

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 43

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SPIRIT AIRLINES, INC.	INDEX NO. <u>655755/2021</u>
Plaintiff,	MOTION DATE <u>11/12/2021</u>
- v -	MOTION SEQ. NO. <u>001</u>
AMERICAN HOME ASSURANCE COMPANY,	
Defendant.	DECISION + ORDER ON MOTION

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HON. ROBERT R. REED:

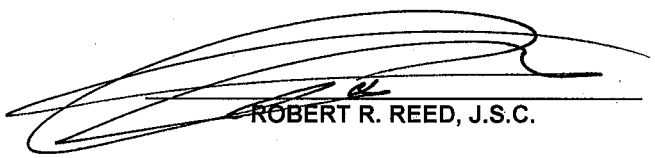
The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56

were read on this motion to/for DISMISS

Upon the foregoing documents, it is hereby

ORDERED that defendant's motion to dismiss is granted in accordance with the attached so-ordered transcript.

09/12/2022
DATE



ROBERT R. REED, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE:

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK : CIVIL TERM : PART 43

-----X

SPIRIT AIRLINES, INC., : Index:
655755/2021

Plaintiff(s). :

- against - :

AMERICAN HOME ASSURANCE COMPANY, : MOTION

Defendant(s). :

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TEAMS VIDEO CONFERENCE
August 18, 2022

B E F O R E:

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J U S T I C E

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THE COURT: Good morning, everyone. Can I have appearances, plaintiff first.

MR. LADD: Yes. Good morning, everyone. Good morning, Your Honor. Marc Ladd on behalf of Cohen Ziffer Frenchman and McKenna on behalf of the plaintiff policyholder Spirit Airlines.

MR. CARLINSKY: Good morning, Justice Reed. It is Mike Carlinsky from Quinn Emanuel. And I am looking to see on the screen if my partner has come on yet. My partner Maaren Shah will be handling the argument with Your Honor's indulgence. And I've just seen her name as it docked, but I am not seeing her picture.

MS. SHAH: Yes, I'm on.

MR. CARLINSKY: All right. That's most important is that you see her, Your Honor. All right. Thank you very much.

THE COURT: Mr. Beattie, are you going to make an appearance?

MR. BEATTIE: You also have Todd Beattie from Quinn Emanuel on behalf of the defendants.

MR. CARLINSKY: My apologies. I should have introduced Mr. Beattie. He is part of my team. Thank you, Mr. Beattie.

THE COURT: Go ahead, Miss Shah.

MS. SHAH: Good morning, Your Honor. Maaren Shah

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2 from Quinn Emanuel on behalf of the defendant here. And we
3 are here this morning on a motion to dismiss the complaint.
4 Now, this is a case about insurance coverage for business
5 interruption losses that the plaintiffs, Spirit Airlines,
6 alleges it suffered as a result of the Coronavirus pandemic.

7 What Spirit is alleging is that it experienced
8 losses and reduced revenue from grounded flights, cancelled
9 tickets, and reduced ticket sales as a result of the
10 pandemic. Now, Spirit's insurance policy at issue in this
11 case is a typical first party property insurance policy that
12 covers such losses only to the extent that they result from,
13 quote, direct physical loss or damage to Spirit's covered
14 property and that's the touchstone here, Your Honor. Spirit
15 needs to allege direct physical loss or damage to its
16 property in order to trigger coverage.

17 And so what Spirit is arguing in this case is that
18 the very presence of Covid-19 itself on and around its
19 property, on surfaces, in the air, constitutes that physical
20 loss or damage to its property such to trigger insurance
21 coverage.

22 Now, as Your Honor is no doubt aware, there is
23 overwhelming and uniform New York authority directly
24 rejecting such claims and, in fact, no New York case, state
25 or federal, has ever sustained a claim similar to the one
26 that Spirit is making here. And by my last count at this

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point, there are almost 100 such decisions from New York State and federal courts that reject such claims and dismiss them on the pleadings.

Now, the good news is I am not going to tell Your Honor that you need to read through 100 cases in order to decide this motion because there's really only one case at this point that Your Honor needs to look to and that case conclusively forecloses Spirit's claim here and that's the First Department recent decision in *Consolidated Restaurant* and that citation is *Consolidated Restaurant Operations versus Westport Insurance Company*. It's at 205 AD 3d 76.

Now, that decision was issued by the First Department in April of this year. That's after the complaint in this case was filed and after the briefing on our motion was concluded, and so we submitted a supplemental authority letter to Your Honor in April of this year identifying this case. And this decision from the First Department is binding authority on this court that conclusively forecloses the claims here because it addresses the exact same question at issue that is at issue in this case. And the way the First Department put it in the *Consolidated Restaurant's* decision is that the issue is whether the actual or possible presence of Covid-19 in plaintiff's restaurants caused, quote, direct, physical loss or damage, end quote, to its property within the meaning of

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2 the insurance policy. That's the exact same question that's
3 at issue here.

4 And so what did the First Department say about
5 this. Here's what it held on this question. It said, "we
6 hold that where a policy specifically states that coverage
7 is triggered only where there is, quote, direct, physical
8 loss or damage to the insured property -- which, Your Honor,
9 is the exact same standard that our policy in this case sets
10 forth -- then, quote, the policyholder's inability to fully
11 use its premises as intended because of Covid-19, without
12 any actual, discernible, quantifiable change constituting,
13 quote, physical difference to the property from what it was
14 before exposure to the virus, fails to state a cause of
15 action for a covered loss.

16 That's what the First Department held. And, in
17 fact, the First Department went even further and it set
18 forth a clear standard for what it means in these cases to
19 allege physical loss or damage to property. And here's what
20 the standard is. It's that the property must be changed,
21 damaged or affected in some tangible way, making it
22 different from what it was before the claimed event
23 occurred. And the First Department said if the proffered
24 facts do not identify any physical, tangible difference in
25 the property, then the complaint fails to state a cause of
26 action.

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Now, that's the standard that Spirit needs to meet here and it doesn't because nowhere in Spirit's complaint does it allege or identify any specific piece of property, a kiosk, a ticket desk, a jet way, an airplane, nothing, that it can allege was tangibly, demonstrably, changed or altered as a result of the presence of Coronavirus. And I wanted to read to you a passage from Spirit's own brief in this case because if Spirit is not alleging any quantifiable, tangible change to its property, what is it alleging here and this is in Spirit's own words.

What Spirit alleges and argues is that, quote, when read as a whole the policy makes clear that physical loss or damage is not limited to visible or structural damage but can be caused instead by the presence of an invisible, yet, dangerous substance that renders property dangerous or impairs its function. Now, that's Spirit argument in this case and that is precisely the argument that the First Department rejected in *Consolidated Restaurant*. The First Department says, no, it's not enough that you allege that the Coronavirus has impaired the function of the property or impaired its intended use. You have to allege a physical tangible alteration in the property and Spirit doesn't and can't do that.

And so it is a straightforward application of binding precedent from the First Department to this case

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2 requires dismissal of the complaint. That's the beginning
3 and end of the issue, Your Honor, and Your Honor need not
4 look any further. And in Spirit's briefs, it relies heavily
5 on the fact that it's complaint alleges the physical
6 presence of the virus on its property, on surfaces, and in
7 the air. And it argues to Your Honor that those kinds of
8 allegations are sufficient to survive dismissal. It is not
9 true because the Court in *Consolidated Restaurant* considered
10 the exact same, in fact, almost identical allegations of the
11 physical presence of the virus on the property and rejected
12 them as insufficient to state a claim.

13 Now, that's not surprising, Your Honor, because the
14 same law firm that's representing Spirit in this case also
15 represented the plaintiff in *Consolidated Restaurant* and
16 argued that appeal and they used the same exact same play
17 book, they made the exact same allegations and arguments and
18 the First Department didn't buy it. And, in fact, if you
19 look at the complaint in this case and the proposed amended
20 complaint in the *Consolidated Restaurant's* case that was in
21 front of the First Department, you'll see that the
22 allegations about the physical presence of the virus and its
23 tangible affects on property are literally almost identical
24 in the two cases.

25 For example, in both cases, the plaintiffs alleged
26 that Coronavirus compromises the physical integrity of the

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2 property and renders it unusable. In both cases, the
3 plaintiffs alleged that there were physical droplets of the
4 virus that landed on surfaces and created fomite that made
5 the property unsafe and unfit for use. And in both cases,
6 the plaintiffs alleged that they had to add improved
7 ventilation systems, air filters, dividers, sanitation
8 stations, in order to remedy the effects of the Coronavirus
9 and the plaintiff cited to the exact same articles and
10 studies and scientific studies about the presence of the
11 Coronavirus to support their claims.

12 Now, the First Department considered all of these
13 allegations and still held they were insufficient to state a
14 claim for physical loss or damage to property. There is
15 nothing different about this case and this complaint here
16 than the *Consolidated Restaurant's* case which applies
17 squarely to foreclose the claims.

18 Now, I wanted to identify two additional cases to
19 Your Honor that the First Department relies on and adopts
20 the reasoning of in *Consolidated Restaurant*. There are two
21 cases from the Second Circuit that also are very instructive
22 here. The first is the *Kim-Chee* case from the Second
23 Circuit. We've cited it to Your Honor in Exhibit E to our
24 August 9th supplemental letter. That case holds that the
25 physical presence of the virus does not cause physical loss
26 or damage within the terms of the similar insurance policy.

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2 The second case is a -- is called 10012 Holdings.
3 It is cited in our briefs to Your Honor, also from the
4 Second Circuit and that case directly rejects the type of
5 loss or use or impaired function theory that the plaintiffs
6 advance here. Now, those two cases I am pointing out to you
7 because the First Department in *Consolidated Restaurant*
8 explicitly called them out and adopted the reasoning and
9 holdings in those two cases as its own in rendering its
10 decision.

11 Now, if these cases had rejected the two theories
12 that the plaintiffs advanced here that loss of use of
13 property is sufficient and that the physical presence of the
14 virus constitutes damages, then what is Spirit left with?
15 So if you read through Spirit's complaint, you are going to
16 see that what Spirit is essentially alleging are financial
17 losses from reduced customer demand and that's it. And what
18 do I mean by that?

19 So Spirit alleges that it experienced decreased
20 ticket sales and cancelled flights from the pandemic but
21 that's not because of any Spirit's airplanes were broken or
22 because its airport facilities weren't physically working.
23 That's not what it alleges. It is because people
24 voluntarily decided that they didn't want to fly as much
25 during the early phases of the pandemic because they were
26 scared for their own health and safety. And how do we know

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2 that? Well, as we've all, unfortunately, come to realize,
3 the Coronavirus pandemic isn't going away. Covid is still
4 around. It is still circulating in the environment. It is
5 still on surfaces and in the air, in airports, in the
6 airplanes, the same as it ever was during the early phases
7 of the pandemic but customer demand for flying is back up.
8 And why is that? It is not because we physically eradicated
9 Coronavirus from Spirit's property. It's because consumer
10 preference has changed. People's risk tolerances for the
11 virus have changed, and people are just deciding to fly more
12 now than they were during the early phases. Now, that is
13 simply a change in consumer preference, and the policy
14 doesn't cover financial losses from changed consumer
15 preference. Now, there is --

16 THE COURT: Is there any -- any argument that's
17 made with respect to the business interruption coverage
18 relating to government orders of any types?

19 MS. SHAH: My understanding of Spirit's argument on
20 government orders is not that the government orders
21 themselves caused the reduced revenue that Spirit
22 experienced but that the presence of Coronavirus led to
23 government orders which also affected Spirit's magnitude of
24 losses. Now, I am going to defer to my colleague on the
25 other side if I properly stated their argument. They do
26 reference government orders, Your Honor, but those

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2 government orders, again, don't constitute physical loss or
3 damage to property. They can't and so they're left in the
4 same place.

5 Now, there are just three more cases that I just
6 wanted to identify for Your Honor that I think you'll find
7 instructive here. We obviously don't have time to discuss
8 the mountain myriad of cases that have come out on the issue
9 but there are three more that I'd like to identify for you.
10 The first is a case that Your Honor yourself decided in
11 March of this year. This is the *616 First Avenue* case.
12 Your Honor decided this case on similar issues and similar
13 allegations before the First Department's case in
14 *Consolidated Restaurant* was issued. And, nonetheless, Your
15 Honor applied the same reasoning that's applied in
16 *Consolidated Restaurant* to materially identical allegations
17 and dismissed that complaint.

18 And, again, the plaintiffs in the *616* case that was
19 before Your Honor earlier this year made almost the same
20 types of arguments and allegations that Spirit has made
21 here. Again, not surprising because it's the same law firm
22 on the other side that argued the *616* case as is arguing
23 here. And even before Your Honor had the benefit of the
24 *Consolidated Restaurant* holding from the First Department,
25 Your Honor looked at those types of allegations and
26 arguments the same as we have here, applied New York law and

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2 found them insufficient to allege loss or damage to property
3 under the terms of a similar insurance policy.

4 And in that case like here, the plaintiff alleged
5 that Covid was physically present on the property and
6 rendered the property unfit for intended use. And in that
7 case like here, the plaintiff also alleged that it had to
8 upgrade air filtration systems and installed remediations
9 like sanitation stations and Plexiglass dividers to remedy
10 the effects of Covid and Your Honor found those allegations
11 insufficient to state actual physical loss or damage to the
12 property and that the type of upgrades to the air filtration
13 systems and sanitation systems were simply long-term
14 improvements and were not the types of, quote, repairs to
15 property that had been physically damaged by the presence of
16 the virus or anything else.

17 The other two cases that I want to cite for Your
18 Honor are cases that we did not cite to you in our briefs or
19 in any of the supplemental authority letters, so I would
20 like to read the citations into record. These are two
21 recent cases that were issued by New York Supreme Courts in
22 the wake of *Consolidated Restaurant* that applied the holding
23 in *Consolidated Restaurant* to allegations that are
24 materially identical to Spirit here.

25 The first is *Rainbow USA the AIJJ Enterprises*.
26 It's at 2022 WL 113 6922. Now, in that case, the plaintiffs

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2 submitted expert affidavits on this issue that spoke to the
3 physical presence of the virus on the property and alleged
4 that the virus caused physical damage to the property. And
5 the Court in that case found even those kind of detailed
6 factual allegations in expert affidavits insufficient under
7 *Consolidated Restaurant* to state a claim because they are
8 like here the plaintiff couldn't and didn't allege any
9 tangible quantifiable change in the physical structure of
10 its property.

11 The second case is Peet's Coffee versus North
12 American Elite Insurance. It's at 2022 WL 147 1257. This
13 is another New York State court case applying *Consolidated*
14 *Restaurant* to dismiss claims that like here alleged that the
15 presence of the virus caused tangible alteration to its
16 property that impaired its usefulness and function. And,
17 again, applying *Consolidated Restaurant*, the New York courts
18 found that that was insufficient to state a claim because
19 the plaintiff like here couldn't allege any quantifiable
20 tangible change to its property.

21 Now, I want to just touch on one more argument that
22 Spirit makes in its briefs which the Court in the First
23 Department case also rejected, considered and rejected, and
24 that argument looks to several out-of-state non-New York
25 cases that have previously held in certain circumstances
26 that the presence of certain noxious substances like

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2 asbestos, ammonia gases, dust and debris from the 911
3 fallout, can, under certain conditions, constitute physical
4 loss or damage to property.

5 Now, the plaintiff in the *Consolidated Restaurant's*
6 case cited these same cases to the First Department, made
7 the same argument, and the First Department rejected that
8 argument and refused to adopt them, so did the Second
9 Circuit in the *Kim-Chee* case and the *10012 Holdings* case
10 that the First Department adopted and so did Your Honor in
11 the *616* case that we've spoken about earlier this morning.

12 In fact, every New York court to have addressed
13 this argument that tries to analogize these other noxious
14 substance cases to the Coronavirus pandemic has rejected the
15 argument and rejected the applicability of those cases here
16 and that's for good reason because those cases are
17 materially different than the situation at hand. And in
18 those cases, the presence of the kinds of substances alleged
19 was so pervasive that it made it physically impossible for
20 humans to inhabit the premises and amounted to a physical
21 dispossession of the property.

22 Now, we know that's not the case here because
23 Spirit's own complaint concedes that people kept coming into
24 its airports, kept flying on airplanes during the
25 Coronavirus pandemic. They were not physically dispossessed
26 of the property. They were in and around the property just

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in reduced numbers than what they were before.

Now, unless Your Honor has any other questions, I want to just briefly touch on two other issues that we've raised in our briefs. We are going to largely rest on the papers on these issues, but I just want to note them. The first is that in addition to the business interruption coverage that we've been discussing, Spirit also points in its complaint to a number of additional coverages that it alleges that it's entitled to under its insurance policy.

Now, as we stated in our briefs, all of those additional coverages failed for the same reasons that we have been discussing this morning because all of them depend, in some respect, on an allegation of physical loss or damage to Spirit's covered property. Well, let me say either to Spirit's covered property or the property in the vicinity of Spirit's property, but they all depend on allegations of physical loss or damage the same as the business interruption coverage and they fail for the same reasons.

Now, the last issue that we've raised is an exclusion in the policy that deals directly with contamination by viruses that are dangerous to human health. Now, Your Honor doesn't even need to reach this issue if you agree with us on the gating issue that Spirit failed to allege physical loss or damage to its property. But if Your

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2 Honor does choose to reach the exclusion, the exclusion
3 provides an independent basis to dismiss Spirit's claims
4 because the policy explicitly excludes from any coverage any
5 actual alleged or threatened release, discharge, escape or
6 dispersal of pollutants or contaminants where the definition
7 of contaminants expressly includes any virus, which after
8 it's released, can cause or threaten damage to human health
9 or human welfare. There's no question that that broad
10 exclusion applies by its plain terms here and that provides
11 an independent basis to foreclose Spirit's claims.

12 Thank you, Your Honor. If you don't have any
13 further questions for me, I'll rest on that.

14 THE COURT: All right. Mr. Ladd.

15 MR. LADD: Good morning, Justice Reed. Again, this
16 is Marc Ladd on behalf of the plaintiff policyholder Spirit
17 Airlines. May it please the Court. I want to take just two
18 points said right off the top by my opposing counsel, and I
19 promise I will try to be brief, and that is the first one.
20 Miss Shah says that and AIG's brief tries to cabinet
21 Spirit's claim solely as one for mere loss of use. Why?
22 Because then it falls within the paradigm of *Roundabout*
23 *Theatre* and it falls within the ruling of *10012* where the
24 early Covid cases that were pled were just mere loss of use
25 without any allegation of physical presence.

26 But at the same time, Miss Shah admits and AIG

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2 brief admits that the airports and the terminals where
3 Spirit's property was located were never actually lost to
4 use. They stayed open. It is just that there was lower
5 demand as a reason and Miss Shah blames that on consumer
6 preference and now income has come back to the travel
7 industry because people just feel like traveling again.

8 Well, we all know that's not necessarily true. Why
9 was there lower demand at the start of the pandemic?
10 Because people didn't want to go to the airport and catch
11 Covid-19. That's why. And in fact, Your Honor, in
12 paragraph 100 of our complaints, we state specifically that
13 in a question to the CDC of, "Can flying on an airplane
14 increase my risk of getting Covid-19." The CDC's answer
15 was, "Yes, air travel requires spending time in security
16 lines and airport terminals, which can bring you in close
17 contact with other people and frequently touched surfaces.
18 This may increase your risk of exposure to the virus that
19 causes Covid-19."

20 Now, I will speak for myself. I have gotten the
21 vaccine. Others have as well. The transmissible rates of
22 Covid-19 has gone down significantly. Is it still around?
23 Yes, but it has gone down significantly and it's no longer a
24 roaring demand for flying on an airplane. That's why
25 Spirit's losses have not continued this entire time but were
26 at its height during the height of the pandemic.

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2 Now, Your Honor, I agree -- the second thing I
3 wanted to briefly bring up is I agree with Miss Shah that
4 *Consolidated Restaurant Operations* is the relevant case
5 here. And, Your Honor, I would ask respectfully that the
6 Court here deny AIG's motion for two reasons. And the first
7 is that the decision in *Consolidated Restaurant Operations*,
8 CRO, incorrectly interpreted prior New York law and it
9 created a new standard for physical loss or damage not in
10 prior New York law and then disregarded the allegations in
11 the complaints which it wasn't necessarily allowed to do on
12 a motion to dismiss.

13 THE COURT: Counsel, you asked quite a lot there.
14 I don't have the ability to -- I don't have the ability to
15 say that my First Department incorrectly interpreted
16 something. I follow the First Department until the Court of
17 Appeals says that the First Department is wrong. So, you're
18 asking too much of me. The thing that you need to do is to
19 appeal and win and that's in the Court of Appeals. Your
20 argument before me is necessarily falling on deaf ears the
21 moment you say that I should rule that the First Department
22 is incorrect.

23 MR. LADD: I understand your point, Your Honor.
24 The two things I would say in response to that point are
25 that the recent California Court of Appeals case in *Marina*
26 *Pacific Hotels versus Firemen's Fund*, the cite for that,

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2 Your Honor, is 2022 WL 2711886, was surveying the landscape
3 of California law on coverage for Covid-19 claims and came
4 to the conclusion that the way the courts were interpreting
5 presence of the virus and whether or not that can bond with
6 property and cause physical loss or damage was not being
7 properly evaluated by the trial courts.

8 Your Honor, that court said that other courts have
9 found, without evidence, the Covid-19 virus does not damage
10 property but the insurers here expressly allege that it can
11 and that it did. We are not authorized to disregard those
12 allegations on a general belief that surface cleaning may be
13 the only remediation necessary. The reason I bring that up,
14 Your Honor, is because before that decision there were
15 several courts in California that had likened their
16 experience with Covid-19 claims and their standard for
17 physical loss or damage to New York courts.

18 Specifically the Court -- specifically the Court in
19 Intermediate Poco (Phonetic) versus Eleon (Phonetic) Global
20 Risks both CRO, that was a Southern District of California
21 case in June of this past year. They quoted CRO and it said
22 that there must be, quote, some physical problem with the
23 property by some physical change before and after the
24 alleged occurrence. And it said the California courts
25 interpret standard for physical loss or damage the same way.
26 Physical alteration of property is necessary and it quoted

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And then a month later -- and it dismissed that case -- and then a month later the California Court of Appeals said that these claims are not being evaluated properly on a motion to dismiss. There it was a demurrer but it is the same standard essentially as a motion to dismiss. The reason I bring that up, Your Honor, is because here with Spirit's complaint there are over a hundred allegations of specific allegations of, number one, science of the virus and what we know so far and that it can attach to property and that it can stay on surfaces for days.

Number two, the actual property being alleged to have been physically altered here it is in airport terminals. Your Honor, it is in some of the largest domestic airports in the country and because of where that property is Covid-19 is being constantly reintroduced into the environment and that is why there was constant cleaning of Spirit's property. That's why there were new ventilation systems put in.

Your Honor, number three, confirmed cases, actual confirmed cases of Spirit employees and other employees at airports having Covid-19. Your Honor, when AIG requested more information after we gave notice, we specifically said there were 65 employees as of April 28th that were confirmed cases of Covid-19 on and around the property. And

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tellingly, Your Honor, when we told AIG that, did they come back and deny coverage? Of course, it was a massive -- there was, obviously, going to be a massive economic loss but they never said the presence of Covid-19, which you're telling us has happened and is confirmed, is not physical loss or damage.

In fact, they asked how has Covid-19 affected the property and Spirit responds to that question. What they said was you've been shut down by a civil authority order, all caps, meaning a civil authority coverage had been triggered but, but, Your Honor, it has -- it has to come from a covered peril. And they said here there's not that covered peril because you have a pollution contamination exclusion that applies. Please let us know if there is any additional information.

I think that's very telling, Your Honor. Now, AIG said in its reply brief that this was a, I believe, gross mischaracterization of their denial letter. Your Honor can read the denial letter. It speaks for itself. It is docket number 22. It's clearly imparting, not taking any position that the presence of Covid-19, which Spirit had always alleged, was physical loss or damage to property. Why? Because we have had decades of case law, Your Honor, where noxious, invisible substances can lead to physical loss or damage.

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2 Your Honor, in the *Newman Myers* case in the
3 Southern District of New York in 2014, it said that it does
4 not require structural or even visible damage to property.
5 It just took the position that there was no actual physical
6 loss or damage actually alleged in that law office in *Newman*
7 *Myers*. And, Your Honor, that's what I respectfully submit
8 is the difference here. And Your Honor remarked on that
9 difference in the *616 Avenue* case. Your Honor said, and I
10 quote, "*Roundabout Theatre*, there is no relation to the
11 facts here presented by the policyholder alleging the
12 physical presence of the virus causing physical alteration
13 to property."

14 But I think as Your Honor probably knows is that
15 when these decisions were first coming out there was no
16 standard for invisible but obviously a physical particle
17 that existed on property and so *Roundabout Theatre* was cited
18 repeatedly even though *Roundabout Theatre* was a mere loss of
19 use case and everyone acknowledges that. Again, Your Honor,
20 we're not alleging mere loss of use but that's not what's
21 required for coverage. What's required for coverage is a
22 partial interruption of your business. It could be measured
23 in gross profits caused by physical loss or damage. And,
24 Your Honor, I would respectfully submit that we have alleged
25 that here.

26 THE COURT: How do you address the specific virus

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exclusion under policy section five?

MR. LADD: Your Honor, I address that exclusion honestly by looking at its plain terms which I know Miss Shah and AIG say says the word virus. Now, just because it says the word virus, it doesn't mean it was an exclusion intended for spread of communicable disease. The insurance industry has exclusions for that. It was promulgated in 2006 in response to the 2003 SARS outbreak and it went into property policies even though, apparently, the virus can't cause property loss and it specifically focused on disease and bacteria caused by a communicable virus. The industry has said that is what was intended. That's not in this policy.

Your Honor, I look quickly to the words of the exclusion. It says, threatens, release, discharge, escape, dispersal, pollutants or contaminants and pollutants or contaminants have the same definition, solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste, which after its release.

Your Honor, I am unaware, and I've looked through a lot of cases, of specific, that specific language in a pollution, clearly a pollution, contamination exclusion for environmental and industrial pollution and contamination applying to Covid-19. It specifically has the words, which

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2 after its release can cause or threaten damage to human
3 health or human welfare or causes or threatens damage,
4 deterioration.

5 Your Honor, after its release means it's being
6 affirmatively or intentionally kept. The virus isn't being
7 released. It is not being kept. What it's doing is it's
8 falling on property around infected individuals. There is a
9 specific carve out to that exclusion, Your Honor. It says,
10 "We will pay the reasonable and necessary expenses incurred
11 by you to remove, dispose of, or clean up the actual
12 presence of pollutants or contaminants from land or water at
13 a covered location when such land or water is contaminated
14 or polluted."

15 Your Honor, AIG knows this is a stock environmental
16 and industrial pollution and contamination exclusion. It
17 could have put in the exclusion it was specifically intended
18 for communicable disease and it did not. It can't shoot on
19 that exclusion now. Your Honor -- I think Your Honor
20 understands the issue very well. I would say that as Miss
21 Shah pointed out my firm is involved in the CRO case. I
22 would submit to Your Honor that if Your Honor is inclined,
23 at this time, to agree with AIG on its motion to dismiss and
24 even in the light most favorable, Spirit, we don't allege
25 physical loss or damage but that the exclusion applies, that
26 under CPLR 2201 if the court would consider a stay of the

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proceedings, a stay of the decision, until we find out whether or not the Court of Appeals is going to affirmatively take on the CRO appeal.

My knowledge of that is that the appeal or the motion for leave for the appeal was fully submitted July 25th. So, if the -- if Your Honor would issue a short stay until the Court of Appeals can weigh in on CRO, if the Court is inclined to agree with AIG on this motion, we would respectfully request it. Thank you, Your Honor. Unless Your Honor has any further questions.

THE COURT: No thank you.

Miss Shah.

MS. SHAH: Your Honor, if I may just briefly respond to a few points. I am going to take the last one first. There's no reason to issue a stay of this decision in this case. As Mr. Ladd noted, the Court of Appeals has not yet taken up a motion for leave to appeal the *Consolidated Restaurant's* case. I know the First Department denied that motion that was made to the First Department and the Court of Appeals hasn't yet indicated any willingness to take it up either.

So as of right now, it remains binding precedent on this court and on all New York Supreme Courts in the jurisdiction. And, in fact, I'm aware of at least six New York Supreme Court cases, including the two that I cited

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2 to Your Honor, that have applied *Consolidated Restaurant* to
3 claims such as this and have dismissed those claims on the
4 pleadings. There is no reason for Your Honor to hold off
5 doing so now. And, in fact, even without the *Consolidated*
6 *Restaurant's* case, the decision should be the same.

7 As Your Honor noted in the 616 case, which as I
8 mentioned you decided before the *Consolidated Restaurant's*
9 decision, there were identical allegations and arguments and
10 Your Honor found them unavailing under prevailing New York
11 law at that point in time, so did almost a hundred other
12 New York State and federal court cases applying New York
13 law. There is simply no reason to wait and Your Honor
14 should dismiss the complaint now as those almost other
15 hundred cases have including cases following the First
16 Department's decision in *Consolidated Restaurant*.

17 I want to move very briefly to the contamination
18 and virus exclusion that Your Honor asked my colleague
19 about. Mr. Ladd's argument in response to Your Honor's
20 question is you shouldn't apply the plain terms of this
21 contamination exclusion that explicitly includes viruses
22 which, after they're released, can cause or threaten damage
23 to human health or human welfare because there's a different
24 exclusion that is sometimes used in other policies that may
25 have the same affect and that's the ISO virus exclusion that
26 Mr. Ladd noted that some other policies use as a standard

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form.

Now, as we've said in our briefs, the fact that there may be different language that other policies use to the same effect doesn't mean that the plain words of the exclusion that's used in this policy should be disregarded. And even more to the point, the First Department, again, considered this same argument made by Mr. Ladd's firm in the *Consolidated Restaurant's* case and explicitly rejected it and that's at page six of the *Consolidated Restaurant* decision.

The First Department says "plaintiff's argument that a property insurance policy without a virus exclusion provides coverage for loss or damage caused by viruses is contrary to well-settled law that exclusion clauses subtract from coverage rather than grant it."

That argument is simply not available to Mr. Ladd here. The First Department has rejected it. Lastly, Your Honor, and very briefly, the citations that Mr. Ladd gave you to the California cases applying California law, very simply, we're not in California. We are not under California law here. We are in New York. We are applying New York law. And the California intermediate appellate court's interpretation of California law on this question simply cannot trump the First Department's interpretation which, as Your Honor noted, is binding on Your Honor of

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2 New York law on this question. So, unless Your Honor has
3 any further questions for me, I'll rest on those points.
4 Thank you.

5 THE COURT: I've heard from the parties, the
6 parties' counsel, with respect to the motion. I have
7 previewed the papers as well. Spirit is an International
8 Airline Company, American Home, through AIG, issued a
9 commercial property damage insurance policy to Spirit to
10 cover physical loss and damage to Spirit's property. Spirit
11 claims that the presence of the Covid-19 virus on their
12 property caused physical damage and economic loss, it should
13 be covered by the American Home policy.

14 Spirit commenced this breach of contract action
15 seeking both damages and a declaration that American Home is
16 obligated to pay for Spirit's losses in accordance with the
17 policy terms. American Home moves to dismiss this action
18 for failure to state a claim. According to American Home,
19 the Covid pandemic did not result in physical loss
20 sufficient to trigger coverage. And the first cause of
21 action for breach of contract, Spirit alleges the covered
22 loss under the policy due to the Covid-19 pandemic.
23 American Home denied coverage and breach of the insurance
24 agreement according to Spirit.

25 The second cause of action for declaratory
26 judgment, American Home -- Spirit wants the Court to find

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2 that American Home is obligated to pay up to the per current
3 limit for Spirit's property loss or damage and business
4 income losses under the policy. Dismissal here is sought
5 pursuant to CPLR 3211 (a)(1), defense is founded upon
6 documentary evidence and CPLR 3211 (a)(7) where the
7 pleadings failed to state a cause of action. The legal
8 standard is well-known on a motion to dismiss.

9 Pursuant to CPLR 3211, pleadings to be afforded a
10 liberal construction. The Courts accept the facts as
11 alleged in plaintiff's truth and afford the plaintiff the
12 benefit of every possible favorable inference and determine
13 whether only the facts as alleged fit within any cognizable
14 or legal theory.

15 Under Section 32 -- CPLR Section 3211 (a)(1),
16 dismissal is warranted only if the documentary evidence
17 submitted conclusively establishes the defense to the
18 asserted claims as a matter of law. The Court necessarily
19 here must look at the policy itself under New York law.
20 Unambiguous provisions in an insurance policy are given
21 their plain and ordinary meaning.

22 The American Home policy is a commercial property
23 policy that ensures against direct physical loss or damage
24 by a covered cause. A covered cause is defined as peril or
25 other loss not excluded under the policy. A policy excludes
26 lost coverage directly or indirectly by pollutants or

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2 contaminants. Pollutants or contaminants are defined to
3 include a virus. The time element provision of the policy
4 provides coverage against partial or total interruption of
5 business operations during a period of indemnity as a result
6 of direct physical loss or damage to covered property by a
7 covered loss -- covered cause of loss.

8 If the time element provision applies, lost
9 earnings are paid up to a limit but only during a period of
10 indemnity which ends when the damaged property could be
11 repaired or replaced. In support of its motion for dismiss,
12 American Home makes several arguments that the Court will
13 summarize.

14 First, the presence of Covid-19 does not constitute
15 direct physical loss or damage to property.

16 Second, the policy language limits coverage to
17 physical loss meaning physical alteration. The government
18 orders do not cause physical loss or damage.

19 Third, the complaint fails to identify any property
20 where the virus was found to exist and failed to state the
21 presence of the virus caused physical damage. For the time
22 element coverage that Spirit seeks to invoke is predicated
23 on the existence of physical loss or damage.

24 Fifth, loss covered by Covid contamination is not a
25 covered loss. The policy expressly exclude viruses that
26 damage held for a human welfare from coverage irrespective

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of whether a loss to property occurred.

In opposition, Spirit argues several points or summarize, as follows, one, policy terms, direct physical loss or damage are not defined in the policy. Using the dictionary's definition of the words, the phrase can be read to mean a material thing that has impaired the value or usefulness or physical function or capability of the insured's property.

Two, Spirit seeks coverage for property damage occasioned by the presence of Covid that extends beyond mere economic loss. Spirit alleges property damage that had to be repaired and replaced i.e. new ventilation systems and filters as well as alterations to the property which included the installation of Plexiglass dividers, sanitation stations and signage, all requiring expenditures of additional money.

The third, three, the policy provides additional coverages for time element i.e. business interruption. The defendant agreed to pay Spirit business income losses where an order of civil authority limits or restricts access to property not uninsured under the policy, under the policy -- not insured under the policy provided that -- the defendant agreed to pay Spirit's business income losses where an order of civil authority limits or restricts access to property not insured under the policy provided that such property

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2 sustained direct physical loss or damage by covered loss,
3 and the effect of such order is to partially or totally
4 prohibit access to Spirit's covered locations. They point
5 to the time element of coverage tab of the policy.

6 Four, Covid's ability to affix to property -- to
7 property and surfaces causes physical loss or damage to
8 property which renders the property a potentially deadly
9 transmission device making it unfit for its intended use.

10 Additionally, Covid aerosols can transmit the virus
11 making the air inside enclosed buildings hazardous. The
12 actual presence of Covid in Spirit's covered locations,
13 according to Spirit, altered the surfaces and impaired the
14 functionality of covered property constituting a physical
15 loss or damage under the policy's language. As indicated
16 before, CPLR 3211 (a)(1) motion to dismiss made on the
17 ground that the action was barred by documentary evidence is
18 appropriately granted, whether documentary evidence refutes
19 plaintiff's factual allegations conclusively establishing a
20 defense as a matter of law.

21 The insurance policy quantifies as documentary
22 evidence under CPLR 3211 (a)(1) and, therefore, the proper
23 review is whether plaintiff's claims losses are covered
24 under the policy. Here, the Court will cite Consolidated
25 Restaurant versus Westport Insurance at 205 AD 3d 76 the
26 recent First Department case that we spent so much time

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2 talking about here today. In considering the motion to
3 dismiss pursuant to CPLR 3211 (a)(7), for failure to state a
4 cause of action, the sole criteria is whether a pleading
5 states a cause of action and hits from the complaints four
6 corners factual allegations manifest the cause of action
7 cognizable at law. And the Court will cite a well-known
8 case *Guggenheimer versus Ginzburg* 43 NY 2d 268.

9 Here, Spirit seeks coverage for revenue it
10 allegedly lost due to a Covid pandemic and for cost
11 suspended in altering or modifying its property due to the
12 presence of Covid -- of a Covid-19 virus. Spirit argues
13 that the presence of the virus impaired the value,
14 usefulness, and functionality of its property sufficient to
15 warrant coverage under the policy with American Home.

16 Spirit's claims as pleaded and assumed to be true
17 for purposes of this motion raised the question of whether
18 the mere presence of the Covid-19 virus constitutes direct
19 physical loss or damage to property sufficient to enforce
20 the terms of the insurance policy that requires a direct
21 physical loss or damage to be applicable with no
22 quantifiable change or actual damage to the property itself
23 has occurred.

24 This question more squarely addressed by the First
25 Department in the case of *Consolidated Restaurant Operations*
26 *versus Westport Insurance Company* and again citations 205 AD

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2 3d at 76. This was, therefore, the appellate court a matter
3 of first impression and there had been scores of decisions
4 by the New York State court and there had been other
5 certainly several other court decisions by courts in
6 Southern District and in the Second Circuit. But for the
7 First Department, this was a matter of first impression.

8 In Consolidated, plaintiff sought to enforce a
9 policy that insures all risks of direct physical loss or
10 damage to insured property while on insured locations
11 provided such physical loss or damages occurred during the
12 term of the policy. Beyond covering physical loss or damage
13 itself, the policy also provided coverage for associated
14 time element losses, also known as business interruption
15 loss, during the period of direct physical loss or damage to
16 the property.

17 The plaintiffs filed a claim alleging it suffered
18 direct physical loss or damage because the presence of the
19 virus in and on its property and argued that though its
20 presence eliminated the functionality of the covered
21 property. The First Department interpreted direct physical
22 damage or loss to property to mean something that directly
23 happens to the property resulting in physical damage to it,
24 some physical problem with the covered property had to have
25 occurred.

26 Loss could not be found where there was just the

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2 mere loss of use. The property must be changed, damaged or
3 affected in a tangible way. If the proffered facts do not
4 identify any physical; that is, tangible difference to the
5 property, the complaint fails to state a cause of action,
6 First Department held.

7 Spirit makes many of the same arguments as
8 plaintiff did in Consolidated. As noted -- as noted,
9 counsel for Spirit was counsel for the appellant in the
10 Consolidated case. Spirit seeks enforcement of the policy
11 by claiming a physical loss or damage which Spirit
12 identifies as having occurred by the presence of the
13 Coronavirus on its property.

14 Spirit does not identify a physical change or
15 damage to the property itself outside of the presence of the
16 virus. Rather, Spirit alleges it's the same economic loss
17 and expenses in having to clean, protect and preserve its
18 properties. Spirit's policy ensures against risk of direct
19 physical loss or damage to covered property. The policy
20 covers business interruption losses only to the extent that
21 they are due to direct, physical loss or damage to property.

22 The terms direct and physical, as it pertains to
23 damage, loss of property under an insurance policy, requires
24 the showing of actual loss of property not simply the
25 inability to use it. The Court cites Spirit -- excuse me.
26 I will cite Consolidated at 205 AD 3d at page 83. The Court

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2 held as well that the First Department in Consolidated, the
3 Court has said earlier the Court follows the First
4 Department until and unless directed otherwise by the
5 New York Court of Appeals, but the First Department in
6 Consolidated adopted the reasoning as persuasive of a Second
7 Circuit in two important cases, *Kim-Chee LLC versus*
8 *Philadelphia Indemnity Insurance Company*. The cite for that
9 is 22 WL 258569 and *10012 Holdings Inc. Versus Sentinel*
10 *Insurance Company* at 21 F.4th 216 at 222.

11 In *Kim-Chee* the Court there said that to survive
12 dismissal the complaint must plausibly allege that the virus
13 itself inflicted actual physical loss of or damage to the
14 property. In *Kim-Chee* Second Circuit Court of Appeals
15 rejected plaintiff's arguments that property was physically
16 damaged due to Covid-19 exposure. In affirming the
17 dismissal of the complaint at an initial stage, the Court
18 held that the complaint did not allege that any part of its
19 building or anything within it was damaged let alone to the
20 point of repair, replacement or total loss.

21 Likewise and *10012 Holdings*, another case applying
22 New York law, the Second Circuit also rejected plaintiff's
23 claim that it had suffered a physical event within the
24 meaning of its policy. The Court affirmed dismissal of the
25 complaint because the facts did not show direct physical
26 loss or physical damage to the plaintiff's property and the

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policy did not extend to mere loss of use of a premises but rather required actual physical loss of or damage to the insured's property.

In this court's view, it is bound to accept the -- bound to accept, obviously, the reasoning of the First Department. Counsel for Spirit flatly says that the Court should rule based upon an understanding that the Court's decision -- the First Department's decision was incorrect. I do not -- that's not how this court rules. I follow the First Department law, and I accept, as they did, the persuasiveness of the Second Circuit.

The Court will also note, as I said before, counsel has said this, counsel for American Home has said this, there is no New York State court that has determined otherwise. Every day it seems or certainly every week we see some decision by New York State Supreme Court addressing this issue in finding exactly the way that the First Department found both before the First Department found this in Consolidated and after.

Here, I would add that the policy, as a further matter, the policy expressly excludes loss caused directly or indirectly by viruses that harm human health reading the policy in its plain terms. That is an additional reason, an additional reason to dismiss this complaint. Spirit has not sufficiently alleged a direct physical damage or loss of

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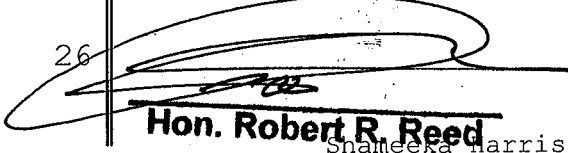
property to state a cause of action and has failed to identify a loss not excluded by the policy's expressed terms. And I believe that the documentary evidence here, the policy itself, is also conclusive. So both and for the reasons expressed in *Consolidated Restaurant Operations*, for the reasons as stated in *Kim-Chee Second Circuit*, for the reasons stated in *10012 Holdings* and pursuant to CPLR 3211 (a) (1) and (a) (7), the complaint herein should be dismissed in its entirety.

Accordingly, it is hereby ordered that the motion to dismiss is granted. It is further ordered, therefore, that the clerk enter judgment dismissing the complaint in its entirety. And I direct counsel for the movant to order a copy of the transcript of today's proceedings and present it to the clerk in Part 43 for so ordering. That so ordered transcript will be uploaded and together with a short form gray sheet order that will reflect the Court's decision and order of this date and will be an appealable instrument. I will have the court reporter put up her e-mail address in the chat.

* * * *

Certified to be a true and accurate transcript of the stenographic minutes taken within.

SO ORDERED:


Hon. Robert R. Reed

Shameeka Harris
SHAMEEKA HARRIS, CSR, RMR, CLR
Senior Court Reporter

Shameeka Harris, CSR, RMR, CLR - Senior Court Reporter