

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO.: 2020-07647

B DAZZLE HAIR STUDIO, LLC

VERSUS

BANKERS INSURANCE COMPANY

FILED
2020 SEP 11 PM 2:58
SECTION 10
DISTRICT COURT
CIVIL
DIVISION

FILED:

DEPUTY CLERK

PETITION FOR DAMAGES AND DECLARATORY
JUDGMENT AND REQUEST FOR JURY TRIAL

JURY

NOW INTO COURT, through undersigned counsel, comes Plaintiff, B Dazzle Hair Studio, LLC, who files this Petition against Defendant, Bankers Insurance Company, and alleges as follows:

INTRODUCTION

1. Plaintiff, B Dazzle Hair Studio, LLC, is a Louisiana limited liability company with its principal place of business in New Orleans, Louisiana.

This lawsuit arises out of B Dazzle Hair Studio, LLC, (hereinafter, "Plaintiff")'s claim of insurance coverage under an "all risks" insurance policy sold by Bankers Insurance Company (hereinafter "Bankers") to Plaintiff.

2. Plaintiff entered into an "all risks" insurance policy with Bankers Insurance Company on March 18, 2020.

Critically, the policy was entered into and became effective on March 18, 2020, months after Bankers had knowledge that the novel virus, SARS-CoV-2, the causative agent for COVID-19, could cause direct physical loss of or damage to property and months after Bankers had knowledge that businesses in China, Italy, and elsewhere in the world were being shuttered because of the presence and spread of COVID-19.

3. Plaintiff paid a substantial premium for the policy.

Despite its knowledge, Bankers sold this insurance policy to Plaintiff *without any virus or pandemic exclusion or limitation whatsoever* in exchange for a substantial premium, even though such exclusions are in use throughout the insurance industry.

VERIFIED
9/25/2020

4.

Bankers sold the policy without the aforementioned virus or pandemic exclusion despite the fact that, *seven (7) days before selling the policy to Plaintiff*, Governor John Bel Edwards had declared that a statewide health emergency existed in Louisiana.

PARTIES

5.

Plaintiff, B Dazzle Hair Studio, LLC, (hereinafter "Plaintiff"), is a limited liability company organized and existing under the laws of the State of Louisiana with a domicile address of 3001 Tulane Ave, Ste. 3, New Orleans, LA 70119.

6.

Defendant, Bankers Insurance Company (hereinafter "Bankers"), is a foreign insurer that may be served with process through the Secretary of State, State of Louisiana, 8585 Archives Ave., Baton Rouge, Louisiana 70809.

JURISDICTION

7.

This Court has personal jurisdiction over Defendant because at all relevant times it has engaged in substantial business activity in the State of Louisiana. At all relevant times Defendant transacted, solicited, and conducted business in Louisiana through its employees, agents, and/or sales representatives, and derived substantial revenue from such business in Louisiana.

VENUE

8.

Venue in this case is proper in this Court pursuant to the Louisiana Code of Civil Procedure, because this suit respects real and personal property located exclusively in Orleans Parish, Louisiana and the conduct, acts, and/or omissions upon which this cause of action is based occurred in Orleans Parish, Louisiana.

FACTS

A. The COVID-19 Pandemic

9.

On March 11, 2020 World Health Organization Director General Tedros Adhanom Ghebreyesus declared the COVID-19 outbreak a pandemic: “WHO has been assessing this outbreak around the clock and we are deeply concerned both by the alarming levels of spread and severity, and by the alarming levels of inaction. We have therefore made the assessments that COVID-19 can be characterized as a pandemic.”

10.

The clinical features of COVID-19 vary from asymptomatic forms to fatal conditions of severe respiratory failure that requires ventilation and support in an intensive care unit (ICU). Pneumonia has been the most frequent severe manifestation of COVID-19, with symptoms of fever, cough, dyspnea, and bilateral infiltrates on chest imaging. There are no specific treatments recommended for COVID-19, and no vaccine is currently available; so, understanding the complexities of COVID-19 is ongoing.

11.

It has now been discovered by scientists that COVID-19 has several modes of transmission. Pursuant to a “Situation Report” released by the WHO, the virus can be transmitted through symptomatic transmission, pre-symptomatic transmission, or asymptomatic transmission. Symptomatic transmission refers to transmission by an individual who is experiencing symptoms associated with the virus who then transfers COVID-19 to another individual. Data from published studies provide evidence that COVID-19 is primarily transmitted from symptomatic people to other who are in close contact through respiratory droplets, by direct contact with infected persons, or by contact with contaminated objects and surfaces.

12.

Based upon currently available information, the incubation period for COVID-19, which is the time between exposure to the virus (being infected) and symptom onset, appears to average several days; however, it can be up to 14 days. During this period, also known as the “pre-symptomatic” period, some infected persons can be contagious. For that reason, transmission from pre-symptomatic case can occur before symptom onset. Pre-symptomatic transmission still

requires the virus to be spread through infectious droplets or touching contaminated surfaces.

13.

An individual who does not develop symptoms, an asymptomatic case of COVID-19, can still transmit the virus to another. Though there are few documented cases reported, it does not exclude the possibility that it has or may occur.

14.

Not only is COVID-19 transmitted via human-to-human, but the WHO and scientific studies have confirmed that the virus can live on contaminated objects or surfaces. According to a study by scientists documented in The New England Journal of Medicine, COVID-19 was detectable in aerosols for up to three hours, up to four hours on copper, up to 24 hours on cardboard, and up to two to three days on plastic and stainless steel.

15.

Another scientific study documented in the Journal of Hospital Infection found that human coronaviruses, such as SARS-Co-V and MERS-CoV can remain infectious on inanimate surfaces at room temperature for up to nine days. At a temperature of 30 degrees Celsius or more, the duration of persistence is shorter. Contamination of frequently touched surfaces is, therefore, a potential source of viral transmission. Though this study was not conclusive on COVID-19 itself, scientists are still grappling to understand this implication.

16.

On March 27, 2020, the Centers for Disease Control and Prevention (“CDC”) released a report entitled Public Health Responses to COVID-19 Outbreaks on Cruise Ships-Worldwide, February-March 2020. The report detailed that during this time frame, COVID-19 outbreaks associated with three different cruise ship voyages caused over 800 confirmed cases and 10 deaths. Of the individuals tested, a high proportion were found to be asymptomatic, which may explain the high rates on cruise ships. What is interesting about this study though, is that COVID-19 was identified on a variety of surfaces in cabins of both symptomatic and asymptomatic infected passengers up to 17 days after cabins were vacated on the Diamond Princess cruise line, but before disinfection procedures had been conducted. The CDC notes that more studies are required to understand the perpetuation of transmission, but what is clear is the uncertainty around COVID-

19 and its implications for the lawful and safe functioning of a variety of businesses.

17.

Without a vaccine to protect against COVID-19, effective control of the outbreak relies on measures designed to reduce human to human and surface to human exposure. Recent information of the CDC's website provides that COVID-19 spreads when people are within six feet of each other or when a person comes in contact with a surface or object that has the virus on it.

18.

The secondary exposure of the surface to humans is particularly acute in places where the public gathers typically to socialize, eat, drink, shop, be entertained, and go for recreation. This is why the CDC recommends that in viral outbreaks individuals who are infected stay at home and those who are not sick engage in preventative measures such as constant hand washing and avoiding activities that would bring them into close proximity of people with the virus or surfaces where the virus may reside. However, because these recommendations have proven ineffective to minimize the spread of COVID-19, containment efforts have led to civil authorities issuing orders closing non-essential business establishments, including restaurants, bars, hotels, theaters, personal care salons, gyms, and schools, and mandating social distancing among the population. This has caused the cancelation of sporting events, parades, and concerts, the closure of amusement parks, and substantial travel restrictions. In addition, to conserve medical supplies, orders have been issued prohibiting the performance of non-urgent or non-emergency elective procedures and surgeries, forcing the suspension of operations at many medical, surgical, therapeutic, and dental practices.

19.

On March 11, 2020, Governor John Bel Edwards declared that a statewide public health emergency existed in Louisiana.

20.

Thereafter, Governor Edwards made multiple declarations and proclamations regarding the pervasive physical presence of COVID-19 throughout Louisiana that negatively affected all salons and similar establishments, which were forced to close due to the pervasive physical presence of COVID-19.

21.

The world has changed due to COVID-19. The safety risks associated with the virus have negatively affected consumers and, likewise, the business of salons and similar establishments have been disturbed, lessened, harmed, and/or interrupted as a result of the pervasive physical presence of the COVID-19 virus. Plaintiff's salon is no exception.

B. Defendant's Insurance Policy

22.

To protect Plaintiff's livelihood from known and unknown risks (such as a widespread virus/pandemic), Plaintiff purchased an "all-risk" commercial property insurance policy from Bankers. That policy is numbered 17-0040007325-3-00 (the "Policy"), and it has a policy period of March 18, 2020 to March 18, 2021.

23.

The Policy provides business income and extra expense insurance coverage for Plaintiff's premises and, specifically, covers direct physical loss of or damage to Plaintiff's property, actual loss of business income Plaintiff sustains due to necessary suspension of its operations, where the suspension is caused by direct physical loss of or damage to Plaintiff's property, and the extra expense Plaintiff incurs to avoid or minimize the suspension of its business. More specifically, the Policy provides "Business Income" and "Extra Expense" coverages, among other coverages.

24.

Plaintiff did not participate in the drafting or negotiating of the policy with Defendant.

25.

The Policy is an all-risk policy, insofar as it provides coverage for all risks unless the risk is specifically and clearly excluded or limited in the Policy. Under an all-risk policy, the insured bears the burden of proving a loss under the terms of the Policy. The insured does not bear the burden of proving the precise cause of the loss. *Morrison Grain Co., Inc. v. Utica Mut. Ins. Co.*, 632 F.2d 424, 430 (5th Cir. 1980). "...[A]ll risk insurance arose for the very purpose of protecting the insured in those cases where difficulties of logical explanation or some mystery surround the loss..." *Id.*

26.

If an insurer denies coverage under an all-risk policy, the insurer bears the burden of proving that the loss was caused by an excluded risk. *Bayle v. Allstate Ins. Co.*, 615 F.3d 350 (5th Cir. 2010). Any ambiguities in the policy must be resolved in favor of coverage for the insured. *McAvey v. Lee*, 260 F.3d 359, 364 (5th Cir. 2001).

27.

The Policy does not contain a virus exclusion, even though Bankers could have included such an exclusion in the Policy, especially since the Policy was issued on March 18, 2020, months after Bankers was undoubtedly aware that businesses across the world were shuttering their doors due to widespread physical infestation of COVID-19.

28.

The Policy does not contain a pandemic exclusion, even though Bankers could have included such exclusion in the Policy, especially since the Policy was issued on March 18, 2020, months after Bankers was undoubtedly aware that businesses across the world were shuttering their doors due to widespread physical infestation of COVID-19.

29.

In 2006, the Insurance Services Office (“ISO”), an insurance industry organization that develops standardized insurance policy programs and forms for use by insurers, drafted a form exclusion for losses “due to disease-causing agents such as viruses and bacteria.”

30.

In presenting the exclusion to state insurance regulators around the country, ISO explained:

Disease-causing agents may render a product impure (change its quality or substance), or enable the spread of disease by their presence on interior building surfaces or the surfaces of personal property. When disease-causing viral or bacterial contamination occurs, potential claims involve the cost of replacement of property (for example, the milk), cost of decontamination (for example, interior building surfaces), and business interruption (time element) losses. Although building and personal property could arguably become contaminated (often temporarily) by such viruses and bacteria, the nature of the property itself would have a bearing on whether there is actual property damage. An allegation of property damage may be a point of disagreement in a particular case.

31.

Even though the Policy contains other ISO forms, Bankers did not add ISO’s virus

exclusion endorsement.

32.

In other words, Bankers had the opportunity to use standard insurance industry forms or language to specifically exclude virus losses like those resulting from COVID-19 from coverage, but it chose not to do so.

33.

Bankers made this decision despite the existence, and globally (and locally) visible impact, of COVID-19 at the time the Policy became effective.

C. Plaintiff's Loss/Claim Under The All-Risk Insurance Policy

34.

Plaintiff has suffered and will continue to suffer a direct physical loss of and damage as a result of the pervasive physical presence, and transmission of, COVID-19, as well as all other effects of COVID-19 on Plaintiff's business. Plaintiff's business has been forced to close for months due to the pervasive physical presence of COVID-19 in and around Plaintiff's business.

35.

Plaintiff's ongoing losses include, but are not limited to, 1) Business Income, and 2) Extra Expense.

36.

Plaintiff notified Bankers of its loss and made a claim under the all-risk Policy.

37.

On or about March 21, 2020, Plaintiff filed a claim with Bankers based on Plaintiff's Business Income and Extra Expense. By letter dated March 28, 2020, Bankers issued a reservation of rights letter asserting that Plaintiff's loss was excluded from coverage under the all-risk Policy. Bankers cited to provisions of the Policy that were clearly inapplicable (such as the ordinance and law exclusion), intentionally failed to cite to provisions that were clearly applicable (such as the provisions granting Business Income and Extra Expense coverage), and intentionally failed to disclose that Bankers could have included a specific virus and/or pandemic exclusion that would have been applicable to COVID-19 claims. Bankers did all of the above despite the fact that at the time it issued the Policy to Plaintiff, COVID-19 was in full swing, and Bankers had been aware

of its impact on businesses for months.

COUNT I – BREACH OF CONTRACT

38.

Plaintiff repeats and realleges the allegations in the preceding paragraphs as if included herein.

39.

The Policy is a valid and enforceable contract between Plaintiff and Bankers.

40.

In the policy, Bankers promised to pay for losses of business income incurred as a result of a suspension of business operations. Specifically, Bankers promised to pay for losses of business income and extra expense sustained as a result of a suspension of business operations.

41.

COVID-19 has caused and continues to cause direct physical loss of or damage to Plaintiff's property and business operations.

42.

Because of the direct physical loss of or damage to property, Plaintiff has experienced a slowdown, cessation, or suspension of its business, and, to the extent Plaintiff has been able to operate Plaintiff's business at all, Plaintiff has been forced to expend large sums of money due to the pervasive physical presence of COVID-19. The suspension of Plaintiff's operations triggered the Policy's business income and extra expense coverages.

43.

Plaintiff complied with all applicable Policy provisions, including paying premiums and providing timely notice of its claim.

44.

Nonetheless, Bankers unjustifiably refused to pay for these losses and expenses in breach of the Policy.

45.

Plaintiff has suffered and continues to suffer damages as a result of Bankers' breach of the Policy. Plaintiff is entitled to damages as a result of Banker's breach in an amount to be determined

at trial, including pre- and post-judgment interest and any other costs and relief that this Court deems proper.

COUNT II – DECLARATORY JUDGMENT

46.

Plaintiff repeats and realleges the allegations in the preceding paragraphs as if included herein.

47.

Plaintiff seeks the Court's declaration of the parties' rights and duties under the Policy.

48.

A justiciable controversy exists between Plaintiff and Bankers regarding whether the Policy provides coverage for Plaintiff's claim.

49.

Plaintiff prays for a declaration as follows:

- 1) Defendant has failed to satisfy its burden of proving that the all-risk Policy clearly and specifically excludes coverage for Plaintiff's loss.
- 2) The all-risk Policy contains ambiguities that must be resolved in favor of coverage for Plaintiff's loss.
- 3) Plaintiff's loss is covered under the all-risk Policy.

COUNT III – BAD FAITH

50.

Plaintiff repeats and realleges the allegations in the preceding paragraphs as if included herein.

51.

In denying Plaintiff's claim, Bankers cited to provisions of the Policy that were clearly inapplicable (such as the ordinance and law exclusion), intentionally failed to cite to provisions that were clearly applicable (such as the provisions granting Business Income and Extra Expense coverage), and intentionally failed to disclose that Bankers could have included a specific virus and/or pandemic exclusion that would have been applicable to COVID-19 claims. Bankers knew that it could have sold Plaintiff a policy with specific pandemic or virus exclusions and that it did

not do so, and that it still denied Plaintiff coverage for Plaintiff's COVID-19 related losses.

52.

Bankers did all of the above despite the fact that at the time it issued the Policy to Plaintiff, COVID-19 was in full swing, and Bankers had been aware of its impact on businesses for months.

53.

Bankers' actions and omissions amount to material misrepresentations of both pertinent facts and pertinent policy provisions, and they amount to an arbitrary, capricious, unreasonable, and illegitimate denial of coverage.

54.

Bankers' actions and omissions were clear violations of its duty to handle claims in good faith. Accordingly, Bankers violated its duties under both La. Rev. Stat. § 22:1973(a) and (b) and La. Rev. Stat. § 22:1892. Bankers thus owes Plaintiff compensatory damages, attorneys' fees, penalties, costs and expenses, and all other relief available under the law and/or that this Court deems proper.

REQUEST FOR JURY

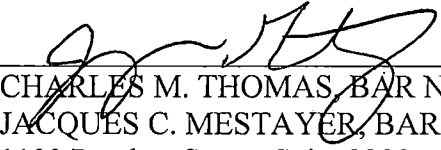
Plaintiff prays for a jury trial of all matters herein.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff demands judgment against Bankers as follows: issuing a Declaratory Judgment declaring Plaintiff's and Bankers' respective rights and obligations under the Policy; awarding Plaintiff compensatory damages from Bankers' breach of the Policy in an amount to be determined at trial, together with appropriate prejudgment interest at the maximum rate allowable by law; awarding Plaintiff compensatory damages, attorneys' fees, costs, expenses, double damages, and penalties for Bankers' bad faith handling of its policy and its bad faith misrepresentations of pertinent facts and policy provisions; and awarding such other and further relief the Court deems just, proper, and equitable.

Respectfully submitted,

HUBER, THOMAS & MARCELLE, LLP


CHARLES M. THOMAS, BAR NO. 31989
JACQUES C. MESTAYER, BAR NO. 37230
1100 Poydras Street, Suite 2200
New Orleans, LA 70163
Telephone: (504) 274-2500
Facsimile: (504) 910-0838
Charlie@huberthomaslaw.com
Jacques@huberthomaslaw.com
ATTORNEYS FOR PLAINTIFF

PLEASE SERVE:

BANKERS INSURANCE COMPANY
Through Their Registered Agent
Louisiana Secretary of State
8585 Archives Ave.
Baton Rouge, LA 70809