CLOSING

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAMBERS OF
MADELINE COX ARLEO
UNITED STATES DISTRICT JUDGE

MARTIN LUTHER KING COURTHOUSE
50 WALNUT ST. ROOM 4066
NEWARK, NJ 07101
973-297-4903

October 26, 2021

VIA ECF

LETTER ORDER

Re: Caterer's in the Park LLC v. Ohio Security Insurance Company
Civil Action No. 20-6867

Dear Litigants:

This matter comes before the Court by way of Defendant Ohio Security Insurance Company's ("Ohio Security") Motion for Judgment on the Pleadings pursuant to Federal Rule of Civil Procedure 12(c), ECF No. 24. Plaintiff Caterer's in the Park LLC t/a Nanina's in the Park ("Plaintiff") opposes the Motion. ECF No. 33. For the reasons explained below, Ohio Security's Motion is **GRANTED**.

I. BACKGROUND[1]

This putative class action arises out of Ohio Security's alleged refusal to pay insurance claims for business interruptions arising during the 2019 novel coronavirus ("COVID-19") global pandemic. See generally Compl., ECF No. 1. Many states, including New Jersey, issued orders designed to curtail the spread of COVID-19, including "stay-at-home" orders, shutdowns of non-essential businesses, and limits on the operations of in-person food services (collectively the "Closure Orders"). Compl. ¶¶ 31-32. Plaintiff operates an on-site catering restaurant and wedding venue that closed while the Closure Orders were effective. Id. ¶ 15.

At some point prior to the COVID-19 pandemic, Plaintiff obtained an "all-risk" commercial property insurance policy from Ohio Security. Id. ¶ 33; see also Declaration of Steven L. Penaro Ex. 1 (the "Policy"), ECF No. 24.3. Relevant here, the Policy contains an "Exclusion of Loss Due to Virus or Bacteria." Policy at 142 (the "Virus Exclusion"). The Virus Exclusion provides:

> A. The exclusion set forth in Paragraph B. 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

[1] The facts are drawn from the Complaint, ECF No. 1, as well as those documents that are "integral to or explicitly relied upon in the complaint." In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1426 (3d Cir. 1997) (emphasis omitted).

> cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority.
>
> B. [Ohio Security] 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.

On June 4, 2020, Plaintiffs filed the instant action on behalf of themselves and a proposed class of similarly situated entities, alleging that Ohio Security and Defendant Liberty Mutual Insurance ("Liberty") breached the Policy by failing to honor claims for business interruptions caused by the Closure Orders. ECF No. 1. The parties stipulated to the dismissal of Liberty from this action on September 24, 2020. ECF No. 12. Ohio Security answered the Complaint on October 16, 2020, ECF No. 14, and now moves for judgment on the pleadings.

II. LEGAL STANDARD

Judgment on the pleadings under Federal Rule of Civil Procedure 12(c) is warranted if "there are no material issues of fact" and the movant is "entitled to judgment as a matter of law." Zimmerman v. Corbett, 873 F.3d 414, 417-18 (3d Cir. 2017) (citation omitted). The Court "must accept all of the allegations in the pleadings of the [non-moving party] as true and draw all reasonable inferences in favor of the non-moving party." Id. (citation omitted). The Court assesses a Rule 12(c) motion "under the same standards that apply to a Rule 12(b)(6) motion" to dismiss. Id. (citation omitted). Thus, to survive a Rule 12(c) motion, the claims in the complaint must be facially plausible, meaning that the pleaded facts "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). The allegations must be "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).

III. DISCUSSION

Ohio Security argues that each of Plaintiff's claims are barred by the Virus Exclusion. The Court agrees.

Plaintiff does not dispute that COVID-19 is a "virus" within the meaning of the Virus Exclusion or that if applicable, the Virus Exclusion bars each of its claims for relief. Rather Plaintiff alleges that its business interruption was not "caused by or resulting" from COVID-19, and that the predominant cause of its loss was the Closure Order issued by Governor Murphy. Compl. ¶ 44.

Under New Jersey law,[2] "insurance policies are contracts of adhesion and as such, are subject to special rules of interpretation." Zacarias v. Allstate Ins. Co., 168 N.J. 590, 595 (2001) (citation omitted). The Court must apply unambiguous policy terms as written, but any ambiguities "should be construed to sustain coverage." Villa v. Short, 195 N.J. 15, 23-24 (2008). Moreover, "policy exclusions must be narrowly construed; the burden is on the insurer to bring the case within the exclusion." Id.

[2] The Parties agree that New Jersey law governs the Policy's interpretation.

Plaintiff's argument invokes the "Appleman Rule," a canon of construction providing that "if an exclusion bars coverage for losses caused by a particular peril, the exclusion applies only if the excluded peril was the 'efficient proximate cause' of the loss." N.J. Transit Corp. v. Certain Underwriters at Lloyd's London, 461 N.J. Super. at 460-61 (App. Div. 2019), aff'd, 245 N.J. 104 (2021) (citation omitted). Where a chain of causation leading to loss includes both a covered cause and an uncovered cause, the "predominant" cause of the loss controls. See, e.g., T & L Catering, Inc. v. Hanover Ins. Grp., Inc., No. 20-7934, 2021 WL 2948425, at *4 (D.N.J. July 14, 2021) (citing Franklin Packaging Co. v. Cal. Union Ins. Co., 171 N.J. Super. 188, 191 (App. Div. 1979)).[3] While an insurer may contract around the Appleman Rule through a so-called "anti-concurrent cause clause," the Virus Exclusion here does not have such a clause. See id. (applying efficient proximate cause doctrine to identical virus exclusion provision).

This Court is far from the first to apply the Appleman Rule in the context of the Closure Orders. Indeed, more than ten courts in this District alone have been asked to interpret similar or identical virus exclusion provisions to determine whether COVID-19 was the predominant cause of business interruption while the Closure Orders were effective. These courts have universally determined that the Closure Orders are "inextricably tied" to COVID-19, such that "the predominant and proximate cause of Plaintiff's business-related losses is the COVID-19 virus, not the closure orders that were issued in response to the virus."[4] T&L Catering, Inc., 2021 WL 2948425, at *4. Put differently, "[t]he virus and the orders are not two equal independent concurrent causes that worked together to cause the loss. The orders are wholly dependent on the virus." Causeway Auto., 2021 WL 486917, at *6 (citation omitted).

Plaintiff does not attempt to distinguish Causeway Automotive and similar cases but argues that they were each incorrectly decided. Specifically, Plaintiff contends that courts have improperly "relied on cases with exclusions containing anti-concurrent cause clauses and applied those cases to exclusions without anti-concurrent cause clauses." Pl. Opp. at 8-9. The Court disagrees. While an anti-concurrent cause clause excludes liability if a particular peril lies anywhere in the chain of causation, the absence of such a clause simply requires a court to conduct an efficient proximate cause analysis. Causeway Automotive and T&L Catering, among other cases reaching the same conclusion, conducted a full Appleman Rule analysis in the context of policy language identical to the Virus Exclusion before finding in favor of the insurer. See Causeway Auto., 2021 WL 486917, at *6-7; T & L Catering, 2021 WL 2948425, at *5 ("It is of

[3] Ohio Security also argues that the Appleman Rule is irrelevant because even if the Closure Order was the predominant cause of Plaintiff's business interruption, losses resulting from such government action are not covered under the policy. The Court need not reach this issue or the other arguments raised by the Motion in light of its disposition.

[4] The weight of authority adopting this position is staggering. See, e.g., J.G. Optical, Inc. v. Travelers Co., Inc., No. 20-5744, 2021 WL 4260843, at *5 (D.N.J. Sept. 20, 2021); T&L Catering, Inc., 2021 WL 2948425, at *4; Quakerbridge Early Learning, LLC v. Selective Ins. Co. of Am., 2021 WL 1214758, at *3-4 (D.N.J. Mar. 31, 2021); Benamax Ice LLC v. Merchant Mutual Ins. Co., 2021 WL 1171633, at *5 (D.N.J. Mar. 29, 2021); Chester C. Chianese DDS LLC v. Travelers Cas. Ins. of Am., 2021 WL 1175344, at *3 (D.N.J. Mar. 27, 2021); Carpe Diem Spa, Inc. v. Travelers Cas. Ins. Co. of Am., 2021 WL 1153171, at *3 (D.N.J. Mar. 26, 2021); Garmany of Red Bank, Inc. v. Harleysville Ins. Co., 2021 WL 1040490, at *6 (D.N.J. Mar. 18, 2021); Colby Rest. Grp. Inc. v. Utica Nat'l Ins. Grp., 2021 WL 1137994, at *4-5 (D.N.J. Mar. 12, 2021); Body Physics v. Nationwide Ins., 2021 WL 912815, at *5-6 (D.N.J. Mar. 10, 2021); In the Park Savoy Caterers LLC v. Selective Ins. Grp., Inc., No. 20-6869, 2021 WL 1138020, at *4 (D.N.J. Feb. 25, 2021); Causeway Auto., LLC v. Zurich Am. Ins. Co., No. 20-8393, 2021 WL 486917, at *6 (D.N.J. Feb. 10, 2021).

no moment that, in conducting [an Appleman Rule] analysis, I relied on certain cases that did not distinguish between virus exclusions with anti-concurrent clauses and those without because, the fact remains that the Closure Orders and the COVID-19 virus 'are so inextricably connected that it is undeniable that the Orders were issued because of the virus.'").

Consequently, the Court concludes that the predominant cause of Plaintiff's alleged business interruption was the COVID-19 virus. See T & L Catering, Inc., 2021 WL 2948425, at *4 n.3 (holding that where no underlying facts are disputed, the court may treat efficient proximate cause as an issue of law subject to resolution on a motion to dismiss). The Virus Exclusion thus unambiguously excludes Plaintiff's alleged losses from coverage.[5]

IV. CONCLUSION

For the reasons stated above, Defendants' Motion for Judgment on the Pleadings, ECF No. 24, is **GRANTED**. This matter is now **CLOSED**.

SO ORDERED.

/s Madeline Cox Arleo
MADELINE COX ARLEO
UNITED STATES DISTRICT JUDGE

[5] Plaintiff has not responded to Ohio Security's argument that the Virus Exclusion is valid under public policy and has thus conceded that issue.