SHORT FORM ORDER

INDEX NO.: 604318-21

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Honorable Elizabeth H. Emerson

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ISLAND GASTROENTEROLOGY CONSULTANTS, PC AND ISLAND ENDOSCOPY CENTER, LLC,

Plaintiffs,

-against-

GENERAL CASUALTY COMPANY OF WISCONSIN,

Defendant.

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MOTION DATE: 6-10-21
SUBMITTED: 7-1-21
MOTION NO.: 001-MOT D; CASE DISP

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Upon the following papers read on this motion to dismiss; Notice of Motion and supporting papers 7-15; Notice of Cross Motion and supporting papers____; Answering Affidavits and supporting papers 19-27; Replying Affidavits and supporting papers 30-36; it is,

ORDERED that this motion by the defendant for an order dismissing the complaint is determined as follows:

The plaintiffs, Island Gastroenterology Consultants, PC, and Island Endoscopy Center, LLC, obtained two separate, but materially identical, business owners' insurance policies from the defendant for the period September 1, 2019, to September 1, 2020. The policies covered, inter alia, "direct physical loss of or damage to the Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss." The premises described in the Declarations were the plaintiffs' medical offices located at 1111 Montauk Highway and 1175 Montauk Highway, West Islip, New York. "Covered Property" included "Buildings," "meaning the buildings and structures at the premises described in the Declarations," and "Business Personal Property located in or on the buildings at the described

premises." "Covered Causes of Loss" were defined as "[r]isks of direct physical loss" unless excluded or limited.

The policies provided additional coverage for losses of Business Income "due to the necessary suspension of . . . 'operations' during the 'period of restoration'" if the suspension was "caused by direct physical loss of or damage to property at the described premises." "Operations" was defined as "business activities occurring at the described premises." "Period of restoration" was defined as the period of time beginning "after the time of direct physical loss or damage" and ending "when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality" or "when business is resumed at a new permanent location." The policies also provided for the payment of necessary Extra Expenses during the "period of restoration" that would not have been incurred "if there had been no direct physical loss or damage to the property at the described premises." The policies further provided for the payment of Business Income and Extra Expenses "caused by action of civil authority that prohibits access to the described premises due to direct physical loss of or damage to property, other than at the described premises."

Both policies contained endorsements entitled "New York – Exclusion of Loss due to Virus or Bacteria" (the "virus exclusion"), which provided, in pertinent part, "We will not pay for loss or damage caused by or resulting from any virus, bacterium or other micro-organism that induces or is capable of inducing physical distress, illness or disease." The virus exclusion explicitly applied to "forms or endorsements that cover property damage to building or personal property and forms or endorsements that cover business income, extra expense or action of civil authority."

In March 2020, the Governor issued a series of Executive Orders to deal with the COVID-19 pandemic. They included an order restricting large gatherings, an order directing all non-essential workers to stay at home, and an order cancelling all elective surgeries and procedures statewide. As a result, the plaintiffs' medical offices were closed from March 23, 2020, until they were able to re-open on May 26, 2020. During that time, the plaintiffs were unable to perform all but a de minimus number of emergency medical procedures, resulting in a substantial loss of business income and additional expenses.

The plaintiffs did not file a claim with the defendant to recover their business-income losses and other expenses under the policies. Instead, they commenced this action for a judgment declaring, inter alia, that those losses and expenses are covered under the policies and that any future losses and expenses incurred due to civil-authority closures will be covered. The defendant moves to dismiss the complaint on the grounds that the plaintiff does not allege any direct physical loss of or damage to their medical offices, that purely economic loss is not covered by the policies, and that the policies expressly exclude coverage for any loss or damage caused by a virus. In opposition, the plaintiffs contend that physical loss does not require structural damage, that lost operations or the inability to use the premises is sufficient, that the

virus exclusion does not apply, and that they have adequately pleaded coverage under the civil-authority provision.

There is no dispute that parties to an insurance contract may bring a declaratory judgment action against each other when an actual controversy develops concerning the extent of coverage, the duty to defend, or other issues arising from the insurance contract (**Lang v Hanover Ins. Co.**, 3 NY 3d 350, 353). While the plaintiffs have not filed claims under the policies which have been denied, there clearly is an actual controversy between the parties regarding the extent of coverage.

In determining an insurance-coverage dispute, the court first looks to the language of the policy (**Soundview Cinemas Inc. v Great Am. Ins. Group**, 71 Misc 2d 493, 506). When the provisions of a policy are clear and unambiguous, they must be given their plain and ordinary meaning (**Roundabout Theatre Co., Inc. v Continental Cas. Co.**, 302 AD2d 1, 6), and courts are to enforce them as written (**Michael Cetta, Inc., v Admiral Indem. Co.**, 506 F Supp 3d 168, 176 [SDNY]). Courts may not make or vary the contract of insurance to accomplish their notions of abstract justice or moral obligation (**Roundabout Theatre Co., Inc.,** *supra*).

New York courts interpreting language that is substantially identical to the language in the insurance policies at bar have found that coverage is limited to losses involving physical damage to the insured's property, and they have declined to interpret such language to include "loss of use" of the property under New York law (**10012 Holdings, Inc. v Sentinel Ins. Co., Ltd.**, 507 F Supp 3d 482 [SDNY], 486-487 [and cases cited therein]; *see also*, **Michael Cetta, Inc.**, *supra* at 176-179). New York courts have also found that the loss of use of premises due to COVID-19 related government orders does not trigger business-income coverage based on physical loss to property (**Id**. at 179-183; **10012 Holdings, Inc.**, *supra;* **Soundview Cinemas Inc.**, *supra* at 507).

Here, the insurance policies clearly require "direct physical loss of or damage to property." "Covered Property" is defined as "Buildings," "meaning the buildings and structures at the premises described in the Declarations," and "Covered Causes of Loss" are defined as "[r]isks of direct physical loss." The additional coverage for losses of Business Income due to a suspension of operations during a "period of restoration'" only applies if the suspension was "caused by direct physical loss of or damage to property at the described premises." Moreover, the coverage for Extra Expenses during a "period of restoration" does not apply "if there [was] no direct physical loss or damage to the property at the described premises." The plaintiffs' interpretation of these and other provisions of the policies have been rejected by New York courts. The cases to the contrary upon which the plaintiffs rely are out-of-state cases that appear to represent a minority view. Accordingly, the court declines to follow them.

In view of the foregoing, the court finds that the plaintiffs' allegations are insufficient as a matter of law to allege coverage under the business-income provisions of the policies. Likewise, the plaintiffs' allegations are insufficient as a matter of law to allege

coverage under the extra-expense provisions of the policies, which apply only if the business-income coverage applies and also require "direct physical loss of or damage to property" (*see*, **Michael Cetta, Inc.**, *supra* at 183; **Soundview Cinemas Inc.**, *supra* at 507).

The plaintiffs' allegations are also insufficient as a matter of law to allege coverage under the civil-authority provisions of the policies. The plaintiffs' contentions to the contrary notwithstanding, access to the premises was not prohibited due to direct physical loss of or damage to neighboring property (**Id.**). Moreover, the Governor's executive orders did not prohibit all surgeries and procedures, only all elective surgeries and procedures. The plaintiffs allege that they performed a de minmis number of emergency procedures between March 23, 2020, and May 26, 2020, when the executive orders were in effect. They, therefore, had access to the premises.

Finally, the plaintiffs' claimed losses fall squarely within the policies' virus exclusion (*see*, **100 Orchard St., LLC v Travelers Indem. Ins. Co. of Am.**, ___ F Supp 3d ___ [SDNY June 8, 2021], 2021 WL 2333244; **Michael J. Redenburg, Esq. PC v Midvale Indem. Co.**, ___ F Supp 3d ___ [SDNY Jan. 27, 2021], 2021 WL 276655).

In the absence of demonstrable merit to the plaintiffs' claims, leave to replead is denied (**Sutton Assoc. v LexisNexis**, 196 Misc 2d 30, 35 [and cases cited therein]).

When, as here, a party seeking a declaratory judgment does not succeed, the court is required to declare the rights of the parties and not merely to deny the plaintiff the relief it seeks (*see*, **Connors, Practice Commentaries**, McKinney's Cons Laws of NY, Book 7B, CPLR C3001:22). A mere dismissal is not appropriate (*see*, **Siegel, NY Prac** § 440, at 770 [5th ed]). Accordingly, the court declares that the plaintiffs do not have claims for Business Income and Extra Expenses under the insurance policies that are the subject of this action for losses incurred due to the closure of their medical offices from March 23, 2020, until May 26, 2020. Insofar as the plaintiffs seek a judgment declaring that future losses and expenses incurred due to civil-authority closures will be covered under the policies, the court finds that the plaintiffs are seeking an advisory opinion, which the court may not constitutionally render (**Connors**, *supra* CPLR C3001:3).

Dated: August 25, 2021

Elizabeth H. Emerson

J.S.C.

HON. ELIZABETH HAZLITT EMERSON