SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

----------x

RAINBOW USA INC., AIJJ ENTERPRISES INC., ET AL,

Plaintiffs, Decision and order

- against - Index No. 513649/20

ZURICH AMERICAN INSURANCE COMPANY,

Defendant, January 27, 2022

----------x

PRESENT: HON. LEON RUCHELSMAN

The defendant moves pursuant to CPLR §3211 seeking to dismiss the lawsuit. The plaintiff opposes this motion. Papers were submitted by the parties and after reviewing the arguments this court now makes the following determination.

The plaintiff, a New York corporation with a principal place of business in Brooklyn, commenced this action seeking business interruption insurance resulting from the government imposed shutdowns due to the COVID-19 pandemic. According to the Complaint the plaintiff is in the business of selling women's apparel and maintains over one thousand retail stores across the United States, the U.S. Virgin Islands and Puerto Rico. The plaintiff purchased comprehensive insurance from the defendant. The specific provisions that are the subject of this lawsuit concern coverage for losses sustained as a result of any civil or military authority or "an interruption of business, whether total or partial, during the period of time when, in connection with or

following a peril insured against, ingress to or egress from real or personal property is impaired" (see, Complaint ¶118). On April 27, 2020 the plaintiff filed a claim with the defendant seeking damages resulting from government imposed shutdowns in excess of five million dollars. On May 27, 2020 the defendant disclaimed coverage citing to a provision of the policy that excluded claims arising from "seepage and/or pollution and/or contamination, direct or indirect, arising from any cause whatsoever" (see, Complaint ¶138). The plaintiff instituted this lawsuit and asserted causes of action for a declaratory judgement, breach of contract and breach of implied covenant of good faith and fair dealing due to the defendant's failure to entertain the claim submitted by the plaintiff. The defendant has now moved seeking to dismiss the lawsuit arguing the plaintiff did not suffer any "direct physical loss" necessary to trigger any coverage. The plaintiff opposes the motion arguing that requirement is ambiguous and is an insufficient basis upon which to dismiss the lawsuit and that in any event there are surely questions whether a direct physical loss has been presented.

Conclusions of Law

It is well settled that upon a motion to dismiss the court

must determine, accepting the allegations of the complaint as true, whether the party can succeed upon any reasonable view of those facts (Strujan v. Kaufman & Kahn, LLP, 168 AD3d 1114, 93 NYS3d 334 [2d Dept., 2019]). Further, all the allegations in the complaint are deemed true and all reasonable inferences may be drawn in favor of the plaintiff (Weiss v. Lowenberg, 95 AD3d 405, 944 NYS2d 27 [1st Dept., 2012]). Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211 motion to dismiss (see, Moskowitz v. Masliansky, 198 AD3d 637, 155 NYS3d 414 [2021]).

The policy in question provides insurance for losses suffered due to business interruption "as a result of direct physical loss or damage to the insured caused by a peril not otherwise excluded" (see, Property Insurance Policy, Policy Provisions, ¶ 2: Coverage, B: Business Interruption). Further, the policy provides that "this Policy insures against all risk of direct physical loss, damage or destruction to property described herein occurring during the term of insurance, except as hereinafter excluded" and that the term peril refers to the above stated conditions regarding physical damage (see, Property Insurance Policy, Policy Provisions, ¶ 1: Perils Insured

Against). While the overwhelming majority of cases that have considered whether one can recover for government imposed shutdowns due to the COVID-19 pandemic have rejected such coverage on the grounds there has been no physical damage to any goods, the plaintiff urges the court to adopt positions taken by a minority of courts that have held otherwise. Of course, the sheer volume of cases pointing in one direction does not mean the conclusions reached are correct, however, they do provide persuasive and precedential value which cannot be ignored. In any event, this court will surely engage in its own analysis in deciding this motion.

The first issue that must be explored is whether the phrase "direct physical loss, damage or destruction to property" is ambiguous. It is well settled the court must determine as a threshold question whether an insurance term is ambiguous (NIACC, LLC v. Greenwich Insurance Company, 51 AD3d 883, 857 NYS2d 723 [2d Dept., 2008]). "The test for ambiguity is whether the provision is 'susceptible of two reasonable interpretations'" (Concordia General Contracting Company Inc., v. Preferred Mutual Insurance Company, 146 AD3d 932, 46 NYS3d 146 [2d Dept., 2017]). The plaintiff does not argue the terms are ambiguous in and of themselves but rather the phrase "direct physical loss" as a whole is ambiguous because it is unclear whether the words

'direct' and 'physical' modify the terms 'loss' or 'damage' or 'destruction' or whether coverage can include damage even without any physical loss. As the plaintiff points out, "the statement "I like green tea, mittens, and hats" could be read to imply that the speaker likes green tea, green mittens, and green hats, or that the speaker's preference for green applies only to tea" (see, Memorandum of Law in Opposition, page 9). It is true that when a single adjective is applied to multiple nouns an ambiguity is raised whether the adjective applies to all nouns. In *The Judge As Linguist*, by Peter Meijes Tiersma, 27 Loyola of Los Angeles Law Review 269 [1993] the author notes that the phrase "large cars or trucks" is ambiguous because it is unclear if all trucks are included or only large ones. This ambiguity could have far reaching consequences (id., see, also, California v. Brown, 479 U.S. 538, 107 S.Ct. 837 [1987]). However, notwithstanding that ambiguity the phrase in the insurance policy in question does not deal with multiple nouns following an adjective but rather with distinct examples of casualty all connected as a single phrase. The plaintiff argues the adjectives 'direct' and 'physical' only modify the word 'loss' and do not necessarily modify the words 'damage' or 'destruction' creating an ambiguity whether the policy covers damage or destruction that did not arise from a direct or physical loss.

The case of Enrico Motorcars, LLC v. Navarro, 138 S.Ct. 1134, 200 L.Ed.2d 433 [2018] while discussing statutory interpretation is likewise instructive in interpreting the insurance policy. In that case a statute exempted certain individuals from the prohibition against working more than the maximum forty hours per week. 29 USCA §213(b)(10)(A) states that maximum hour prohibitions do not apply to "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers" (id). Thus, the statute covers three individuals, namely, salesmen, partsmen and mechanics and two activities, namely selling or servicing vehicles. The Supreme Court rejected a lower court interpretation that limited salesmen only engaged in sales and partsmen and mechanics only engaged in servicing. The court explained the word "or" in the phrase "selling or servicing" as connecting all the activities together. Therefore, "the use of 'or' to join 'selling' and 'servicing' suggests that the exemption covers a salesman primarily engaged in either activity" (id). Likewise, when considering the policy in question and specifically the phrase "direct physical loss, damage or destruction to property" it is clear that 'direct physical loss'

applies in addition to 'damage' and 'destruction' as well. Therefore, the policy requires physical damage or physical destruction. In truth, any other reading of the phrase is untenable. The phrase contains three types of casualty, namely loss, damage and destruction. According to the plaintiff's reading of the phrase, the policy covers against risk of direct physical loss, any damage whatsoever or any destruction whatsoever. Of course, even the plaintiff concedes that 'destruction' by its very term requires physical damage (see, Memorandum in Opposition, page 10). Thus, the plaintiff's reading would require physical damage for any loss sustained, physical damage for any destruction sustained and the right to recovery for any damage at all, even where no physical damage occurred, for example, damage caused by a governmental shutdown. It strains credulity that of the three sorts of casualty mentioned, the first and third necessarily require physical damage whereas the middle one mentioned does not. Thus, besides ignoring the ordinary disjunctive use of the word 'or' plaintiff's reading expands the narrow scope of the phrase's opening reach which only applies where there is "direct physical loss" (Enrico, supra).

The plaintiff argues that damage must mean something other than loss or destruction otherwise its inclusion is entirely

superfluous. That argument has been considered by other courts which have concluded the language is not superfluous. For example, in Chief of Staff LLC v. Hiscox Insurance Company Inc., 532 F.Supp.3d 598 [Northern District of Illinois, Eastern Division, 2021] the court explained that physical loss and damage are not the same. "Consider a thief who attempts to steal a desktop computer. If the thief succeeds, the computer is 'physical[ly] los[t]' but not necessarily 'physical[ly] ... damage[d].' If the thief cannot lift the computer, so instead of stealing it takes a hammer to its monitor in frustration, the computer would be 'physical[ly] ... damage[d]' but not 'physical[ly] los[t].' Yet if the thief were only to change the password on the system so that employees could not log in, there would be neither 'physical ... damage' nor 'physical loss,' though the computer would be unusable for some while. The Business Income provision might cover the first two cases, but it does not cover the third" (id). Again, in Chefs' Warehouse Inc., v. Employers Insurance Company of Wausau, 2021 WL 4198147 [Southern District of New York, 2021] the court explained that "'physical loss' may refer to circumstances in which a property's value is entirely lost, as through theft or complete destruction, whereas 'physical damage' may refer to circumstances in which property is harmed but not wholly obliterated" (id). Further, in

Food For Thought Caterers Corp., Sentinel Insurance Company Ltd., 524 F.Supp.3d 242 [Southern District of New York 2021] the court also noted that the term 'loss' can include the complete destruction of property or some lesser degree of destruction or no destruction at all rendering the phrase completely harmonious with the words 'damage' and 'destruction' contained in the policy.

Moreover, the cases cited by plaintiff in support of its arguments that have denied motions to dismiss on the grounds COVID-19 shutdown orders may constitute physical damage because such provisions are ambiguous, are wholly unpersuasive. The plaintiff cites over thirty cases in support of its position. Many of the cases cited have been rejected by other courts. For example, Serendipitous, LLC/Melt v. Cincinnati Insurance Company, 537 F.Supp.3d 1274 [Northern District of Alabama Southern Division 2021] was not followed in ACME Nashville LLC v. Cincinnati Insurance Company, 2021 WL 4311211 [Middle District of Tennessee, Nashville Division 2021], Gaston & Murrell Family Dentistry PLLC v. Cincinnati Insurance Company, 2021 WL 4311212 [Middle District of Tennessee, Nashville Division 2021] and LGW LLC v. Cincinnati Insurance Company, 2021 WL 4320487 [Middle District of Tennessee, Nashville Division 2021]. Kingray Inc. v. Farmers Group, 523 F.Supp.3d 1163 [Central District of California

2021] was found "unpersuasive" in SA Hospitality Group LLC v. Hartford Fire Insurance Company, _F.Supp.3d_, 2021 WL 2291116 [District of Connecticut 2021]). Derek Scott Wiliams PLLC v. Cincinnati Insurance Company, 522 F.Supp.3d 457 [Northern District of Illinois Eastern Division 2021] was specifically not followed in Dino Drop, Inc., v. Cincinnati Insurance Company, _F.Supp.3d_, 2021 WL 2529817 [Eastern District of Michigan Southern Division 2021]. In re Society Insurance Company COVID-19 Business Interruption Protection Insurance Litigation, 521 F.Supp.3d 729 [Northern District of Illinois Eastern Division 2021] was considered an "outlier" and was not followed in Menominee Indian Tribe of Wisconsin v. Lexington Insurance Company, _F.Supp.3d_, 2021 WL 3727070 [Northern District of California 2021]. Further, Baldwin Academy, Inc. v. Markel Insurance Company, 2020 WL 7488945 [Southern District of California 2020], Sunstone Hotel Investors Inc., v. Endurance American Specialty Insurance Company, 522 F.Supp.3d 690 [Central District of California Southern Division 2021], National Fire & Marine Insurance Company v. Infinity Biscayne Myrtle Members LLC, 316 So.3d 766, 46 Fla. L. Weekly D902 [District Court of Appeal of Florida, Third District 2021], Urogynecology Specialist of Florida LLC, v. Sentinel Insurance Company Ltd., 489 F.Supp.3d 1297 [Middle District of Florida Orlando Division 2020], Thor

Equities, LLC v. Factory Mutual Insurance Company, 531 F.Supp.3d 802 [Southern District of New York 2021] did not deal with the issue of direct physical loss at all.

Notwithstanding the rejection of the legal reasoning of many of the cases plaintiff presents, each court is really guided by two factors when deciding any case, namely precedent and the court's own reasoned judgement. The fact that a consensus has been reached, despite an opposing minority view, is not a reason to criticize the majority consensus. Likewise, any lower court can disagree with any other based purely on the truism that differences can legitimately exist about the interpretation of statutes or contracts, how facts should be applied to the law, whether an exception exists and whether a legal burden has been met. When such conflicts arise between various lower courts (and appellate courts too) our judicial system looks to appellate authority to resolve those conflicts. They are not resolved by undermining appropriate judicial methods utilized which yielded an unhappy result, by accusations of judicial indolence or by questioning the integrity of reasoned decisions as merely following, blindly, the decisions of others (*cf.*, JDS Construction Group LLC v. Continental Casualty Insurance Company, (Case Number 2020 CH 5678 [Circuit Court of Cook County, Chancery Division, Illinois 2021]).

Furthermore, even before COVID-19, cases were consistent that without a physical loss an insured was unable to recovery under a policy which required physical damage. Thus, in Roundabout Theatre Company v. Continental Casualty Company, 302 AD2d 1, 751 NYS2d 4 [1st Dept., 2002] the City of New York denied access to a city block when a building collapsed on the street. The plaintiff, a theatre company located on the block that did not really suffer any damage, was forced to cancel thirty-five performances since the "theatre became inaccessible to the public" (id). Although any damage the theatre sustained was quickly repaired, the city's closure nevertheless resulted in losses "in the form of ticket and production-related sales as well as additional expenses incurred in reopening the production" (id). The theatre sought to recover under its business interruption insurance policy. The court denied such coverage on the grounds that "the language in the instant policy clearly and unambiguously provides coverage only where the insured's property suffers direct physical damage" and that "the only conclusion that can be drawn is that the business interruption coverage is limited to losses involving physical damage to the insured's property" (id). Since there was no physical damage to the theatre there could be no recovery. The plaintiff asserts that in Roundabout "the theatre's losses were caused, not by the

swiftly repaired damage, but rather by the effect of the order of a civil authority, for which no coverage was afforded" (see, Memorandum of Law in Opposition, pages 12,13). First, while the order of the city was the "cause" of the losses incurred the request for payment was not rooted in that cause. Similarly, in these COVID-19 shutdown insurance cases, of course, the cause of the losses were governmental shutdown orders, however, the basis for recovery is not the shutdown orders *per se* but rather the business interruption that flowed from such shutdowns. More importantly, the decision in Roundabout (supra) was not based upon any civil shutdown authority but on contractual interpretation that contain, in substance, the same language as the policy in this case.

The case of Pepsico Inc., v. Winterhur International American Insurance Company, 24 AD3d 743, 806 NYS2d 709 [2d Dept., 2005] does not demand a contrary result. In Pepsico the plaintiff, soft drink maker Pepsi, sought insurance for losses incurred because of faulty ingredients supplied by third parties. The faulty ingredients were not harmful, rather, they caused the beverages to have different tastes and therefore, the drinks were not merchantable and were destroyed (see, Pepsico Inc., v. Winterhur International American Insurance Company, 13 AD3d 599, 788 NYS2d 142 [2d Dept., 2004]). The court held that based upon

the language of the policy, it was possible the goods were in fact physically damaged. The court disagreed with the defendant's position that to demonstrate physical damage it was necessary to "prove that 'there has been a distinct demonstrable alteration of [the] physical structure [of the plaintiffs' products] by an external force'" (id). Rather, the court held it was "sufficient under the circumstances of this case involving the unmerchantability of beverage products that the product's function and value have been seriously impaired, such that the product cannot be sold" (id). That conclusion does not, as urged by the plaintiff, establish a standard whereby physical loss is not required. That case merely holds that beverages, and perhaps other goods, that experience an alteration that changes the product "from good to bad" (id) does not necessarily require a physical alteration. Consider a clothing store where clothing on display is damaged by sunlight that changes the colors of the clothing, essentially ruining their merchantability. Of course, the clothes have not suffered any physical loss, as opposed to a change in physical appearance. The clothes remain sturdy, provide protection and function as clothes are designed to do. However, due to a change in their appearance, similar to a change in taste, they can no longer be sold. Pursuant to Pepsico (supra) an insured may have a claim for damage (assuming no other

provisions are applicable) despite the fact no physical loss occurred. Thus, Pepsico (supra) permits coverage in the unusual case where a loss has occurred, due to some external change, without any physical damage at all. In this case, however, there are no allegations that COVID-19 so damaged the clothing to fall under the ambit of such coverage. Indeed, there are no allegations that COVID-19 affected the goods in any manner whatsoever rendering them unable to be sold triggering any coverage enunciated in Pepsico (supra).

Next, the plaintiff argues that the court should adopt the reasoning espoused in JDS Construction Group LLC (supra) which denied a motion to dismiss on the grounds that complaint sufficiently alleged that the COVID-19 virus may have caused physical damage. In that case the complaint alleged that "resporator droplets (*i.e.*, droplets larger than 5 10 pm) expelled from infected individuals land on, attach, and adhere to surfaces and objects. In doing so, they structurally change the property and its surface by becoming a part of that surface. This structural alteration makes physical contact with those previously safe, inert surfaces (*e.g.*, fixtures, handrails, furniture) unsafe" and "when the coronavirus and COVID-19 attach to and adhere on surfaces and materials, they become a part of those surfaces and materials, converting the surfaces and

materials to fomites. This represents a physical change in the affected surface or material, which constitutes physical loss and damage" (id). Of course, the court cannot evaluate the medical accuracy of those allegations, however, the specific and detailed nature of them surely informed the court there that a possible claim for direct physical damage may exist sufficient to defeat a motion to dismiss. The complaint in this case contains no such detailed language. The Verified Complaint in this case merely recites, in conclusory fashion, that damage from COVID-19 "both existed on surfaces found within the insureds and surrounding premises as well as in the breathable air circulating within the insureds and surrounding premises" (see, Complaint, ¶101). The complaint fails to present any allegation the virus itself caused any physical damage (see, Pepsico, supra).

Lastly, turning to a survey of New York courts addressing this issue, there has been unanimity that without any direct physical loss there can be no claims for business interruption insurance due to government shutdowns in the wake of COVID-19. A sampling of state court cases so holding include Benny's Famous Pizza Plus Inc., v. Security National Insurance Company, 72 Misc3d 1209(A), 149 NYS3d 883 [Supreme Court, Kings County 2021], 6593 Weighlock Drive, LLC v. Springhill SMC Corp., 71 Misc3d 1086, 147 NYS3d 386 [Supreme Court, Onondaga County 2021), Mangia

Restaurant Corp., v. Utica First Insurance Company, 72 Misc3d 408, 148 NYS3d 606 [Supreme Court Queens County 2021], Visconti Bus Service, LLC v. Utica National Insurance Group, 71 Misc3d 516, 142 NYS3d 903 [Supreme Court Orange County 2021]). New York federal cases include Kim-Chee LLC v. Philadelphia Indemnity Insurance Company, 535 F.Supp.3d 152 [Western District of New York 2021], Mohawk Gaming Enterprises LLC v. Affiliated FM Insurance Company, 534 F.Supp.3d 216 [Northern District of New York 2021], Jeffrey M. Dressel, D.D.S., P.C. v. Hartford Insurance Company of the Midwest, Inc., 2021 WL 1091711 [Eastern District of New York 2021], Sharde Harvey DDS, PLLC v. Sentinel Insurance Company, 2021 WL 1034259 [Southern District of New York 2021]. Furthermore, in 10012 Holdings Inc., v. Sentinel Insurance Company, Ltd., _F.4th_, 2021 WL 6109961 [2d. Cir. 2021] the Second Circuit concluded that language contained in an insurance policy that requires direct physical loss cannot provide coverage because of a COVID-19 shutdown. The court noted that every New York case that has addressed the issue has uniformly concluded no such coverage is available. The court explained that "we are unaware of any contrary authority in New York that diverges from the holding in Roundabout Theatre, which state and federal courts in New York have (at either the motion to dismiss stage or on summary judgment) uniformly applied since

the start of the COVID-19 pandemic to deny coverage under similar insurance provisions where the insured property itself was not alleged or shown to have suffered direct physical loss or physical damage" (id). In support of this conclusion the court cited to numerous cases, some of which are cited here to emphasize the unanimity of the conclusions reached.

The plaintiff argues that 10012 Holdings Inc., (supra) held that each insurance policy must be examined individually to discern if such coverage could be available. In that vein the court noted that "because 10012 Holdings alleges only that it lost access to its property as a result of COVID-19 and the governmental shutdown orders, and not that it suspended operations because of physical damage to its property, we agree with the District Court that 10012 Holdings cannot recover under either the Business Income or Extra Expense provisions" (id). That language cannot possibly further the plaintiff's position and does not in any way raise any questions of fact. That sentence merely summarizes its holding that no coverage is available since no physical damage has been alleged and thus no coverage is ever available where a policy contains a physical loss provision and there is no evidence of physical loss.

For similar reasons there can be no coverage based upon the lost rental clauses of the civil authority clauses since they too

require evidence of direct physical loss.

Therefore, based on the foregoing the motion seeking to dismiss the complaint and the lawsuit is granted.

So ordered.

ENTER:

DATED: January 27, 2022
Brooklyn, N.Y.

Hon. Leon Ruchelsman
JSC