IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

NAPLETON RIVER OAKS CADILLAC INC., SESSLER FORD, INC. d/b/a NAPLETON FORD, NAPLETONS PARK RIDGE LINCOLN INC. d/b/a NAPLETON LINCOLN, LOREN HYUNDAI INC. d/b/a NAPLETON HYUNDAI, NAPLETON GENESIS, AND NAPLETON MAZDA OF LIBERTYVILLE INC. d/b/a NAPLETON MAZDA OF LIBERTYVILLE, INC.,,	)	20 L 6777
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Plaintiffs,	)	Judge Michael Otto
v.	)	
ERIE INSURANCE PROPERTY & CASUALTY COMPANY,and CORKILL INSURANCE AGENCY, INC.,	)	
Defendants.	)	

ORDER

In this lawsuit Plaintiffs, several automotive dealerships, seek to recover from their insurer (Erie Insurance Property & Casualty Company ("Erie")) and their insurance broker (Corkill Insurance Agency, Inc. ("Corkill")) for Plaintiffs' claimed business losses due to the COVID-19 pandemic and the Executive Orders issued by Illinois Governor J.B. Pritzker to combat same. This court has already, in its Orders of January 28, 2021 and June 1, 2021, dismissed with prejudice Plaintiffs' claims against Corkill for negligent misrepresentation and negligence. The only remaining claims are against Erie.

As against Erie, Plaintiffs seek a declaratory judgment that their losses are covered (Count I), bring suit for breach of contract for Erie's denial of coverage (Count II), and bring a claim for vexatious refusal under section 155 of the Insurance Code (215 ILCS 5/155) (Count III). The matter is now before the court on Erie's motion for judgment on the pleadings, pursuant

to 735 ILCS 5/2-615(e). Erie seeks judgment on the grounds that the losses Plaintiffs claim to have suffered are not covered by the insurance policies Erie issued to them. Erie argues first, the alleged losses are not covered because they did not result from "physical loss of or damage to" Plaintiffs' property. Second, Erie argues in the alternative that Plaintiffs' losses are in any event excluded from coverage under the Virus Exclusion of Plaintiffs' policies.

The court agrees with Erie that the losses are not covered. The motion is granted.

Facts

The following facts are taken from the allegations of Plaintiffs' Complaint, the well-pleaded factual allegations of which, for purposes of a motion for judgment on the pleadings, the court must assume to be true.

Plaintiffs operate, manage and maintain automobile dealerships and repair shops. As of March 9, 2020, Plaintiffs claim to have sustained physical damage to insured property and business income losses caused by the COVID 19 pandemic and related governmental orders.

Physical damage. After one of Plaintiffs' executive officers, among others, became infected with, and spread the COVID-19 virus at Plaintiffs' businesses, the COVID-19 virus molecules present there caused direct physical damage to the air quality, surfaces, personnel, services, and interests of plaintiffs. Plaintiffs allege the physical damage caused by Covid-19 caused them to restrict, slowdown, and/or cease ordinary business activities at their insured premises.

Governmental Orders. On March 15, 2020, Governor Pritzker issued an executive order closing all restaurants, bars, and movie theaters in an effort to slow the spread of Covid-19. Governor Pritzker expanded his Order on March 16, 2020 to close all "non-essential business"

until March 30, 2020. Plaintiffs allege that on March 20, 2020, they were forced to terminate, lay off, furlough or otherwise suspend the majority of their workforce.

Plaintiffs allege Covid-19, coupled with the Governor's executive orders, resulted in loss of business income, much of their labor force being furloughed or contracts cancelled, and an increase in expenses to continue business operations.

Policy Provisions

Plaintiffs claim they are entitled to coverage for their losses pursuant to the policies issued to them by Erie. The parties cite several provisions of the policies. Relevant provisions include the following.

Section A (Coverage) to the Building and Personal Property Coverage Form attached to the policies provides that Erie will pay for "direct physical loss of or damage to Covered Property" resulting from any "Covered Cause of Loss." "Covered Property" includes Plaintiffs' buildings, business personal property, and the personal property of others. "Covered Causes of Loss" is defined by Section A to the "Causes of Loss Special Form" as "direct physical loss unless the loss is excluded or limited in this policy."

The Business Income Form and Extra Expenses Coverage Form offers coverage for the "actual loss of Business Income [the insured] sustain[s] due to the necessary 'suspension' of [its] 'operations' during the 'period of restoration,'" where such suspension is "caused by a direct physical loss of or damage to property at premises."

Section 5(a) of the Business Income Form ("Civil Authority Provision") provides coverage for loss of business income "When a Covered Cause of Loss causes damage to property other than property at the described premises," and the civil authority prohibits access to the area "immediately surrounding the damaged property ... as a result of the damage," and "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."

The Equipment Breakdown Coverage provides that Erie "will pay for direct physical damage to Covered Property that is the direct result of an 'accident.'" An "accident" is defined, for purposes of this Form, as "a fortuitous event that causes direct physical damage to 'covered equipment.'"

Finally, the "Exclusion of Loss due to Virus or Bacteria Endorsement" ("Virus Exclusion") provides that Erie will not pay for any loss or damage caused by "any virus... that induces or is capable of inducing physical distress, illness or disease." The Virus Exclusion "applies to all coverage under all forms and endorsements that comprise this Coverage Part or Policy, including but not limited to forms or endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority."

Analysis

Section 2-615(e) of the Code permits any party to seek judgment on the pleadings. Such a motion is akin to a motion for summary judgment, albeit limited to the pleadings. *Employers Ins. v. Ehlco Liquidating Trust*, 186 Ill. 2d 127, 138 (1999), quoting 3 R. Michael, Illinois Practice 27.2, at 494 (1989). *Compare* 735 ILCS 5/2-1005(c) (motions for summary judgment should consider not only pleadings, but depositions, admissions, and affidavits). Thus, the motion should be granted if "'the pleadings disclose no genuine issue of material fact and that the movant is entitled to judgment as a matter of law.'" *State Bank of Cherry v. CGB Enters., Inc.*, 2013 IL 113836, ¶ 65, quoting *Pekin Ins. Co. v. Wilson*, 237 Ill. 2d 446, 455 (2010). The court may consider only the allegations of the pleadings (*State Bank of Cherry*, 2013 IL 113836, ¶ 65),

although of course "[c]opies of written instruments attached to a pleading as an exhibit are considered a part of the pleading" for 2-615 purposes. *Employers Ins.*, 186 Ill. 2d at 139, citing 735 ILCS 5/2-606. All well-pled facts in the non-movant's pleadings are deemed admitted, as well as "the fair inferences drawn therefrom." *State Bank of Cherry*, 2013 IL 113836, ¶ 65; *Pekin Ins. Co.*, 237 Ill. 2d at 455; *Employers Ins.*, 186 Ill. 2d at 138.

In an action for breach of an insurance policy, the burden is on the insured to prove that its claim falls within the scope of the insurance policy's coverage. *Addison Ins. Co. v. Fay*, 232 Ill. 2d 446, 453 (2009); *St. Michael's Orthodox Catholic Church v. Preferred Risk Mut. Ins. Co.*, 146 Ill. App. 3d 107, 109 (1986) ("[T]he existence of coverage is an essential element of the insured's case, and the insured has the burden of proving that his loss falls within the terms of his policy."). The insurer, however, has the burden of proving the applicability of a policy exclusion. *United Nat'l Ins. Co. v. Faure Bros. Corp.*, 409 Ill. App. 3d 711, 717 (2011).

In construing an insurance policy, provisions that limit or exclude coverage to the insured must be construed liberally in favor of the insured and against the insurer. *United States Fire Ins. Co. v. Aetna Life & Cas.*, 291 Ill. App. 3d 991, 997 (1997). However, insurance contracts are subject to the same rules of construction as other types of contracts. *Int'l Surplus Lines Ins. Co. v. Pioneer Life Ins. Co.*, 209 Ill. App. 3d 144, 148 (1990). Thus, the court cannot distort policy language to reach a desired result, nor invent ambiguities where none exist. *Id.* Rather, the court must examine the contract as a whole, give effect to the parties' intentions, and, if the words are unambiguous, afford them their plain, ordinary, and popular meaning. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 108 (1992).

Moreover, a contract is not necessarily ambiguous merely because the parties fail to agree on its meaning. *Thompson v. Gordon*, 241 Ill. 2d 428, 443 (2011). Rather, ambiguity exists only

"if the contract language is obscure in meaning through indefiniteness of expression." (Internal punctuation omitted.) *Id.* at 443, quoting *Central Illinois Light Co. v. Home Insurance Co.*, 213 Ill. 2d 141, 153 (2004). Even where a contract term could have different meanings in isolation, it will not be found ambiguous if it is only reasonably susceptible to a single interpretation in context, considering the contract as a whole. *Id.*

I. **The COVID-19 Virus Did Not Cause "Direct Physical Loss of or Damage to" Plaintiffs' Property**

Erie's first argument for judgment on the pleadings is that Plaintiffs' claimed losses are not covered under any policy form, because Plaintiffs suffered no direct physical loss of or damage to insured property. The court agrees.

Damage

Plaintiffs plead that their property was physically damaged by the presence of COVID-19 contagion on the surfaces at their premises. Specifically, Plaintiffs contend that "COVID-19 molecules physically infect surfaces, remain on infected surfaces for considerable periods of time, and can remain on infected surfaces for up to four weeks in low temperatures." Although the court must accept as true Plaintiffs' allegation that COVID-19 molecules remain on surfaces for some time, the court finds that a temporary state of contagion is not "damage" to the property.

The Illinois Supreme Court has held in the insurance context that "to the average, ordinary person, tangible property suffers a 'physical' injury when the property is altered in appearance, shape, color or in other material dimension. Conversely, to the average mind, tangible property does not experience 'physical' injury if that property suffers intangible damage, such as diminution in value." *Travelers Ins. Co. v. Eljer Mfg., Inc.*, 197 Ill. 2d 278, 301 (2001). In *Travelers*, the Court expressly rejected the Seventh Circuit's earlier holding that "the

term 'physical injury' does not require that the covered property actually be 'injured' in a 'physical' sense … , but only that the claimants suffered any 'loss that results from physical contact, physical linkage' with the defective … systems.'" *Id.* at 303, quoting *Eljer Manufacturing Corp. v. Liberty Mutual Insurance Co.*, 972 F.2d 805, 810 (7th Cir. 1982). In *Eljer*, the Seventh Circuit held that physical damage to property occurred when a defective plumbing system was incorporated into a home even though the system had not yet actually malfunctioned. *Travelers* expressly rejected this holding, holding that a policy which requires a "physical" injury to trigger coverage, unambiguously contemplates an "alteration" to the covered property. *Id.* at 311. Although *Travelers* involved the term "physical injury" as opposed to "physical … damage," in the language at issue here, the court finds the discussion on-point.

In this case, Plaintiffs do not, and cannot, allege that their property was altered in appearance, shape, color or other material dimension where a thorough cleaning – or even a relatively short passage of time – would eliminate the contagion and leave the property in its original state. Under *Travelers*, Erie is entitled to judgment on the pleadings that the COVID-19 contamination did not "damage" Plaintiffs' property.

Plaintiffs attempt to analogize COVID-19 contagion to asbestos contamination, which Illinois courts have found to constitute physical injury to property. *See, e.g., United States Fid. & Guar. Co. v. Wilkin Insulation Co.*, 144 Ill. 2d 64 (1991); *Board of Educ. v. International Ins. Co.*, 308 Ill. App. 3d 597 (1997). The court disagrees that the analogy holds. The policyholders in *Travelers* invoked the same line of cases, and the Court distinguished them, noting that asbestos contamination caused physical injury due to the fact that the buildings and their contents were "contaminated or impregnated with asbestos fibers" which they "continuous[ly] release[d]." *Travelers*, 197 Ill. 2d at 305-6.

Clearly, like asbestos, COVID-19 represents a serious health risk. Unlike asbestos, however, the COVID-19 virus is not bound up with or embedded in Plaintiffs' property, nor is it "released" from Plaintiffs' property, or components or systems thereof. Moreover, and critically, unlike asbestos - which persists indefinitely absent remediation - COVID-19 dissipates on its own without intervention. COVID-19 surface contagion, simply put, is not physical "damage" to property in the same way as impregnation with asbestos fibers.

Loss

Plaintiffs argue in the alternative that even if they might not have suffered "damage" to their property, they have alleged "loss" of their property within the meaning of the policy. The court again disagrees. Plaintiffs' argument relates to loss of *use* of their property. The court sees no plausible reading of the relevant policy provisions through which such loss of use could be covered where, as here, the policy does not cover all "loss," but rather only covers "direct physical loss." Plaintiffs offer no credible argument how loss of use could be considered "physical loss," and the court agrees with the majority of courts to consider the issue in the COVID-19 context that COVID-19 contamination does not cause a "physical loss" of the property. *See, e.g.*, *Park Place Hospitality, LLC v. Cont'l Ins. Co.*, 2021 U.S. Dist. LEXIS 150316, *9-11 (N.D. Ill. Aug. 10, 2021) (and cases cited therein).[1]

Plaintiffs argue that "loss" must mean something different than "damage," or loss would be mere surplusage in the policy, an interpretation which the court should avoid. *Outboard*

[1] The parties have cited a host of decisions to the court addressing the issue of insurance coverage for losses resulting from the COVID-19 pandemic. None of the decisions have been issued from the Illinois Supreme Court or Illinois Appellate Court, however. Accordingly, although such decisions are entitled to respectful consideration – which this court has given them – none are binding. *See, e.g.*, *Maniez v. Citibank, F.S.B.*, 404 Ill. App. 3d 941, 955 (2010) (decisions of federal courts (other than the Supreme Court) are not binding); *In re Scarlett Z.-D.*, 2015 IL 117904, ¶ 55 (decisions of other state courts are not binding).

Marine, 154 Ill. 2d at 108. The court agrees that they do mean different things, but as the Northern District in *Park Place Hospitality* concluded, neither term covers the instant situation: "'[t]he plain wording of the phrase requires either a permanent disposition of the property due to a physical change ('loss'), or physical injury to the property requiring repair ('damage').'" 2021 U.S. Dist. LEXIS 150316, quoting *Crescent Plaza Hotel Owner L.P. v. Zurich Am. Ins. Co.*, --- F. Supp. 3d ----, 2021 U.S. Dist. LEXIS 30267, (N.D. Ill. Feb. 18, 2021). Loss, in other words, is a higher degree of impact than damage, connoting irreparable physical harm. To interpret "loss" as including "loss of use" would, as the Northern District noted, "improperly read[] 'physical' out of the policy's language." *Id.*

This construction of the policy dooms all remaining counts of the Complaint. As noted above, all of the coverage Parts of the policy which Plaintiffs seek to invoke require, as a threshold matter, "direct physical loss of" property or "damage to" property. Neither COVID-19 nor the Governor's Orders caused either. Accordingly, Erie is entitled to judgment on the pleadings on Plaintiffs' claims for declaratory judgment and breach of contract. Further, where no coverage is owed under a policy, there can be no finding that the insurer acted vexatiously or unreasonably with respect to the claim. *Joseph T. Ryerson & Son, Inc. v. Travelers Indem. Co. of Am.*, 2020 IL App (1st) 182491, ¶ 48. Thus, Erie is also entitled to judgment on Plaintiffs' claim for vexatious delay.

II. Even if Plaintiffs Had Alleged Facts Implicating Coverage, The Virus Exclusion Would Still Bar Recovery Under the Policy

Exclusion of Loss Due to Virus or Bacteria

A. The exclusion set forth in paragraph B. applies to all coverage under all forms and endorsements that comprise this Coverage Part of Policy, including but not limited to forms or endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority

B. We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.

Erie argues in the alternative that even if there is a question whether Plaintiffs' claims might state a cause of action for damage or loss, Erie is still entitled to judgment on the pleadings due to the Virus Exclusion, quoted above.

Erie argues the Virus Exclusion is clear and that any claims of coverage under the cited provisions are expressly excluded. Plaintiffs' brief in opposition contends the Exclusion is ambiguous, especially as to Plaintiffs' claims based on the actions of civil authority and the government rendering the premises unusable.

Direct Contamination

As previously noted, if the terms of an insurance policy are clear and unambiguous, then the Court must give them their plain, ordinary and popular meaning. *Outboard Marine*, 154 Ill. 2d at 108. There is no question at all that any loss or damage suffered as a result of alleged direct contamination of Plaintiffs' premises by COVID-19 was "caused by or result[ed] from" the COVID-19 virus, nor is there any question that COVID-19 is a virus "capable of inducing physical distress, illness or disease." The Virus Exclusion unambiguously excludes coverage for Plaintiffs' claims relating to direct contamination by COVID-19.

Governmental Action

Turning to Plaintiffs' claims relating to governmental action to combat the COVID-19 pandemic, the court still finds the Exclusion bars recovery. The Exclusion bars recovery for any loss or damage "caused by or resulting from" any virus under "all coverage under all forms and endorsements," specifically including coverage for "action of civil authority." In this case, it is clear that the action of civil authority for which Plaintiffs seek to recover, *i.e.* Governor Pritzker's Executive Orders, "result[ed] from" the COVID-19 virus. Again, there is simply no room for dispute that the Virus Exclusion precludes recovery even if Plaintiffs suffered physical loss of or damage to their property (which, again, they did not).

Plaintiffs argue that the Virus Exclusion should be found ambiguous in the case at bar because it "should not be given a broad construction that equally excludes physical losses of business capacity that result from the common cold and global pandemics alike." Plaintiffs analogize their argument to the insured's position in *Am. States Ins. Co. v. Koloms*, 177 Ill. 2d 473, 481 (1997), where the Court rejected an insurer's position that a leaking kitchen appliance constituted "environmental pollution." This court rejects that argument. The Virus Exclusion plainly bars recovery for injury caused by any virus. COVID-19 is a virus. The fact that COVID-19 has exploded to pandemic proportions is simply irrelevant to the discussion of applicability and coverage. True, the scale of the spread of the disease did result in civil authorities taking action to contain it, but the Virus Exclusion expressly contemplated that possibility and specifically provided that the Exclusion would apply to bar recovery under any coverage part for such action. The Virus Exclusion unambiguously excludes from coverage the losses Plaintiffs here claim to have suffered.

Conclusion

Accordingly, for the reasons above stated, Erie's Motion for Judgment on the Pleadings is GRANTED. As Plaintiffs' claims against Corkill have already been dismissed, this is a final and appealable Order.

ENTER:

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Hon. Michael F. Otto