomatic individuals who passed through Plaintiff's doors…, the nature of Plaintiff's operations and modeling by experts." The plaintiff urges the court to draw a parallel between the presence or threat of COVID-19 virus particles at a building and the presence of such airborne contaminants

as chemicals, odors, and bacteria, which it avers have been held by courts in this state and elsewhere to constitute physical damage within the meaning of insurance policies.

Even accepting at face-value the plaintiff's allegation that the COVID-19 virus was actually present at the insured premises and posed an imminent risk of danger, the plaintiff fails to allege physical loss or damage within the meaning of the Policies. "Contamination of a structure that seriously impairs or destroys its function may qualify as direct physical loss." Kim-Chee LLC v Philadelphia Indemnity Ins. Co., 535 F Supp 3d 152, 160 (W.D.N.Y. 2021). In this regard, courts have found that the persistent presence of physical or chemical contaminants such as exposed asbestos, methamphetamine fumes, lead, gasoline seepage, carbon monoxide, e-coli bacteria, and wildfire smoke, which render a premises unusable may entitle an insured to coverage. Id. (collecting cases). At the same time, other courts have concluded that "contamination which is short-lived or does not prevent the use of the structure," including dust from construction, mold and bacteria requiring cleaning, and quantities of asbestos that do not render a premises unusable, "does not qualify as direct physical loss." Id. at 160-61 (collecting cases).

The presence of COVID-19 falls into the latter category of airborne contaminants. As many New York courts have already held, "[t]he *presence* of the coronavirus does not physically alter property in a permanent manner" and is thus "different from other physical or chemical contaminants that have been found to cause 'direct physical loss or damage' to property." Buffalo Xerographix, Inc. v Sentinel Ins. Co., Ltd., 2021 WL 2471315, *4 (W.D.N.Y. June 16, 2021); see also, e.g., Spirit Realty Capital, Inc. v Westport Ins. Corp., 2021 WL 4926016 (S.D.N.Y. Oct. 21, 2021); Chefs' Warehouse, Inc. v Employers Ins. Co. of Wausau, 2021 WL 4198147 (S.D.N.Y. Sept. 15, 2021); Kim-Chee LLC v Philadelphia Indemnity Ins. Co., supra;

Northwell Health, Inc. v Lexington Ins. Co., 2021 WL 3139991 (S.D.N.Y. 2021); Food for Thought Caterers Corp. v Sentinel Ins. Co., Ltd., 524 F Supp 3d 242 (S.D.N.Y. 2021). While COVID-19 virus particles may circulate in the air and settle on surfaces within the insured premises, they are invisible, transient, and do not alter the premises in any way. In fact, the premises is only rendered unsafe when it is continuously occupied by individuals who might carry the virus and facilitate its spread. Moreover, as the plaintiff admits, virus particles can be eliminated by routine cleaning and disinfecting. An "item or structure that merely needs to be cleaned has not suffered a direct physical loss." Food for Thought Caterers Corp. v Sentinel Ins. Co., Ltd., supra at 249 (internal quotation marks and citations omitted). Thus, the plaintiff's claim "is one of contamination—relatively short in duration but always with the risk of returning—which affects all structures and, indeed, all places in the world." Kim-Chee LLC v Philadelphia Indemnity Ins. Co., supra at 161. It is not a claim of direct physical loss or damage within the meaning of the Policies.

The plaintiff further argues that the deprivation of access to its property occasioned by government restrictions triggers coverage under the Policies. On this point, however, New York law is clear: a provision for coverage of "loss of" property does not encompass "loss of use" of the property. In Roundabout Theatre Co., Inc. v Continental Cas. Co., supra, the Appellate Division, First Department explained that insurance policies cover only loss of property "caused by the perils insured against." Id. at 8. In that action, as here, the subject policy defined such perils to include all risks of direct physical loss of or damage to the insured's property. The First Department concluded, based on this language, the plain meaning of the words "direct" and "physical," and the structure of the policy overall, that the policy "clearly and unambiguously provides coverage only where the insured's property suffers direct physical damage" and not

where the insured claims loss of use of the property Id. Therefore, the plaintiff in Roundabout Theatre, a theater company that was forced to cancel performances when its theater was rendered inaccessible to the public due to a municipal order closing the street on which it was located for safety reasons, could not obtain the coverage it sought. See also RSVT Holdings, LLC v Main St. Am. Assur. Co., 136 AD3d 1196, 1198 (3rd Dept. 2016) (noting that policy covering "direct physical loss of or damage to" provided coverage only for "direct damage to plaintiffs' property").

The plaintiff presents no cogent reason why the holding in Roundabout Theatre should be limited to permit it to recover under the circumstances presented. To be sure, the relevant provisions at issue in Roundabout Theatre and the provisions at issue in this action are not materially different. Moreover, the exclusion of loss of use of the premises from coverage comports with other provisions of the Policies. For example, the Policies' restriction of coverage to a period of restoration, defined as a specific time period during which the insured is to "repair," "rebuild," or "replace" damaged property, signifies that the damage or loss required to trigger coverage in the first instance must be tangible and capable of remedy. See Newman Myers Kreines Gross Harris, P.C. v Great N. Ins. Co., 17 F Supp 3d 323, 332 (S.D.N.Y. 2014); Roundabout Theatre Co., Inc. v Continental Cas. Co., supra at 8 (policy requirement that insured "rebuild, repair, or replace" supported limitation of coverage to instances of physical damage). In contrast, the plaintiff alleges in the amended complaint that its business operations will be limited "indefinitely, even when the building is permitted to be reopened." Accordingly, in the plaintiff's view, the period of restoration would not be subject to any limitation. Such an interpretation of the Policies cannot be reconciled with their plain language.

The plaintiff nonetheless contends that Roundabout Theatre is distinguishable because the purported property damage here was on site, rather than off site. However, the cases cited by the plaintiff in support of this principle are inapposite. In Pepsico, Inc. v Winterthur Intern. Am. Ins. Co., 24 AD3d 743 (2nd Dept. 2005), the Appellate Division, Second Department, held that a plaintiff adequately demonstrated physical loss within the meaning of the insurance policy where the wrong ingredients had been added to beverages it had produced for sale, such that they were rendered unmerchantable. Here, as the court has explained, the COVID-19 virus did not fundamentally alter the function or value of the premises. In Schlamm Stone & Dolan, LLP v Seneca Ins. Co., 6 Misc 3d 1037(A) (Sup Ct, NY County 2005), the presence of noxious particles on the floor and surfaces and in the air of the plaintiff's office building due to the events of September 11, 2001, which persisted despite the plaintiff's cleaning efforts, were held to constitute property damage because they impaired the plaintiff's ability to make use of the building. Similarly, in Parks Real Estate Purchasing Group v St. Paul Fire & Marine Ins. Co., 472 F3d 33 (2nd Cir. 2006), the Second Circuit held that a fact issue existed as to whether the damage caused by the settling of the same noxious particles was physical damage subject to coverage. Again, however, as the court has explained, the COVID-19 virus did not effect a permanent, physical alteration of premises analogous to that caused by the noxious particles at issue in the foregoing cases such that it was rendered unusable.

Finally, while the plaintiff points to a handful of courts in other jurisdictions that have held that the presence of COVID-19 might cause physical loss or damage to property, an ever-increasing number of New York courts applying New York law have reached the opposite conclusion. Indeed, state and federal courts in New York have "uniformly applied" the holding in Roundabout Theatre since the start of the COVID-19 pandemic "to deny coverage under

similar insurance provisions where the insured property was not alleged or shown to have suffered direct physical loss or physical damage." 10012 Holdings, Inc. v Sentinel Ins. Co., Ltd., 21 F 4th 216 (2nd Cir. 2021); see, e.g., Benny's Famous Pizza Plus Inc. v Sec. National Ins. Co., 72 Misc 3d 1209(A) (Sup Ct, Kings County 2021); 6593 Weighlock Drive, LLC v Springhill SMC Corp., 71 Misc 3d 1086 (Sup Ct, Onondaga County 2021); Mangia Rest. Corp. v Utica First Ins. Co., 72 Misc 3d 408 (Sup Ct, Queens County 2021); Visconti Bus Serv., LLC v Utica National Ins. Group, 71 Misc 3d 516 (Sup Ct, Orange County 2021); see also, e.g., Kim-Chee LLC v Philadelphia Indemnity Ins. Co., supra; Spirit Realty Capital, Inc. v Westport Ins. Corp., supra; Chefs' Warehouse, Inc. v Employers Ins. Co. of Wausau, supra; Mohawk Gaming Enters., LLC v Affiliated FM Ins. Co., 534 F Supp 3d 216 (N.D.N.Y. 2021); Food for Thought Caterers Corp. v Sentinel Ins. Co., Ltd., supra; Buffalo Xerographix, Inc. v Sentinel Ins. Co., Ltd., supra; Sharde Harvey DDS, PLLC v Sentinel Ins. Co., 2021 WL 1034259 (S.D.N.Y. Mar. 18, 2021). Thus, in declining to certify the question of Roundabout Theatre's applicability to losses occasioned by the COVID-19 pandemic and government shutdown orders, the Second Circuit recently concluded that it could "confidently predict how the Court of Appeals would decide the issue." 10012 Holdings, Inc. v Sentinel Ins. Co., Ltd., supra at n.1.

The court has considered the plaintiff's remaining contentions in support of its theory that COVID-19 effected a "direct physical loss" under one of the applicable coverage provisions and finds them to be without merit. The relevant coverage provisions of the Policies clearly and unambiguously require direct physical loss or damage as a condition precedent to recovery on an insurance claim. The plaintiff has not pleaded any such physical loss or damage. Accordingly, to the extent they are premised on the defendants' denial of coverage under the general, business loss, and extra expense coverage provisions of the Policies, the plaintiff's breach of contract and

breach of covenant of good faith and fair dealing claims, which arise from identical conduct, are dismissed.

B. Civil Authority Coverage

The Policies' civil authority coverage provision is more expansive than the general, business income, and extra expense coverage provisions inasmuch as is provides for coverage where the action of civil authority prohibits access to the insured premises, without requiring physical loss or damage to the insured premises itself. However, the civil authority coverage provision is triggered only where the action of civil authority has been taken in response to "dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage" to a property within half a mile of the insured premises. In other words, coverage continues to be predicated on "physical loss or damage," except that such loss or damage must in this instance be alleged with respect to another property.

The amended complaint alleges only that "COVID-19 was physically present within the Lenox Hill Greenwich Village Emergency Department, which is half a mile or less from the insured premises." As the court has explained, the presence of COVID-19 at a neighboring property does not give rise to a direct physical injury to such property, particularly where, as here, the property alleged to have been injured was an emergency department that continued to operate at full capacity throughout the pandemic and was unaffected by the government's shutdown orders. Since the plaintiff "cannot provide specific, non-general allegations that document a direct physical injury" to any neighboring property, (Kim-Chee LLC v Philadelphia Indemnity Ins. Co., supra at 162), it has not pleaded facts sufficient to satisfy the requirements for civil authority coverage.

In addition, civil authority coverage is unavailable here for the independent reason that the plaintiff fails to plead that access to the insured premises was "prohibited," as opposed to having limitations placed on its use.

In light of the foregoing, to the extent the plaintiff seeks to recover under the civil authority coverage provision, its claims are subject to dismissal.

C. Alternative Bases for Coverage

The plaintiff contends in its opposition papers that its losses are covered as "sue and labor" claims. The plaintiff does not identify a source of coverage for such claims. Rather, the provisions in the Policies applicable to sue and labor are affirmative requirements that, in the event of a Covered Cause of Loss, the plaintiff, *inter alia*, "use all reasonable means to save and preserve property from further damage of and after the time of loss" in order to remain entitled to coverage. Because no physical loss or damage occurred, however, there is no contractual basis upon which they plaintiff can recover expenses it incurred in shutting down the premises. Nor is the court persuaded that there exists any implied basis for such recovery. Thus, the plaintiff's claims are not saved by the purported sue and labor provisions of the Policies.

D. Exclusions

Because the court concludes that the plaintiff has not pleaded that it met the requirements for coverage under the Policies in the first instance, it does not reach the defendants' arguments as to the applicability of any exclusions.

V. CONCLUSION

Accordingly, on the foregoing papers, it is

ORDERED that the defendants' motion pursuant to CPLR 3211(a)(7) to dismiss the amended complaint is granted, and the amended complaint is dismissed; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the Decision and Order of the court.

DATED: January 19, 2022

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON