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CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

FILED
2022 JUL 13 P 01:43
CIVIL
DISTRICT COURT

NO. DIVISION
SECTION

C. NAPCO, INC. and CJN, INC.,

vs.

CERTAIN UNDERWRITERS AT LLOYD’S OF LONDON SUBSCRIBING TO
POLICY NO. NF23588

FILED: _____
DEPUTY CLERK

PETITION FOR DAMAGES

NOW INTO COURT, through undersigned counsel, comes now Plaintiffs C. NAPCO, INC. and CJN, INC. (“Plaintiffs”), through undersigned counsel, who respectfully aver, allege and represent as follows:

PARTIES

1.

Made Plaintiffs are C. Napco, Inc., and CJN, Inc., who are incorporated by virtue of the laws of the State of Louisiana, authorized to conduct business in the Parish of New Orleans, State of Louisiana.

2.

Made defendants herein are Certain Underwriters at Lloyd’s of London (“Defendants”) subscribing to Policy No. NF23588 (“Policy”) issued to the Plaintiffs for the period April 20, 2020, through April 20, 2021.

JURISDICTION AND VENUE

3.

This Court has subject matter jurisdiction over the matters alleged herein.

4.

Personal jurisdiction exists over Defendants pursuant to the Louisiana “long-arm” statute, La. R.S. 13:3201.

5.

On or about April 20, 2020, Defendants entered into a contract of insurance with the Plaintiffs in New Orleans, Louisiana whereby the Plaintiffs paid premiums to Defendants for their

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Debbie Ciaccio

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promise to compensate the Plaintiffs in the event of a covered loss. Defendants are transacting the business of insurance in the State of Louisiana, and the basis of this suit arises out of such conduct.

6.

Venue in this action is proper under La. C.C.P. art. 76.1, as Orleans Parish is the parish in where the contract at issue was executed and was to be performed.

FACTUAL BACKGROUND

7.

Plaintiffs and Defendants entered into a contract of insurance whereby Plaintiffs agreed to make monetary payments in exchange for Defendants' promise to insure the Plaintiffs for losses, including but not limited to, business income losses at 1037 Broadway Street, New Orleans Louisiana ("Insured Premises").

8.

The Insured Premises are the location of The Boot Bar and Grill ("Bar") and The Boot Store ("Store"). The Bar is a popular and profitable, forty-year-old nationally-known tavern serving food and beverages primarily to college students located immediately adjacent to the Tulane University campus in New Orleans, Louisiana. The Store is a small convenience store located on the Insured Premises. Large crowds of college students frequent the Insured premises day and night throughout most of the year.

9.

The Bar has the capacity to hold approximately 500 guests.

10.

The Insured Premises are covered under a Commercial All Risk Policy, Certificate No. NF23588 issued to Plaintiffs by Defendants with various coverages including Business Income (and Extra Expense) coverage, Covered Cause of Loss "Special" with limits of \$400,000.00 and coverage effective April 20, 2020, through April 20, 2021.

11.

The Policy provided property, business personal property, business income and extra expense and ordinance or law coverage.

12.

Plaintiffs faithfully paid policy premiums to Defendants to specifically provide all risk coverage for their business, particularly the extension of coverage in the event of business closure by order of Civil Authority.

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13.

An “All Risk” insurance policy is a policy that covers all risks unless clearly and specifically excluded. *Dawson Farms, LLC v. Millers Mut. Fire Ins. Co.*, 794 So.2d 949 (La. App. 2 Cir. 8/1/01), writ denied, 803 So.2d 34 (La 2001).

14.

The subject Policy issued by Defendants to Plaintiffs provides Business Income and Extra Expense Coverage under ISO Form CP 00 10 00 as follows:

“We will pay for direct physical or damage to Covered Property at the Premises described in the Declarations caused by or resulting from any Covered Loss.

The loss or damage must be caused by or result from a Covered Cause of Loss, defined in “Causes of Loss – Special Form” ISO form CP 10 30 10 00:

“A. Covered Causes of Loss:

When Special is shown in the Declarations, Covered Cause of Loss means Risks Of Direct Physical Loss unless the loss is:

1. Excluded in Section B... or
2. Limited in Section C...”

15.

The above Policy language establishes this as an “all risk” Policy providing coverage for any loss from any cause except those that are specifically excluded.

16.

The Policy does not provide any exclusion due to losses, business or property, from a virus or global pandemic. Specifically, the Policy does not include the “Virus Exclusion”, “Loss Due to Virus or Bacteria”, ISO form CP 01400706. This ISO Form Exclusion has been in existence at least since 2006. Its absence from this Policy indicates a clear intent to include coverage for a virus pandemic such as the COVID-19 pandemic that is the subject of this Claim.

17.

The Policy only has excluded losses due to biological materials such as mold, pathogens in connection with terrorism or malicious use. The elemental distinction between mold and a virus is that a virus, including COVID-19, requires a living host in order to survive, while mold does not.

18.

The above policy language therefore provides coverage to Plaintiffs for virus contamination or global pandemics.

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19.

On information and belief, Defendants have accepted premium payments from Plaintiffs with no intention of providing coverage due to direct physical loss and/or from a civil authority shutdown due to a global pandemic virus.

20.

The 2019 – 2020 COVID-19 pandemic had a global impact, with entire countries, states, and local governments completely shutting down. The virus physically impacted public and private property and physical spaces around the world. The scientific community and those personally affected by the COVID-19 virus recognize it as a cause of actual physical loss and damage. Defendants' actions denying the reality that the virus causes physical damage and loss constitute a false and fraudulent misrepresentation.

21.

The 2019 – 2020 COVID-19 pandemic was and is exacerbated by the fact that the deadly virus physically infects and stays on the surface of objects or materials, "Fomites" for up to 28 days, particularly in humid areas below 84 degrees.

22.

New Orleans, Louisiana was identified as a "hot-spot" during the early days of the global COVID-19 pandemic. The pandemic is responsible in Louisiana alone for over 938,103 confirmed cases and 14,827 confirmed deaths as of this filing. As of July 5, 2022, there have been 13,710,446 tests completed, 2,796,436 COVID-19 vaccines completed in Louisiana with 60% of the State population vaccinated. In Louisiana, 94% of new reported COVID-19 cases are from community spread. Indoor businesses drawing large crowds have been identified as primary sources of infection.

23.

The Insured Premises, with its large crowds of students, was contaminated with COVID-19, and physically damaged by the presence of the microscopic but real and dangerous COVID-19 virus on the surfaces of the Insured Property. Contamination of the insured premises by COVID-19 are a direct physical loss requiring remediation to clean the surfaces of the establishment.

24.

The Bar has been closed twice by governmental order, first on March 16, 2020, and then following a limited and ineffective "re-opening" in May and June, was closed again by

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Government Order on July 13, 2020. These closures have had a devastating effect upon the Bar's business. Food and beverage inventory have spoiled and been disposed, employees have been released, and revenue has been slashed. Customers are prohibited from entering the premises due to Government order.

25.

On July 8, 2020, Defendants' agent issued a "Corrected Reservation of Rights" letter to Plaintiffs, advising that they were investigating coverage for Plaintiffs' claims on behalf of Defendants.

26.

On or about August 7, 2020, Plaintiffs submitted to Defendants' agent a Notice of Claim, a preliminary coverage analysis, and the Insured's responses to Underwriter's written questions. On August 8, 2020, Plaintiffs submitted a Supplemental Notice of Claim.

27.

On September 2, 2020, Plaintiffs wrote to Defendants' agent voluntarily submitting internal accounting summaries concerning COVID-related losses, and requesting a status of the coverage investigation, whether or not any additional information was needed or necessary, whether or not Defendants had made a final determination of coverage, and if not, when a final determination will be forthcoming. Plaintiffs repeated their request that Defendants promptly provide the Plaintiffs with a Proof of Loss form and identify what other information was needed to assist with the investigation of this claim to enable the Plaintiffs to otherwise comply with the terms and conditions of the Policy.

28.

On November 13, 2020 Plaintiffs wrote to Defendants' agent again requesting the status of the coverage investigation, a Proof of Loss form, and whether any additional information was necessary in order to make a final coverage determination. No response was received.

29.

On December 14, 2020, Plaintiffs submitted additional documentation the lease agreement between the named Insureds, and additional financial loss summaries.

30.

On January 19, 2021, Plaintiffs again wrote to Defendants' requesting the status of Defendants' coverage investigation. No response was received.

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31.

On February 5, 2021, Plaintiffs wrote to Defendants' agent submitting copies of monthly sales tax returns filed with the Louisiana Department of Revenue for the years 2019 and 2020, reflecting that Plaintiffs had sustained \$1,308,630 in sales losses arising out of the COVID-19 pandemic and resulting government enforced closure of bars and taverns.

32.

On April 9, 2021, Defendants' agent wrote to Plaintiffs indicating that they had "assumed handling of the claim file", that "a coverage question existed" and that they were reviewing all documentation, statements, circumstances surrounding this claim."

33.

On June 7, 2021, Defendants' agent wrote to Plaintiffs, saying that Defendants were "reviewing the file, and reserved the right to deny the claim."

34.

On June 29, 2021, Plaintiffs wrote to Defendants' agent requesting a loss advance of 50% of Policy limits to help mitigate the Plaintiffs' losses. No response was received.

35.

On July 6, 2021, Defendants' agent wrote to Plaintiffs on behalf of Defendants saying that "to date they had not received a coverage determination from Underwriters" and "[the Insureds] claims remain under review".

36.

On July 15, 2021, Plaintiffs' counsel wrote to Defendants' agent that the Plaintiffs had never been interviewed, and that there was no pending declaratory relief action. Defendants were requested to specifically identify what they were investigating, what was unknown, and what the Plaintiffs could do to assist in resolution.

37.

On July 30, 2021, Underwriters' agent wrote to Plaintiffs, denying claim based upon determination that no coverage existed under Policy.

COUNT I
DECLARATORY JUDGMENT

38.

Plaintiffs incorporate each of the preceding paragraphs as though fully set forth at this point.

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39.

Pursuant to La. C.C.P. art. 1871, the Court may declare rights, status and other legal relations whether or not further relief is or could be claimed.

40.

Plaintiffs seek a Declaratory Judgment to determine whether the various closure orders from the State and local governments trigger the civil authority provision of the Policy issued to Plaintiffs.

41.

Plaintiffs seek a Declaratory Judgment that the subject COVID-19 claims and subsequent governmental business closures with resulting loss of revenue and related losses are covered by the subject Policy.

42.

Plaintiffs seek a Declaratory Judgment because the “All Risk” Policy issued by Defendants to Plaintiffs does not contain an exclusion for a viral pandemic, the Policy provides coverage to Plaintiffs for their loss of business income due to physical loss from the COVID-19 contamination of the insured premises, and that the Policy provides coverage as triggered by the civil authority shutdowns and business closures.

43.

In a recent declaratory relief action where precisely the same language as the Subject Policy was at issue, the Louisiana Fourth Circuit Court of Appeals ruled that an all-risk property policy without the virus exclusion may provide coverage under a business-income for interruption losses caused by COVID-19 shutdown orders and other operational restrictions. *Cajun Conti LLC et al. v. Certain Underwriters at Lloyd's, London et al.*, No. 2021-CA-0343 (La. App. 4 Cir. 6/15/22).

COUNT II BREACH OF CONTRACT

44.

Plaintiffs incorporate each of the preceding paragraphs as though fully set forth at this point.

45.

A valid and enforceable contract of insurance existed between Plaintiff and Defendants, providing “all risk” coverage for the Insured Premises.

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46.

Plaintiffs' insured premises were closed pursuant to governmental decree and order as aforesaid.

47.

Plaintiffs have complied with their obligations pursuant to the Policy, including payment of all premiums due, giving prompt notice of the subject claim to Defendants, providing a description of the facts of the loss, providing accounting statements and ledgers concerning the subject loss, and providing written and oral answers to questions requested by Defendants, and otherwise cooperating during the investigation of the claim.

48.

Defendants have not complied with their obligations pursuant to the insurance agreement, specifically, payment of the loss.

49.

As a result of Defendants' breach of contract, Plaintiffs suffered damages, including loss of revenue, loss of inventory, loss of use of contractually owed insurance proceeds, and loss of goodwill of customers, all in amounts exceeding the jurisdictional minimum of this Court, to be proven at trial.

COUNT III
BREACH OF DUTY UNDER L.A. R.S. 22:1973

50.

Plaintiffs incorporate each of the preceding paragraphs as though fully set forth at this point.

51.

Pursuant to La. R.S. 22:1973, Defendants owed a duty of good faith and fair dealing to Plaintiffs.

52.

Defendants breached the aforesaid duty to Plaintiffs by doing the following:

A. By failing to pay the amount of the claim within 60 days of receipt of satisfactory proof of loss, and such failure was arbitrary, capricious, and without probable cause insofar as the Defendants had no reasonable basis for denying coverage and refusing to pay the sums due under the Policy; and

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B. By misrepresenting material facts pertinent to a coverage issue, specifically, that although the Policy did not contain the virus exclusion indicating a clear intent to provide such coverage under the subject "All Risk" Policy, that the infestation of the insured premises by the COVID-19 virus did not constitute a direct physical loss, that civil authority did not prohibit access to the Plaintiffs' property due to direct physical loss or damage, and that the Plaintiffs claims were excluded by the pollution exclusion, the mold exclusion, and that other inapplicable exclusions.

53.

Insurers failure to make payments under the Policy was arbitrary, capricious and without probable cause.

54.

In connection with the above-referenced statute, Plaintiffs suffered damages including but not limited to loss of revenue, loss of inventory, loss of use of contractually owed insurance proceeds, and loss of goodwill of customers, all in amounts exceeding the jurisdictional minimum of this Court, to be proven at trial.

COUNT IV
BREACH OF DUTY UNDER L.A. R.S. 22:1892

55.

Plaintiffs incorporate each of the preceding paragraphs as though fully set forth at this point.

56.

Pursuant to La. R.S. 22:1892 (A)(1), Defendants had a statutory duty to Plaintiffs to pay the amount of the insurance loss within 30 days of receipt of satisfactory proof of loss.

57.

Defendants received satisfactory proof of loss from Plaintiffs consisting of written and oral answers to questions, leases, inventory and employment records, and accounting books and records substantiating the Plaintiffs' income loss, on or before January 19, 2021. Defendants have never indicated this information was inaccurate, incomplete, or otherwise insufficient.

58.

Pursuant to La. R.S. 22:1892(B), insurers have a statutory duty owed to Plaintiffs to make a written offer to settle Plaintiffs' claims within 30 days of receiving satisfactory proof of loss.

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59.

In connection with the above-referenced statute, Plaintiffs suffered damages including but not limited to loss of revenue, loss of inventory, loss of use of contractually owed insurance proceeds, and loss of goodwill of customers, all in amounts exceeding the jurisdictional minimum of this Court, to be proven at trial.

WHEREFORE, Plaintiffs pray for relief as follows:

(i) For a judicial declaration and judgment that the subject policy of insurance extends coverage to Plaintiffs for direct physical loss and from civil authority shutdown due to the global pandemic COVID-19 virus;

(ii) For trial by jury;

(iii) For general damages for breach of contract in favor of Plaintiffs and against Defendants;

(iv) For general, special, and punitive damages in favor of Plaintiffs and against Defendants pursuant to La. R.S. 22:1973;

(v) For general, special, and punitive damages in favor of Plaintiffs and against Defendants pursuant to La. R.S. 22:1892;

(vi) For reasonable attorneys fees and costs in favor of Plaintiffs and against Defendants pursuant to La. R.S. 22:1892(B);

(vii) For such other relief as the Court deems just and proper.

Respectfully Submitted:

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PLEASE SERVE:

Certain Underwriters at Lloyd's, London, Subscribing to Policy No. NF23588

Through their registered agent for Service of Process:

Louisiana Secretary of State

8585 Archives Avenue

Baton Rouge, LA 70809