

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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TOPGUN 21 ASTOR LLC,

Plaintiff,

- v -

CERTAIN UNDERWRITERS AT LLOYDS SUBSCRIBING TO POLICY NUMBER DCESP01777-01, HDI GLOBAL SPECIALTY SE F/K/A INTERNATIONAL INSURANCE COMPANY OF HANNOVER SE SUBSCRIBING TO LLOYD POLICY NUMBER DCESP01777-01, HISCOX SYNDICATE 0033 SUBSCRIBING TO LLOYD POLICY NUMBER DCESP01777-01, QBE CSN 1886 SUBSCRIBING TO LLOYD POLICY NUMBER DCESP01777-01, PIONEER SYNDICATE 1980 SUBSCRIBING TO LLOYD POLICY NUMBER DCESP01777-01, AXIS SYNDICATE 1686 SUBSCRIBING TO LLOYD POLICY NUMBER DCESP01777-01, ARGENTA SYNDICATE SUBSCRIBING TO LLOYD POLICY NUMBER DCESP01777-01, TRAVELERS AT LLOYD'S SUBSCRIBING TO LLOYD POLICY NUMBER DCESP01777-01, APOLLO SYNDICATE 1969 SUBSCRIBING TO LLOYD POLICY NUMBER DCESP01777-01

Defendant.

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INDEX NO. 651112/2021

MOTION DATE 04/16/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64

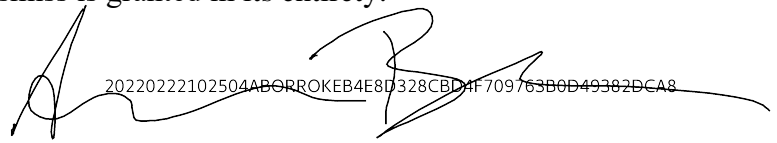
were read on this motion to/for DISMISSAL.

Upon the foregoing documents, the motion to dismiss, pursuant to CPLR 3211(a)(7) must be granted. The predicate for coverage under the Commercial Business Policy of Insurance, policy no. DCESP01777-01 (NYSCEF Doc. No. 14) requires a direct physical loss or damage to the property. COVID-19 is not that (*Roundabout Theatre Co. v Cont'l Cas. Co.*, 302 AD2d 1, 6 [1st Dept 2002]; *Raymours Furniture Co., Inc. v Lexington Ins. Co.*, 2021 WL 4789148, *1 [Sup Ct, NY County 2021]; *Century 21 Department Stores, LLC et al v. Starr Surplus Lines Insurance*

Co. et al, Sup Ct, NY County, Feb. 18, 2022, Borrok, J., index No. 652975/20; *Food For Thought Caterers Corp. v Sentinel Ins. Co.*, 2021 US Dist LEXIS 42828 at *10, 2021 WL 860345 [SDNY Mar 6, 2021]; *10012 Holdings, Inc. v Sentinel Ins. Co.*, 2021 US App LEXIS 38270 [2d Cir Dec 27, 2021]; *Mario Badescu Skin Care Inc. v Sentinel Ins. Co.*, 2022 US Dist LEXIS 15270 [SDNY Jan 27, 2022]). The affidavits submitted in opposition to the motion do not conclude otherwise. Simply put, COVID-19 did not cause physical alteration or damage to the premises. Cleaning addresses any viral concerns and the use of personal protective equipment can be employed to reduce any viral transmission. Finally, any interruption in use stems from the Governor's executive orders (*Gap Inc., v Ponte Gadae New York LLC*, 524 F Supp 3d 224 [SDNY 2021]; *Victoria's Secret Stores, LLC v Herald Sq. Owner LLC*, 2021 NY Misc Lexis 26 [2021]; *Gap, Inc. v 170 Broadway Retail Owner, LLC*, 195 AD3d 575 [1st Dept 2021], *rev'g* 2020 NY Misc LEXIS 9794 [2020]; *Tina Turner Musical LLC, v Chubb Insurance Company of Europe SE*, 73 Misc3d 1228(A) [Sup Ct, Dec 6, 2021]). Thus, this case must be dismissed as, even taking the allegations in the complaint as a true as the court must at this stage, the plaintiff fails to state a cause of action upon which relief could be granted (*Morone v Morone*, 50 NY2d 481, 484 [1980]). In addition, it would appear that the case must be dismissed based on CPLR 3211(a)(1) documentary evidence as well because of the Microorganism Exclusion and the Seepage and/or Pollution and/or Contamination Exclusion, which both exclude coverage for occurrences where the presence of microorganisms or contaminants pose a risk to human health (NYSCEF Doc. Nos. 14, 17 & 18).

Accordingly, it is

ORDERED that the Defendants' motions to dismiss is granted in its entirety.



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2/22/2022

DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE