

20-129
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Broadwall Management Corp.,	:	Docket No.:
French Partners LLC, SPA_NY LLC, New York French	:	
Soundview LLC, 551 Fifth Avenue Co-Investors LLC,	:	SUMMONS
New York French Building Co-Investors LLC,	:	
CIC_NY LLC,	:	<u>Jury Demanded</u>
	:	
	:	
	:	
	:	
Plaintiffs,	:	
	:	The basis of venue is:
-against-	:	Plaintiffs' Principal Place
	:	Of Business
Affiliated FM Insurance Company	:	551 5th Avenue
	:	New York, New York 10001
Defendant.	:	

To the above-named Defendant:

YOU ARE HEREBY SUMMONED to appear in the Civil Court of the City of New York, County of New York at the office of the Clerk of the said Court at 111 Centre Street, New York, New York in the County of New York City and State of New York, within the time provided by law as noted below and to file your answer to the annexed complaint with the Clerk; upon your failure to answer, judgment will be taken against you for the relief demanded in the complaint, together with the costs of this action.

Defendants' Address:
Affiliated FM Insurance Company
270 Central Avenue,
Johnston, RI 02919-4949

Dated: New York, New York
April 18, 2022

Yours, etc.,

WEG AND MYERS, P.C.
Attorneys for Plaintiffs

By: /s/ Joshua L. Mallin
Joshua L. Mallin, Esq.

800 Westchester Avenue
Suite N-513
Rye Brook, NY 10573
(212) 227-4210

NOTE: The law provides that: (a) If this summons is served by its delivery to you personally within the City of New York, you must appear and answer within TWENTY days after such service; or (b) If this summons is served by delivery to any person other than you personally, or is served outside the City of New York, or by publication, or by any means other than personal delivery to you within the City of New York, you are allowed THIRTY days after proof of service thereof is filed with the Clerk of this Court within which to appear and answer.

5. The inundation of SARS-CoV-2 within the confined spaces of these properties resulted in the physical loss or damage suffered by these premises.

6. Further, in response to this widespread physical loss or damage caused by the effects of the Covid-19 virus, and to protect the public from further harm arising from exposure to areas infected by this virus, states and municipalities issued various orders targeting various types of commercial properties, including the properties owned by Plaintiffs and insured by the Subject Policy.

7. By way of example, the State of New York and New York City both issued closure orders in response to physical loss or damage caused by Covid-19.

8. These closure orders, and ones similar to them, together with the presence of airborne virus within the premises owned or leased by the Plaintiffs, resulted in Plaintiffs' tenants' stoppage of rental payments due to their inability to utilize the space for which the space was intended and for which they were the lessee. As a result, Plaintiffs have suffered substantial economic damages.

9. Plaintiffs fully expected that, in light of the all-encompassing all-risk policy of insurance issued to them by Defendant, Defendant would be responsive to their insurance claim.

10. Defendant's failure to provide Plaintiffs with coverage for losses sustained due to the outbreak of Covid-19 has forced Plaintiffs to bring this litigation.

PARTIES

11. At all times hereinafter mentioned, Broadwall Management Corp. is a domestic corporation duly organized and existing under and by virtue of the laws of New York, having its principal place of business at 370 7th Avenue, New York, New York 10001.

12. At all times hereinafter mentioned, French Partners LLC is a foreign limited liability company duly organized and existing under and by virtue of the laws of the State of

Delaware and having its principal place of business at 551 5th Avenue, New York, New York 10017.

13. At all times hereinafter mentioned, SPA_NY LLC is a domestic limited liability company duly organized and existing under and by virtue of the laws of the State of New York and having its principal place of business at 551 5th Avenue, New York, New York 10001.

14. At all times hereinafter mentioned, New York French Soundview LLC is a domestic limited liability company duly organized and existing under and by virtue of the laws of the State of New York and having its principal place of business at 551 5th Avenue, New York, New York 10001.

15. At all times hereinafter mentioned, New York 551 Fifth Avenue Co-Investors LLC is a domestic limited liability company duly organized and existing under and by virtue of the laws of the State of New York and having its principal place of business at 551 5th Avenue, New York, New York 10001.

16. At all times hereinafter mentioned, New York French Building Co-Investors LLC is a domestic limited liability company duly organized and existing under and by virtue of the laws of the State of New York and having its principal place of business at 551 5th Avenue, New York, New York 10001.

17. At all times hereinafter mentioned, CIC-NY, LLC is a domestic limited liability company duly organized and existing under and by virtue of the laws of the State of New York and having its principal place of business at 551 5th Avenue, New York, New York 10001.

18. Upon information and belief, at all times hereinafter mentioned, Defendant AFFILIATED FM INSURANCE COMPANY (hereinafter referred to as “Defendant or “Affiliated FM”) was and is a foreign corporation organized and existing under and by virtue of

the laws of Rhode Island, having its principal place of business at 270 Central Avenue, Johnston, Rhode Island.¹

THE NOVEL CORONAVIRUS AND ITS EFFECTS

19. It is beyond cavil that at all relevant times the world was experiencing a global pandemic from a disease caused by a novel coronavirus (specifically, SARS-CoV-2) and commonly referred to as Covid-19.

20. From as early as December 2019, Covid-19 began spreading, first in China and then, because the disease is highly contagious, rapidly around the globe.

21. On January 30, 2020, the World Health Organization (“WHO”) declared that the Covid-19 outbreak constituted a public health emergency of international concern.

22. The World Health Organization (“WHO”) stated that “[t]he disease spreads primarily from person to person through small droplets from the nose or mouth, which are expelled when a person with COVID-19 coughs, sneezes, or speaks People can catch COVID-19 if they breathe in these droplets from a person infected with the virus These droplets can land on objects and surfaces around the person such as tables, doorknobs and handrails. People can become infected by touching these objects or surfaces, then touching their eyes, nose or mouth.”²

23. In addition, studies have verified that many individuals remain asymptomatic despite infection by COVID-19.³ COVID-19 also includes a pre-symptomatic incubation period of up to 14 days, during which time infected people can transmit COVID-19 to people, into the air

¹ For the avoidance of doubt, at all times hereinafter mentioned, Plaintiffs note that at least one of their ultimate members was a citizen of Rhode Island, such that this matter could not be brought before a federal court pursuant to diversity jurisdiction.

² *Q&A on coronaviruses (COVID-19)*, World Health Organization, <https://web.archive.org/web/20200506094904/https://www.who.int/emergencies/diseases/novelcoronavirus-2019/question-and-answers-hub/q-a-detail/q-a-coronaviruses> (last visited Mar. 20, 2021).

³ See CDC, Jing Cai, Wenjie Sun, Jianping Huang, Michelle Gamber, Jing Wu, Guiqing He, *Indirect Virus Transmission in Cluster of COVID-19 Cases, Wenzhou, China, 2020*, 26 EMERGING INFECTIONS DISEASES 6 (June 2020), https://wwwnc.cdc.gov/eid/article/26/6/20-0412_article (last visited Mar. 20, 2021).

and onto surfaces without having experienced symptoms and without realizing that they are infected.⁴ COVID-19 is not only highly contagious, but also deadly. In April 2020, 3 people staying at a Hotel in midtown Manhattan died of COVID-19. The Hotel is located less than a mile from numerous of Plaintiffs' insured properties claiming losses in the instant action

24. Consequently, while during this time period it was possible to identify certain individuals who were suffering from obvious symptoms of the coronavirus, given a lack of significant medical testing at the time, it was impossible to distinguish between infected and non-infected members of the general public. Additionally, the existence and/or presence of the Coronavirus and COVID-19 is not simply reflected in reported cases or individuals' positive test results. The Centers for Disease Control and Prevention ("CDC") estimates that the number of people in the U.S. who have been infected with COVID-19 is likely to be 10 times higher than the number of reported cases.⁵

25. Civil authority orders began to be issued by states and municipalities throughout March 2020.

26. The basis of these orders were all predicated, in part, on the effect of the presence of, and the physical loss or damage caused by Covid-19 within enclosed, highly trafficked locations.

27. For example, New York City Emergency Executive Order No. 100, issued March 16, 2020 stated that the order was issued "because the virus physically is causing property loss and damage."⁶

⁴ *Id.*

⁵ Lena H. Sun and Joel Achenbach, CDC chief says coronavirus cases may be 10 times higher than reported, WASH. POST (June 25, 2020), <https://www.washingtonpost.com/health/2020/06/25/coronavirus-cases-10-times-larger/> (last visited Mar. 31, 2021).

⁶ *See* The City of New York, Office of the Mayor, Emergency Executive Order No. 100, March 16, 2020.

THE PHYSICAL IMPACTS OF COVID-19

28. Given the nature of Plaintiffs' business, the spread of the Covid-19 virus led to significant economic damages.

29. These damages resulted from physical loss or damage to and from within Plaintiffs' insured premises as well as from premises within the vicinity of the insured locations.

30. SARS-CoV-2 is a physical substance and a human pathogen which can be present outside the body and is more likely to be transmitted indoors.

31. As a result, when people infected with Covid-19 cough, sneeze, talk or breath, they produce respiratory droplets, or "fomites" carrying SARS-CoV-2.

32. Not only is SARS-CoV-2 transmitted human-to-human, but the WHO and scientific studies have confirmed that the virus can remain infectious on objects and surfaces.

33. SARS-CoV-2 and resultant COVID-19 are "communicable diseases" within the ordinary meaning of those words.

34. As noted above, COVID-19 spreads both through aerosols which linger for an extended period of time in the air of the space that an infected person has entered or passed through.

35. COVID-19 also spreads through physical droplets which land on surfaces rendering those surfaces damaged by converting those surfaces into a vehicle for further infection to other customers, employees or any other person who subsequently comes in contact with those physical droplets.

36. Like many other threats to human health and life (for example, formaldehyde, radioactivity, carbon monoxide, and legionella) SARS-CoV-2 presents a threat to human life and health through the risk of contact with the virus on surfaces.

37. “Fomites” are physical objects or materials that carry, and are capable of transmitting infectious agents, altering these objects to become vectors of disease. Fomite transmission has been demonstrated for SARS-CoV-2, both from object-to-hand and from hand-to-mouth.⁷

38. At all relevant times, human beings have spread Covid-19 through the simple act of breathing in air that contains viral droplets. The New York Times has reported that “[a]n infected person talking for five minutes in poorly ventilated space can also produce as many viral droplets as one infectious cough.”⁸

39. At all relevant times, such damage both existing on surfaces found within the insureds’ and surrounding premises as well as in the breathable air circulating within the insureds’ and surrounding premises.

40. Fomites physically alter the surface of property into a potentially deadly Coronavirus transmission device. A study published in the Journal of Epidemiology and Infection demonstrated that after lockdown in the United Kingdom, Coronavirus transmission via fomites may have contributed to as many as 25% of deaths in that region.⁹

41. “Healthy individuals contacting contaminated surfaces as part of their daily routine allow transmission to happen from an infected person to a healthy person even though there is no direct contact.”

⁷ See n.3 *supra*.

⁸ Yuliya Parshina-Kottas, Bedel Saget, Karthik Patanjali, Or Fleisher and Gabriel Gianordoli, *This 3-D Simulation Shows Why Social Distancing Is So Important*, New York Times (Apr. 14, 2020) <https://www.nytimes.com/interactive/2020/04/14/science/coronavirus-transmission-cough-6-feet-ar-ul.html>.

⁹ A. Meiksin, *Dynamics of COVID-19 transmission including indirect transmission mechanisms: a mathematical analysis*, 148 EPIDEMIOLOGY & INFECTION e257, 1-7 (Oct. 2020), <https://www.cambridge.org/core/journals/epidemiology-and-infection/article/dynamics-ofCOVID19-transmission-including-indirect-transmission-mechanisms-amathematicalanalysis/A134C5182FD44BEC9E2BA6581EF805D3> (last visited Mar. 20, 2021).

42. According to a metanalysis of studies reported in The Royal Society, “aluminum surfaces allowed coronavirus to stay alive for 2-8 [hours],” other results indicated that “steel, stainless steel, glass, silicone rubber, PVC, ceramic and Teflon all allowed coronavirus to stay active for 5 days.”¹⁰ According to a study documented in The New England Journal of Medicine, Covid-19 was detectable in aerosols for up to 3 hours, up to 4 hours on copper, up to 24 hours on cardboard, and up to 3 days on plastic and stainless steel.¹¹

43. Indeed, scientific studies suggest that during the relevant time period set forth herein, individuals could contract Covid-19 through indirect contact with surfaces or objects used by an infected person, regardless of whether the infected person was symptomatic.

44. Accordingly, at all relevant times, the presence of the Coronavirus in and on property, including in indoor air, on surfaces, and on objects, caused direct physical loss of or damage to property by causing harm to and altering property and otherwise making it incapable of being used for its intended purpose.

45. During the relevant time periods, removing COVID was difficult as well. A number of early studies found that the Coronavirus was much more resilient to cleaning than other respiratory viruses so tested.

46. Furthermore, during the relevant subject period, because Covid-19 physically affected surfaces of property and the air and could be transferred to individuals that come into contact with the surface or the air of the property, causing additional infections, effective response

¹⁰ M. Aydogdu, E. Altun, E. Chung, G. Ren, S. Homer-Vanniasinkam, B. Chen and M. Edirsinghe, *Surface interactions and viability of coronaviruses*, Journal of the Royal Society (Jan. 6, 2021), <https://doi.org/10.1098/rsif.2020.0798> (last visited October 5, 2021).

¹¹ Neeltje van Foremalen, Trenton Bushmaker, Dylan H. Morris, Myndi G Holbrook, Amandine Gamble, Brandi N. Williamson, Azaibi Tamin, Jennifer L. Harcourt, Natalie J. Thornburg, Susan I. Gerber, James O. Lloyd-Smith, Emmie de Wit, and Vincent J. Munster, *Aerosol and Surface Stability of SARS-CoV-2 as Compared with SARS-CoV-1*, The New England Journal of Medicine (Mar. 17, 2020), <https://www.nejm.org/doi/full/10.1056/nejmc2004973>.

to the Covid-19 pandemic required measures designed to reduce human to human contact along with surface to human contact.

47. As a result, at all relevant times, the presence of Sars-CoV-2 caused physical loss or damage to commercial space.

48. Additionally, the CDC recognized the importance of heating, ventilation and air conditioning (“HVAC”) improvements prior to reoccupying buildings. According to the CDC, “[p]rotective ventilation practices and interventions can reduce the airborne concentrations and reduce the overall viral dose to occupants.” For that reason, the CDC recommended that building owners and operators make various physical modifications to their HVAC systems to reduce exposure to the virus on their properties and the spread of COVID-19.¹²

49. Like many other threats to human health and life (for example, formaldehyde, radioactivity, or carbon monoxide) at all relevant times, SARS-CoV-2 presented a threat to human life and health through the risk of contact with the virus on surfaces.

PLAINTIFFS’ INSURANCE POLICY AND CLAIM

50. The commencement of this lawsuit results from a breach of insurance contract arising from the failure of Affiliated FM to provide payment to Plaintiffs for their losses resulting from the global pandemic commonly referred to as coronavirus beginning in March 2020, resulting in an economic loss that was first realized in or about May, 2020.

51. On or before May 15, 2019, for good and valuable consideration, Plaintiffs procured a policy of insurance from Affiliated FM (the “Subject Policy”) bearing policy number KM955.

¹² CDC Guidance with respect to Ventilation in Buildings (June 2, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/ventilation.html> (citing Laurence J. Schoen, P.E., *Guidance for Building Operations During the COVID-19 Pandemic*, American Society of Heating, Refrigerating and Air-Conditioning Engineers Journal (May 2020)).

52. The Subject Policy provides coverage for, *inter alia*, physical loss or damages, as well as losses of income due to business interruption.

53. The Subject Policy bears effective dates from May 15, 2019 to May 15, 2020.

54. The Subject Policy was in full force and effect as of March, 2020 and for the period of time immediately thereafter.

55. The insuring clause of the Subject Policy provides in relevant part:

This Policy covers property, as described in this Policy, against ALL RISKS OF PHYSICAL LOSS OR DAMAGE, except as hereinafter excluded, while located as described in this Policy.

56. The Subject Policy further provides coverage for losses resulting from interruption to Plaintiffs' business, Specifically:

B. BUSINESS INTERRUPTION COVERAGE

3. Rental Income

The recoverable Rental Income is the actual loss sustained by the Insured of the following during the Period of Liability:

- a) The fair rental value of any portion of the property occupied by the Insured;
- b) Income reasonably expected from the rentals of unoccupied or unrented portions of such property;
- c) The rental income from the rented portions of such property, according to bona fide leases, contracts or agreements, in force at the time of the loss.

57. The Subject Policy provides Business Interruption Coverage Extensions specifically:

(2) Civil or Military Authority

This Policy covers the Business Interruption Coverage loss incurred by the Insured during the Period of Liability if an order of civil or military authority prohibits access to a **location** provided such order is the direct result of physical damage if the type insured at a **location** or within five (5) statute miles of it.

(3) Communicable Disease – Business Interruption

If a described location owned, leased or rented by the Insured has the actual not suspected presence of communicable disease and access to such described location is limited, restricted or prohibited by:

- a) an order of an authorized governmental agency regulating such presence of communicable disease;
- b) A decision of an Officer of the Insured as a result of such presence of communicable disease.
This Policy covers the Business Interruption Coverage loss incurred by the Insured during the Period of Liability at such described location with such presence of communicable disease.

(7) Extended Period of Liability

The Gross Earnings and Rental Income coverage is extended to cover the reduction in sales resulting from:

- a) The interruption of business as covered by Gross Earnings or Rental Income;
- b) For such additional length of time as would be required with the exercise of due diligence and dispatch to restore the Insured's business to the condition that would have existed had no loss happened; and
- c) Commencing with the date on which the liability of the Company for loss resulting from interruption of business would terminate if this Business Interruption Coverage Extension had not been included in this Policy.

(8) Ingress/Egress

This Policy covers the Business Interruption Coverage loss incurred by the Insured due to the necessary

interruption of the Insured's business when ingress to or egress from a described location(s) is physically prevented, either partially or totally, as a direct result of physical loss or damage of the type insured to property of the type insured whether or not at a described location.

58. No exclusion in the Policy applies to preclude or limit coverage for the actual presence of Covid-19 at or away from Plaintiffs' property, the physical loss and damage to the property/or the business interruption losses that have and will continue to result from the physical loss and damage to property. To the extent Defendant contends any exclusion(s) apply, such exclusions(s) are unenforceable.

59. On or about April 15, 2020, Affiliated FM issued requests for information consisting of a questionnaire to be filled out by the Plaintiff, asking for specific verified cases of Covid-19 on its premises.

60. Plaintiffs timely responded to this request and all later requests made by Defendant.

61. On or about June 16, 2020, Plaintiffs submitted a sworn statement in proof of loss, making a claim for \$15,525,660.00 for damages estimated between April 1, 2020 through May 6, 2020.

62. In correspondence dated August 21, 2020, Affiliated FM adopted this position that it could "neither accept nor reject" Plaintiff's sworn statement in proof of loss and refused to provide coverage.

63. Affiliated FM's failure to provide coverage breached its obligations under the Subject Policy.

PROPERTIES AFFECTED

64. As detailed below, Plaintiffs are commercial landlords operating spaces leased to various businesses impacted by COVID-19 and the subsequent civil authority orders mandating the closure of such businesses.

65. Plaintiffs' businesses include, *inter alia*, gyms, department stores and restaurants—businesses which are trafficked by high numbers of customers and which employ numerous personnel on-site in order to service those customers.

66. Owing in part to that high-volume customer traffic and the numerous employees present at each location, SARS-CoV-2 was physically present in each property in March 2020 at the time of the issuance of the various civil authority orders mandating the closure of such properties.

67. Consequently, Plaintiff experienced physical loss and damage to each of the following properties insured by the Subject Policy:

a. 551 5th Ave, New York, New York 10017; comprising a 38-story tower with public-facing commercial space on the ground floor situated in Midtown Manhattan. The tenants at the property include numerous commercial retailers directly impacted by the COVID-19 shutdown orders, including, *inter alia*, Tommy Bahama, Pace University. The nature of the operation of these tenants, which are dependent on the physical presence of customers in stores, resulted in the physical presence of SARS-CoV-2 in the properties impacted and resulting physical loss and damage.

AS AND FOR A FIRST CAUSE OF ACTION AGAINST DEFENDANT (Breach of Contract)

68. Plaintiffs repeat and reallege paragraphs “1” through “68”, with the same force and effect as if set forth at length herein.

69. The Subject Policy constituted a binding contract between Plaintiffs and Affiliated FM.

70. Plaintiffs have an insurable interest in each of the Subject Property set forth at ¶ 68.

71. Plaintiffs complied with all of their obligations under the Subject Policy, including through timely notification of a loss and the filing of a Sworn Statement in Proof of Loss.

72. To date, Affiliated FM has failed to compensate Plaintiffs for any of their losses which now total \$3,343,787.

73. Affiliated FM’s failure to compensate Plaintiffs for their losses constitutes a breach of the Subject Policy.

74. As a result of Affiliated FM’s breach of the Subject Policy, Plaintiffs have suffered damages in the amount of \$3,343,787 together with such additional and subsequent damages as may be incurred and proven at trial.

WHEREFORE, Plaintiffs demand judgment against Affiliated FM Insurance Company as follows:

- (a) On the First Cause of Action, a money judgment against Affiliated FM in the amount of \$3,343,787, together with such additional and subsequent damages as may be proven at trial;
- (b) Reasonable fees and costs of this action; and
- (c) For such other and further relief as to which this Court deems just and proper.

Dated: New York, New York
April 18, 2022

Yours, etc.,

WEG AND MYERS, P.C.
Attorneys for Plaintiffs

By: /s/ Joshua L. Mallin
Joshua L. Mallin, Esq.
800 Westchester Avenue
Suite N-513
Rye Brook, NY 10573
(212) 227-4210