UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

147 FIRST REALTY LLC	:	Civ. No. 3:22CV00569(SALM)
v.	:	
ASPEN AMERICAN INSURANCE COMPANY	:	September 2, 2022

RULING ON MOTION TO DISMISS [Doc. #22]

Defendant Aspen American Insurance Company ("Aspen" or "defendant") has filed a motion pursuant to Federal Rule of Civil Procedure 12(b)(6) seeking to dismiss the Complaint in its entirety. [Doc. #22]. Plaintiff 147 First Realty LLC ("147 First Realty" or "plaintiff") has filed a memorandum in opposition to the motion [Doc. #36], to which defendant has filed a reply. [Doc. #37]. For the reasons stated herein, the Motion to Dismiss [**Doc. #22**] is **GRANTED.**

I. Background

The Court accepts the following allegations as true, solely for purposes of this Motion to Dismiss.

"Plaintiff owns and operates the East Village Hotel, a boutique hotel consisting of suites with fully equipped kitchenettes in the East Village neighborhood of New York, where scores of guests come to stay overnight or for extended periods to time to attend events and visit the New York City area." Doc.

#1-1 at 7 (sic). "Prior to the pandemic, Plaintiff purchased an 'all risk' insurance policy from Defendant, which included coverage for direct physical loss of or damage to properties (or both) for business interruption[.]" Id. at 9.[1]

"On or about March 2020, the state of New York and city of New York issued orders closing or restricting access to numerous business locations, including Plaintiff's premises insured under the Policy." Id. at 23. "Because of the danger posed by COVID-19 and its spread ... Plaintiff also determined that closure was necessary to slow the spread of COVID-19 as a result of infected persons on the property or from those who would enter the property." Id.

By its terms, the Policy provides coverage for "direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss." Id. at 58. The Policy defines "Covered Cause of Loss" as "direct physical loss unless the loss is excluded or limited in this policy." Id. at 83.

The Policy also contains a Business Income provision, which provides, in part:

> We will pay for the actual loss of Business Income you sustain due to the necessary "suspension" of your "operations" during the "period of restoration". The "suspension" must be caused by direct physical loss of

[1] The Court refers to this policy as "the Policy" throughout this ruling.

> or damage to property at premises which are described in the Declarations and for which a Business Income Limit Of Insurance is shown in the Declarations. The loss or damage must be caused by or result from a Covered Cause of Loss.

Id. at 74.

Finally, the Policy contains a Civil Authority provision, which states, in part:

> When a Covered Cause of Loss causes damage to property other than property at the described premises, we will pay for the actual loss of Business Income you sustain caused by action of civil authority that prohibits access to the described premises, provided that both of the following apply:
>
> > (1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property; and
> >
> > (2) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property[.]

Id. at 75.

Plaintiff asserts that, as a result of the COVID-19 pandemic, it

> promptly advised Defendant it sustained and is sustaining losses and expense covered by the Global All Risk Policy. ... Defendant has failed to accept, acknowledge or provide coverage for or make any payment with respect to Plaintiff's losses and expenses. ... Defendant's failure to provide coverage for Plaintiff's losses and expenses constitutes a breach of the Global All Risk Policy.

Id. at 37.

II. Legal Standard

"When deciding a motion to dismiss, a district court may consider documents attached to the complaint or incorporated by reference into the complaint[,]" including an insurance policy attached to the complaint. New Image Roller Dome, Inc. v. Travelers Indem. Co. of Ill., 310 F. App'x 431, 432 (2d Cir. 2009) (citation omitted).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citation and quotation marks omitted); accord Kaplan v. Lebanese Canadian Bank, SAL, 999 F.3d 842, 854 (2d Cir. 2021). In reviewing such a motion, the Court "must accept as true all nonconclusory factual allegations in the complaint and draw all reasonable inferences in the Plaintiffs' favor." Kaplan, 999 F.3d at 854 (citations omitted).

"[W]hile this plausibility pleading standard is forgiving, it is not toothless. It does not require [the Court] to credit legal conclusions couched as factual allegations or naked assertions devoid of further factual enhancement." Mandala v. NTT Data, Inc., 975 F.3d 202, 207 (2d Cir. 2020) (citation and quotation marks omitted). "A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause

of action will not do." Iqbal, 556 U.S. at 678 (citations and quotation marks omitted).

III. Choice of Law

Defendant asserts that "New York law applies to the interpretation of the Policy. Regardless, for purposes of this motion, there is no difference between New York and Connecticut law -- both preclude coverage." Doc. #22-1 at 13. Plaintiff "agrees [that New York law applies] because the location of the insured risk -- the East Village Hotel -- is in New York City." Doc. #36 at 10. The Court therefore applies New York law, but has consulted Connecticut law as well.

IV. Law Regarding Interpretation of Insurance Policies

> In New York State, an insurance contract is interpreted to give effect to the intent of the parties as expressed in the clear language of the contract. If the provisions are clear and unambiguous, courts are to enforce them as written. However, if the policy language is ambiguous, particularly the language of an exclusion provision, the ambiguity must be interpreted in favor of the insured.

Vill. of Sylvan Beach, N.Y. v. Travelers Indem. Co., 55 F.3d 114, 115 (2d Cir. 1995) (citations omitted). "Contract language is ambiguous if it is reasonably susceptible of more than one interpretation, and a court makes this determination by reference to the contract alone." Burger King Corp. v. Horn & Hardart Co., 893 F.2d 525, 527 (2d Cir. 1990).

V. Discussion

Defendant moves to dismiss all three counts of plaintiff's Complaint. See Doc. #22-1. Count One seeks a declaratory judgment that "[e]ach coverage provision identified in the Complaint is triggered by Plaintiff's claims[.]" Doc. #1-1 at 36. Count Two asserts a claim for breach of contract on the grounds that "Defendant's failure to provide coverage for Plaintiff's losses and expenses constitutes a breach of the Global All Risk Policy." Id. at 37. Count Three asserts a claim for "Breach of the Duty of Good Faith and Fair Dealing and Bad Faith" based upon "Defendant's refusal to honor its obligation to act in good faith with respect to Plaintiff's claim[.]" Id. at 38-39. Because the Court finds that plaintiff's failure to adequately allege any physical loss or damage is determinative of both Count One and Count Two, it considers these claims together.

A. Breach of Contract and Declaratory Judgment

Count One and Count Two each fail to state a claim upon which relief can be granted because plaintiff has not adequately alleged any physical loss or damage under the Policy.

1. Relevant Contractual Provisions

Plaintiff appears to assert the right to coverage under: (1) the Building and Personal Property Coverage Form; (2) the

Business Income (Without Extra Expense) Coverage Form; and (3) the Civil Authority provision. See Doc. #1-1 at 27-32.[2]

First, plaintiff asserts the right to coverage under the Building and Personal Property Coverage Form. This provision provides coverage for "**direct physical loss of or damage to Covered Property** at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss." Id. at 58 (emphases added). Thus, under this provision, "direct physical loss of or damage to" property is necessary to trigger coverage.

Second, plaintiff asserts the right to coverage under the Policy's Business Income (Without Extra Expense) Coverage Form. This provision provides, in part:

> We will pay for the actual loss of Business Income you sustain due to the necessary "suspension" of your "operations" during the "period of restoration". The "suspension" **must be caused by direct physical loss of or damage to property** at premises which are described in the Declarations and for which a Business Income Limit Of Insurance is shown in the Declarations. The loss or damage must be caused by or result from a Covered Cause of Loss.

[2] The Complaint also asserts the right to coverage under Extra Expense, Dependent Property, and Communicable Disease provisions. See Doc. #1-1 at 27-32. Defendant argues that plaintiff is not entitled to coverage under these theories because "[t]he Policy contains none of these provisions." Doc. #22-1 at 15. In its opposition, plaintiff fails to point to any of these provisions in the Policy, and the Court has been unable to identify any of these provisions through its independent review of the Policy. Accordingly, plaintiff's claims for coverage under these purported provisions fail.

Id. at 74 (emphases added). Thus, under this provision, "direct physical loss of or damage to property" is necessary to trigger coverage.

Finally, plaintiff asserts the right to coverage under the Civil Authority Provision. This provision states:

> When a **Covered Cause of Loss** causes damage to property other than property at the described premises, we will pay for the actual loss of Business Income you sustain caused by action of civil authority that prohibits access to the described premises, provided that both of the following apply:
>
> > (1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property; and
> >
> > (2) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property[.]

Id. at 75 (emphases added). A Covered Cause of Loss is defined as "**direct physical loss** unless the loss is excluded or limited in this policy." Id. at 83 (emphases added). Thus, to invoke coverage under this provision, plaintiff must adequately allege that a "direct physical loss" "cause[d] damage to property[.]" Id. at 83, 74.

In sum, each provision under which plaintiff asserts the right to coverage requires either "physical loss" or "physical loss of or damage to" property. The Court finds that plaintiff

has not adequately alleged any "physical loss of or damage to" property here.

2. The Policy's Language

The Court turns to the threshold interpretive issue of the Policy language. The Court finds that the phrase "physical loss of or damage to" is not ambiguous. Where, as here, a term is undefined in an insurance policy, it must "be construed so as to give the term its ordinary and accepted meaning[.]" Sloman v. First Fortis Life Ins., 266 A.D.2d 370, 371 (N.Y. App. Div. 1999).

A review of the ordinary and accepted meaning of the phrase "physical loss of or damage to" reveals that "the language of the Policy was clear and unambiguous, and required coverage only in the event of some physical harm to property, which was not present here." Jeffrey M. Dressel, D.D.S., P.C. v. Hartford Ins. Co. of the Midwest, Inc., No. 20CV02777(KAM), 2021 WL 1091711, at *3 (E.D.N.Y. Mar. 22, 2021). Indeed, as the Eastern District of New York has aptly explained:

> The plain language of "physical loss of ... property" does not mean, as Plaintiff argues, a loss of the ability to run the business. A "physical loss" means that physical property suffered a loss. Plaintiff, however, does not allege that its loss of income was caused by any physical property suffering a loss, in value or otherwise. Similarly, "physical damage to property" can only mean that the physical property suffered some sort of physical damage.

Id. (citations to the record omitted).

The undersigned agrees with this analysis. "Deriving the plain and ordinary meaning of identical contract language from the dictionary, courts in this Circuit have repeatedly concluded that the phrase direct physical loss of or physical damage to connotes a negative alteration in the tangible condition of property, that is, that this phrase requires some form of actual physical damage to the insured premises." Mario Badescu Skin Care Inc. v. Sentinel Ins. Co., No. 20CV06699(AT), 2022 WL 253678, at *4 (S.D.N.Y. Jan. 27, 2022) (citations and quotation marks omitted). "Losing the ability to use otherwise unaltered or existing property simply does not change the physical condition or presence of that property and therefore cannot be classified as a form of 'direct physical loss' or 'damage.'" Michael Cetta, Inc. v. Admiral Indem. Co., 506 F. Supp. 3d 168, 176 (S.D.N.Y. 2020), appeal withdrawn, No. 21-57-cv, 2021 WL 1408305 (2d Cir. Mar. 23, 2021).

The Court thus joins the "overwhelming weight of precedent[,]" St. George Hotel Assocs., LLC v. Affiliated FM Ins. Co., 577 F. Supp. 3d 135, 144 (S.D.N.Y. 2021), in holding that the phrase "physical loss of or damage to" property does "not extend to mere loss of use of a premises, where there has been no physical damage to such premises; those terms instead require actual physical loss of or damage to the insured's

property." 10012 Holdings, Inc. v. Sentinel Ins. Co., Ltd., 21 F.4th 216, 222 (2d Cir. 2021); see also, e.g., BR Rest. Corp. v. Nationwide Mut. Ins. Co., No. 21-2100-cv, 2022 WL 1052061, at *1 (2d Cir. Apr. 8, 2022) ("[U]nder New York law the terms direct physical loss and physical damage do not extend to mere loss of use of a premises, where there has been no physical damage to such premises." (citation and quotation marks omitted)); SA Hosp. Grp. v. Hartford Fire Ins. Co., No. 21-1523-cv, 2022 WL 815683, at *2 (2d Cir. Mar. 18, 2022) ("[Plaintiff] alleges only a loss of use of property with respect to its restaurants, which does not amount to an 'actual physical loss of' property."); Kim-Chee LLC v. Philadelphia Indem. Ins. Co., 21-1082-cv, 2022 WL 258569, at *1 (2d Cir. Jan. 28, 2022) ("[T]o survive dismissal, [plaintiff's] complaint must plausibly allege that the virus itself inflicted actual physical loss of or damage to property." (citation and quotation marks omitted)); Rye Ridge Corp. v. Cincinnati Ins. Co., No. 21-1323-cv, 2022 WL 120782, at *2 (2d Cir. Jan. 13, 2022) (dismissing claim for coverage where plaintiffs did "not allege any physical damage to their insured premises").[3]

[3] Plaintiff has provided citations to a number of cases that support its position. See generally Doc. #36. However, this Court declines to follow such cases, which constitute a minority position nationwide, because they are unpersuasive, distinguishable, and/or do not apply New York law.

3. Plaintiff's Theories of Recovery

Despite this overwhelming weight of authority, plaintiff asserts that it is has adequately alleged the right to coverage under the Policy because "The Presence of the Covid-19 Virus Constitutes Physical Loss or Damage[.]" Doc. #36 at 11. Specifically, plaintiff contends: (a) "the Complaint alleges that the covid virus attaches itself to the surfaces of the hotel's rooms and public spaces, thereby producing a physical change in the condition of the surfaces and the premises, altering it from a safe place to a dangerously unsafe one for humans that was no longer fit for its intended use[,]" id. at 12; (b) "First Realty 'suffered a complete and permanent loss of use of its business premises and the premises were unfit for use for their intended purposes[,]'" id. at 7 (quoting Doc. #1-1 at 25); and (c) "Aspen does not point to any specific exclusion that applies to viral contamination[.]" Id. at 15.

a. *COVID-19's Physical Impact on Property*

Plaintiff first asserts that "the Complaint alleges that the covid virus attaches itself to the surfaces of the hotel's rooms and public spaces, thereby producing a physical change in the condition of the surfaces and the premises, altering it from a safe place to a dangerously unsafe one for humans that was no longer fit for its intended use." Id. at 12.

This argument fails. The mere presence of COVID-19 at the covered property is insufficient to show physical loss or damage to that property. See St. George Hotel Assocs., LLC, 577 F. Supp. 3d at 145 ("This Court agrees with the great weight of authority concluding that the presence of Covid-19 does not actually 'damage' insured property." (collecting cases)); Park Ave. Oral & Facial Surgery, P.C. v. Hartford Fin. Serv. Grp., 20CV05407(VSB), 2021 WL 5988342, at *5 (S.D.N.Y. Dec. 17, 2021) ("COVID-19 virus particles do not cause 'direct physical loss of or physical damage' within the meaning of the Policy."); Jeffrey M. Dressel, D.D.S., P.C., 2021 WL 1091711, at *4 ("Though the virus has the potential to cause significant harm to people, the court is not aware of any scenario in which its presence can cause 'physical damage' to property such as a building, or other inanimate objects."). Indeed, as the Second Circuit recently held when addressing an identical argument:

> Even assuming the virus's presence at Kim-Chee's tae-kwon-do studio, the complaint does not allege that any part of its building or anything within it was damaged -- let alone to the point of repair, replacement, or total loss. Nor does Kim-Chee explain how, other than by the denial of access, any of its property could no longer serve its insured function. To the contrary, we agree with the district court that the virus's inability to physically alter or persistently contaminate property differentiates it from radiation, chemical dust, gas, asbestos, and other contaminants whose presence could trigger coverage under Kim-Chee's policy.

Kim-Chee LLC, 2022 WL 258569, at *2.[4]

Plaintiff argues that the Kim-Chee LLC Court's holding that the mere presence of COVID-19 does not cause physical damage to property is "factually disputed by First Realty and should not be made without the benefit of an evidentiary record which could include evidence presented by scientists and public health officials." Doc. #36 at 17. Despite plaintiff's argument to the contrary, however, "[t]he construction of an unambiguous agreement is a matter of law for the court[.]" Kenney v. Kemper Nat. Ins. Cos., 133 F.3d 907, 907 (2d Cir. 1998). Thus, the undersigned finds that, as a matter of law, "the presence of the COVID-19 virus does not qualify as damage to the property itself, given the virus's short lifespan." Mario Badescu Skin Care Inc., 2022 WL 253678, at *5 (citation and quotation marks omitted); see also John Gore Org., Inc. v. Fed. Ins. Co., No.

[4] Plaintiff's assertion that it took measures that included "repairing or replacing air filtration systems, remodeling and reconfiguring physical spaces, removal of fomites by certified technicians, and other measures[]" does not undermine this analysis. Doc. #1-1 at 20-21. As the Southern District of New York has previously explained: "The virus damages humans, not physical structures. ... [H]and sanitizing stations, plexiglass shields, Covid-related signage and an enhanced HVAC system are not there to replace or repair damage to the property, they are there to protect humans." John Gore Org., Inc. v. Fed. Ins. Co., No. 21CV02200(PGG)(KHP), 2021 WL 6805891, at *7 (S.D.N.Y. Dec. 8, 2021), report and recommendation adopted, 2022 WL 873422 (S.D.N.Y. Mar. 23, 2022).

21CV02200(PGG), 2022 WL 873422, at *12 (S.D.N.Y. Mar. 23, 2022) (rejecting argument that there was a "factual dispute[]" regarding "whether the COVID-19 virus caused physical damage to Plaintiff's property"); Sharde Harvey DDS PLLC v. Sentinel Ins. Co. Ltd., No. 20CV03350(PGG), 2022 WL 558145, at *10 (S.D.N.Y. Feb. 24, 2022) (rejecting argument that whether COVID-19 caused physical damage was a factual dispute because "the Second Circuit rejected the notion that the COVID-19 virus -- standing alone -- could cause 'physical damage' to property").

In sum, "the presence of COVID-19 on the surfaces or in the ambient air is not sufficient to allege" physical loss or damage. Dr. Jeffrey Milton, DDS, Inc. v. Hartford Casualty Ins. Co., --- F. Supp. 3d ---, No. 3:20CV00640(SALM), 2022 WL 603028, at *10 (D. Conn. Mar. 1, 2022). Rather, to be entitled to coverage under the Policy, plaintiff must also allege facts showing that COVID-19 caused actual physical loss of, or damage to, property. It has not done so here. Accordingly, plaintiff fails to adequately allege the right to coverage under this theory.

b. *Loss of Use*

Plaintiff further asserts that it is entitled to coverage because it "suffered a complete and permanent loss of use of its business premises and the premises were unfit for use for their intended purposes." Doc. #1-1 at 25.

This theory fails, however, because plaintiff does not allege any physical loss of property. The Second Circuit expressly rejected this argument in 10012 Holdings, Inc., 21 F.4th at 216. There, the Court considered an insurance claim by an art gallery for business loss-of-use stemming from the COVID-19 pandemic. See id. at 219. The policy at issue, like the Policy here, was limited to "direct physical loss or physical damage[.]" Id. The Second Circuit relied on New York state appellate court authority interpreting a policy allowing coverage for "'all risks of direct physical loss or damage to the [insured's] property,'" in which "the Appellate Division held that the provision 'clearly and unambiguously provides coverage only where the insured's property suffers direct physical damage.'" Id. at 221 (quoting Roundabout Theatre Co. v. Cont'l Cas. Co., 302 A.D.2d 1, 8 (N.Y. App. Div. 2002)). The Second Circuit explained that "'direct physical loss' and 'physical damage' in the Business Income and Extra Expense provisions do not extend to mere loss of use of a premises, where there has been no physical damage to such premises; those terms instead require actual physical loss of or damage to the insured's property." Id. at 222.[5]

[5] The Second Circuit has repeatedly reaffirmed this interpretation of various policies' physical loss or damage requirements. See BR Restaurant Corp., 2022 WL 1052061, at *2; SA Hosp. Grp., 2022 WL 815683, at *2; Deer Mountain Inn LLC,

Here, plaintiff asserts that it has lost the ability to use its property. Plaintiff has failed, however, to point to any actual physical loss of, or damage to, property. Plaintiff is not entitled to coverage under this theory.

c. *The Absence of Exclusionary Language*

Plaintiff next contends that "Aspen does not point to any specific exclusion that applies to viral contamination." Doc. #36 at 15. However, as the Second Circuit held when rejecting an identical argument, "[t]he absence of an exclusion cannot create coverage; the words used in the policy must themselves express an intention to provide coverage." Kim-Chee LLC, 2022 WL 258569, at *2 (citations and quotation marks omitted). Accordingly, plaintiff is not entitled to coverage on this basis.

In sum, plaintiff has failed to adequately allege any "physical loss of or damage to" property under the Policy. Moreover, plaintiff is unable to create an affirmative right to coverage by pointing to the absence of an exclusion in the Policy. In light of these failures, plaintiff has not alleged facts demonstrating that defendant breached the Policy. Plaintiff's claims for breach of contract and a declaratory judgment are therefore dismissed.

2022 WL 598976, at *2; Kim-Chee LLC, 2022 WL 258569, at *1; Rye Ridge Corp., 2022 WL 120782, at *2.

B. Bad Faith

Plaintiff next asserts a claim for "Breach of the Duty of Good Faith and Fair Dealing and Bad Faith" based upon "Defendant's refusal to honor its obligation to act in good faith with respect to Plaintiff's claim[.]" Doc. #1-1 at 39. Defendant moves to dismiss this claim, arguing that the bad faith "claim is based on Aspen's purportedly wrongful denial of coverage. However, ... Aspen's coverage position clearly was not wrongful, much less in bad faith." Doc. #22-1 at 23.

Under New York law,

> [t]he implied covenant of good faith and fair dealing is breached when a party acts in a manner that would deprive the other party of the right to receive the benefits of their agreement. The implied covenant includes any promises which a reasonable promisee would be justified in understanding were included. However, no obligation may be implied that would be inconsistent with other terms of the contractual relationship.

1357 Tarrytown Rd. Auto, LLC v. Granite Props., LLC, 142 A.D.3d 976, 977 (N.Y. App. Div. 2016) (citations omitted).

Plaintiff concedes "that a bad faith claim is dependent upon a finding that the policy at issue provides coverage." Doc. #36 at 22. Thus, in light of this Court's finding that plaintiff is not entitled to coverage under the Policy, plaintiff's bad faith claim also fails. See Rye Ridge Corp. v. Cincinnati Ins. Co., 535 F. Supp. 3d 250, 256 (S.D.N.Y. 2021), aff'd, No. 21-1323-cv, 2022 WL 120782 (2d Cir. Jan. 13, 2022) ("Because the

Complaint fails to plead that Plaintiffs were eligible for coverage, the [bad faith] claim[] [is] not well pleaded."); Broadway 104, LLC v. XL Ins. Am., Inc., 545 F. Supp. 3d 93, 104 (S.D.N.Y. 2021) (Claim for breach of the implied covenant of good faith and fair dealing fails where "the Complaint has not plausibly alleged conduct by XL that contrary to the parties' contractual relationship." (sic)). Plaintiff's claim for bad faith denial of coverage is therefore dismissed.[6]

VI. Conclusion

For the reasons stated, the Motion to Dismiss [**Doc. #22**] is **GRANTED.**

The Clerk shall close this case.

It is so ordered at Bridgeport, Connecticut, this 2nd day of September, 2022.

/s/
HON. SARAH A. L. MERRIAM
UNITED STATES DISTRICT JUDGE

[6] Plaintiff asserts, in passing, that the Court should "defer ruling on Aspen's Motion until the issues it raises are matters of settled New York law." Doc. #36 at 2. The Court denies this passing request.