

IN THE CIRCUIT COURT FOR THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR
MIAMI-DADE COUNTY, FLORIDA

CASE NO.: 2020-017923-CA-44

SUKKAH MIAMI BEACH ACQUISITIONS,
LLC

Plaintiff,

v.

ZURICH AMERICAN INSURANCE
COMPANY, HDI GLOBAL SPECIALTY
SE, WESTERN WORLD INSURANCE
COMPANY, GENERAL SECURITY
INDEMNITY COMPANY OF ARIZONA,
EVANSTON INSURANCE COMPANY,
NAVIGATORS SPECIALTY INSURANCE
COMPANY, CERTAIN UNDERWRITERS
AT LLOYDS OF LONDON, EVEREST
INDEMNITY INSURANCE COMPANY,
WESTCHESTER SURPLUS LINES
INSURANCE COMPANY, AND STARR
SURPLUS LINES INSURANCE COMPANY,

Defendants.

**ORDER GRANTING DEFENDANTS MOTION FOR
SUMMARY JUDGMENT**

THIS MATTER came before this Court on Defendants' Motion for Summary Judgment. The Court having reviewed the motion, response, and having heard argument of counsel and being otherwise advised in the premises, the Court makes the following findings:

Undisputed Facts

The Policy Defendants issued commercial property policies to Driftwood Hospitality Management LLC ("Driftwood Hospitality") effective March 19, 2019 to March 19, 2020. (collectively referred to as "Policies"). Defendants participated at various percentages in a \$25,000,000 primary layer of coverage. Each Defendant subscribed to the same manuscript form

and then attached their own specific endorsements. The Policies insured the Hampton Inn Hotel at 4000 Collins Avenue, Miami Beach, Florida (“Hotel”), which is owned by Plaintiff. The Policies’ Perils Insured Against provision specifies the scope of coverage as “all risk of direct physical loss of or damage to property . . . except as hereinafter excluded.” (Policies, Section 8). Plaintiff seeks coverage for Business Interruption, Extra Expense, Time Element Extensions of Coverage for Contingent Time Element and Attraction Properties, Civil Authority, Ingress/Egress, Expediting Expense, and Sue and Labor. Each of these is only triggered if there has been loss as result of a peril insured against – i.e., direct physical loss of or damage to property:

- Business Interruption provides coverage for “[l]oss resulting from necessary interruption of business conducted by the Insured and caused by direct loss, damage, or destruction by any of the perils covered herein.” (Policies, Section 7(B)).
- Extra Expense coverage applies to “[e]xtra expenses incurred resulting from loss or damage to property by any of the perils covered herein.” (Policies, Section 7(C)).
- The Time Element Extensions of Coverage including Contingent Time Element and Attraction Properties coverage insure “against loss resulting from damage to or destruction by the perils insured against.” (Policies, Section 7(G)(4)).
- Civil Authority coverage applies to “loss sustained during the period of time when, as a direct result of a peril insured against, access to real or personal property is impaired by order or action of civil or military authority issued in connection with or following a peril insured against.” (Policies, Section 7(G)(5)).
- Ingress/Egress coverage applies to “loss sustained during the period of time when, as a direct result of a peril insured against, access to or access from insured property is prevented.” (Policies, Section 7(G)(6)).
- Expediting Expenses provide coverage for extra costs for temporary or expedited “repair and/or replacement of damaged property.” (Policies, Section 18).
- Sue and Labor coverage applies when an Insured takes necessary and reasonable measures to protect or preserve property “[i]n case of actual or imminent loss or damage by a peril insured against.” (Policies, Section 38)).

The Policies also contain several exclusions, including loss of market and for losses due to Pollutants or Contaminants and/or Microorganisms.

Beginning in March 2020, SARS-Co-V-2, the virus associated with COVID-19, was first identified in the Florida area. Although the City of Miami Beach implemented various emergency measures to stop the spread of the virus, as of March 19, 2020, “[h]otels, motels, other commercial lodging establishments and temporary vacation rentals” were considered “[e]ssential retail and commercial businesses” and permitted to remain open pursuant to Miami-Dade County Emergency Order 07-20, Amendment No. 1. On March 20 and 21, 2020, the City of Miami Beach and Miami-Dade County issued revised emergency measures for hotels. The measures required that hotels begin vacating non-essential lodgers, cancelling reservations, and not making any new reservations for guests who were not considered essential lodgers. These Orders were further revised and extended as the COVID-19 pandemic continued on during the spring of 2020 until May 31, 2020, when hotels in Miami-Dade County were given permission to fully reopen. Miami-Dade County Emergency Order 24-20. Plaintiff reported a loss to the Defendants on March 24, 2020, claiming business income loss related to the various government orders, including the March 20, 2020 order that purported to require Plaintiff to close the Hotel to non-essential lodgers by March 23, 2020. Despite the various emergency orders, “Essential Lodgers” were permitted to stay at the Hotel at all times and, after May 27, 2020, anyone was permitted to book rooms at the Hotel. Between June 17, 2020 and August 17, 2020, the Insurers denied coverage for Plaintiff’s claim because, inter alia, Plaintiff failed to establish any “direct physical loss of or damage” to the insured property. On August 20, 2020, Plaintiff filed a Complaint asserting five causes of action against the Defendants for breach of the Policies’ contractual provisions. Plaintiff seeks coverage for its business income losses as a result of the COVID-19 pandemic, which Plaintiff alleges began on March 13, 2020.

Summary Judgment Standard

Pursuant to rule 1.150, summary judgment shall be granted if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law. Fla. R. Civ. P. 1.150(1). Rule 1.150 was amended effective on May 1, 2021 “adopting the text of federal rule 56 almost verbatim.” *See In re: Amendments to Florida Rule of Civil Procedure 1.150*, SC20-1490, 2021 WL 1684095 at *3 (Fla. Apr. 29, 2021). As such, rule 1.150 “shall be construed and applied in accordance with the federal summary judgment standard.” Fla. R. Civ. P. 150(a).

The initial burden is on the movant to demonstrate the absence of a “genuine, triable issue of material fact.” *See* Fla. R. Civ. P. 1.150(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). The substantive law applicable to the dispute will identify which facts are material. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). As such, “[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” *Id.* at 248. “Once the moving party has met its initial burden, Rule [1.150] requires the nonmoving party to go beyond the pleadings and identify facts which show a genuine issue for trial.” *Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 531 (9th Cir. 2000). In other words, the nonmoving party must come forward with sufficient evidence supporting the existence of a genuine triable issue of material fact. *See Anderson*, 477 U.S. at 248-249; *Celotex*, 477 U.S. at 327. If a dispute about a material fact is genuine, meaning, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party or the court could find in favor of the nonmoving party, summary judgment is not proper. *Anderson*, 477 U.S. at 248-49. The Court’s function at the summary judgment stage is not “to weigh the evidence and determine the truth of the matter but it is limited to determine whether there is a genuine issue for trial.” *Id.* at 249.

“[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party” or for the court to render a judgment in favor of the non-movant. *See id.* When the evidence is merely colorable or is not significantly probative and “the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no ‘genuine issue for trial’” and summary judgment may be granted. *See id.* at 249-250; *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Inferences to be drawn from the underlying facts and the record must be viewed in the light most favorable to the nonmoving party. *See Matsushita*, 475 U.S. 574, 587 (1986).

Conclusions of Law

In Florida, the insured has the burden of proving facts that bring its claim within an insurance policy’s affirmative grant of coverage. *Homeowners Choice Prop. & Cas. v. Miguel Maspons*, 211 So. 3d 1067, 1068–69 (Fla. Dist. Ct. App. 2017) (citing *E. Fla. Hauling, Inc. v. Lexington Ins. Co.*, 913 So. 2d 673, 678 (Fla. 3d DCA 2005)). In order to meet this burden under a property insurance policy, the insured must prove that the property harmed or damaged falls within the insuring clause of the policy and that the loss claimed falls within the scope of the policy’s covered perils. *Id.* Here, Plaintiff’s claims are legally insufficient because SARS-CoV-2 did not and could not cause “direct physical loss of or damage to property,” which is a prerequisite to coverage under all of the provisions invoked by Plaintiff. The provisions under which Plaintiff seeks coverage all require a loss from a “peril insured herein,” a “peril covered herein” or a “peril insured against.” (Policies, Section 8). The “Perils Insured Against” provision (Section 8 of the Policy) makes it clear that the policy insures only against “risk of direct physical loss of or damage to property described herein... except as hereinafter excluded.” Absent such direct physical loss of or damage to property, there is no coverage.

Plaintiff alleges that it has sustained a business income loss “[a]s a result of physical loss or damage to its property,” (Compl. ¶ 87). However, Plaintiff has not specifically alleged any facts that SARS-CoV-2 was ever present on its premises. Additionally, the mere presence of the virus does not constitute “direct physical loss of or damage to property. *Edison Kennedy, LLC v. Scottsdale Ins. Co.*, No. 8:20-cv-1416, 2021 WL 22314, at 13 *7 (M.D. Fla. Jan. 4, 2021) (“the necessity of cleaning the property to remove particles resting on the property does not mean the property suffered direct physical damage or loss”). Plaintiff has, at all times, been in possession of its Hotel property and it remained open, albeit (at certain times) to a smaller category of guests. Indeed, despite the various emergency measure orders, “Essential Lodgers” were permitted to stay at the Hotel, further illustrating the point that the hotel was not “uninhabitable” or “substantially unusable.” Therefore, it is

ORDERED AND ADJUDGED that based upon the facts of this case, Plaintiff has failed to demonstrate any “direct physical loss of or damage to property.” Plaintiff has not produced evidence that suggests the Hotel suffered direct physical loss of or damage such that the Policies’ coverage is triggered. No reasonable jury could conclude under the facts of this case that the physical characteristics of the Hotel have changed or that there has been a direct physical loss of or damage to the Hotel. Therefore, the Policies’ insuring provisions were not triggered as a matter of law. Accordingly, Defendants motion for summary judgment is **GRANTED**.

DONE AND ORDERED in Chambers at Miami-Dade County, Florida, on 06/18/21.


WILLIAM THOMAS
CIRCUIT COURT JUDGE

FINAL ORDERS AS TO ALL PARTIES

SRS DISPOSITION NUMBER 12

**THE COURT DISMISSES THIS CASE AGAINST
ANY PARTY NOT LISTED IN THIS FINAL ORDER
OR PREVIOUS ORDER(S). THIS CASE IS CLOSED
AS TO ALL PARTIES.**

Judge's Initials WT

The parties served with this Order are indicated in the accompanying 11th Circuit email confirmation which includes all emails provided by the submitter. The movant shall IMMEDIATELY serve a true and correct copy of this Order, by mail, facsimile, email or hand-delivery, to all parties/counsel of record for whom service is not indicated by the accompanying 11th Circuit confirmation, and file proof of service with the Clerk of Court.

Signed original order sent electronically to the Clerk of Courts for filing in the Court file.