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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

GRECH MOTORS, INC., Plaintiff and Appellant, v. TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, Defendant and Respondent.	E077303 (Super.Ct.No. RIC2002552) OPINION

APPEAL from the Superior Court of Riverside County. Carol A. Greene, Judge. Affirmed.

Shernoff Bidart Echeverria, Michael J. Bidart, Ricardo Echeverria, Kristin Hobbs; The Ehrlich Law Firm, Jeffrey I. Ehrlich and Reid M. Ehrlich-Quinn for Plaintiff and Appellant.

Robinson & Cole, Gregory P. Varga; Weston & McElvain, Randy M. McElvain and Edmond Sung for Defendant and Respondent.

Plaintiff and appellant Grech Motors, Inc. (Grech) sued defendant and respondent Travelers Property Casualty Company of America (Travelers) for breach of contract and breach of the implied covenant of good faith and fair dealing. The trial court sustained Travelers's demurrer without leave to amend. Grech contends the trial court erred in sustaining the demurrer. We affirm.

FACTUAL HISTORY

A. FIRST AMENDED COMPLAINT

The facts in this subsection are taken from Grech's first amended complaint (FAC). Grech "is a designer and manufacturer of high-end shuttle buses and sprinter vans. . . . Its principal place of business and headquarters are located in Riverside, California, and the main manufacturing plant is in Mexicali, Mexico." Grech had "two 'All Risk' commercial property and general liability insurance policies issued by Travelers." "The Policies each have a provision for 'Business Income' coverage."

The business income provisions provided, " '[Travelers] will pay for: [¶] The actual loss of Business Income you sustain due to the necessary "suspension" of your "operations" during the "period of restoration"[1]; and The actual Extra Expense you incur during the "period of restoration"; [¶] caused by direct physical loss of or damage to property at premises which are described in the Declarations and for which a

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1 "Period of restoration means the period of time that: [¶] Begins with the date of direct physical loss or damage caused by or resulting from any Covered Cause of Loss at the described premises; and [¶] Ends on the earlier of: [¶] The date when the property at the described premises should be repaired, rebuilt, or replaced with reasonable speed and similar quality; or [¶] The date when business is resumed at a new permanent location."

Business Income and Extra Expense Limit of Insurance is shown in the Declarations. The loss or damage must be caused by or result from a Covered Cause of Loss.' "

"Direct physical loss" was not defined in the policy.

Due to the Covid-19 pandemic, in March 2020, Riverside County, the State of California, and the Mexican government issued orders limiting gatherings and the operation of non-essential businesses. "The Orders effectively stopped all business by Grech . . . because the showrooms and salesforce were forced to close and all manufacturing ceased, causing a suspension of its operations resulting in an immediate loss of business income."

Grech submitted claims for its lost business income to Travelers, for Grech's Riverside and Mexico locations. Travelers denied both claims. Travelers concluded that a "direct physical loss" did not include "losing physical access or use of [Grech's] property." Grech alleged that Travelers wrongfully denied Grech's claims because "[l]osing the ability to access or use one's property is a direct loss of physical, material rights and advantages."

B. DEMURRER, OPPOSITION, AND REPLY

In Traveler's demurrer to the FAC, it contended that, under California law, " 'losses from [an] inability to use property do not amount to 'direct physical loss of or damage to property.' " Travelers contended that Grech's "failure . . . to allege facts supporting the existence of any direct physical loss of or damage to property . . . is fatal to its claims . . . . Accordingly, [Grech] cannot state a claim against Travelers for breach of contract or breach of the implied covenant of good faith."

In Grech's opposition to the demurrer, it asserted that the plain meaning of "loss" includes "the 'failure to . . . utilize.' " Therefore, its "loss of use . . . of the insured premises due to government orders constitutes 'direct physical loss of or damage to property' under the Policy."

In Travelers's reply, it contended that "courts in California and around the country . . . have held . . . that an insured's mere loss of use of its property due to a government public health order does not constitute the 'direct physical loss of or damage to' property necessary to trigger coverage under [the] Business Income . . . provision[]."

C. HEARING AND RULING

In a tentative ruling, the trial court wrote, "In modern property insurance policies, coverage is triggered by physical loss or damage, which requires 'distinct, demonstrable or physical alteration' of the property. [Citation.] Under California law, losses from [an] inability to use property do not amount to 'direct physical loss of or damage to property' within the ordinary and popular meaning of that phrase." The trial court tentatively concluded that the FAC included allegations of damage "to the business rather than the property," and therefore did not sufficiently allege a loss that was covered by the policies.

At the hearing on the demurrer, the trial court said, "I think my hands are tied based on the state of the California law at this time." Grech commented that it was "not seeking further leave to amend at this juncture." The trial court sustained the demurrer without leave to amend.

DISCUSSION

"[O]n appeal from an order sustaining a demurrer without leave to amend, we assume the truth of all properly pleaded and reasonably implied allegations. [Citations.] Because a demurrer tests the legal sufficiency of a pleading, our review is de novo." (*Musso & Frank Grill Co., Inc. v. Mitsui Sumitomo Ins. USA Inc.* (2022) 77 Cal.App.5th 753, 756 (*Musso*).) If a claim is not covered by the insurance policy, then causes of action for breach of contract and bad faith against the insurance company will fail. (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 36.)

Musso involves nearly identical facts and the identical issue as the instant case. *Musso* concerned a restaurant that had to close due to various pandemic related orders. (*Musso, supra,* 77 Cal.App.5th at p. 755.) The restaurant "had a business interruption insurance policy" and filed a claim, "which was denied on the grounds that the policy covered only 'direct physical loss of or damage to' the property." (*Ibid.*) The restaurant sued its insurance company for breach of contract and breach of the implied covenant of good faith and fair dealing. The insurance company demurred arguing "there was no property loss or damage," and that trial court sustained the demurrer without leave to amend. (*Id.* at p. 756.)

At the appellate court, the issue was "whether the insuring clause's requirement of 'direct physical loss of or damage to [the insured] property' can reasonably be construed to cover the closure resulting from the pandemic." (*Musso, supra,* 77 Cal.App.5th at p. 757.) The appellate court explained, "[T]he policy required direct ' "physical loss" ' or ' "physical damage" ' to trigger the business interruption policy.

[Citation.] 'Accordingly, there must be some physicality to the loss or damage of property—*e.g.*, a physical alteration, physical contamination, or physical destruction.' " (*Id.* at p. 758-759.) Restating its point, the court wrote, "California law is clear. Physical loss and damage must have [a] material existence." (*Id.* at p. 760.) The appellate court concluded, "At this point, there is no real dispute. Under California law, a business interruption policy that covers physical loss and damages does not provide coverage for losses incurred by reason of the COVID-19 pandemic." (*Id.* at p. 760.)

We find the *Musso* decision to be persuasive because "[i]t is now widely established that temporary loss of *use* of a property due to pandemic-related closure orders, without more, does not constitute direct physical loss or damage." (*United Talent Agency v. Vigilant Insurance Co.* (2022) 77 Cal.App.5th 821, 830-831.) Thus, we too conclude that the phrase "direct physical loss of or damage to property" requires some negative occurrence to befall the physical aspect of the property; the phrase does not encompass a temporary restriction on using property that is physically intact and still in the physical possession of the insured. (*Musso, supra,* 77 Cal.App.5th at p. 760; *The Inns by the Sea v. California Mutual Insurance Co.* (2021) 71 Cal.App.5th 688, 705-708; *United Talent Agency v. Vigilant Insurance Co., supra,* 77 Cal.App.5th at p. 834; *Apple Annie, LLC c. Oregon Mutual Insurance Co.* (2022) 82 Cal.App.5th 919, ___ [2022 WL 4007516, *7-8]; *Tarrar Enterprises, Inc. v. Associated Indemnity Corp.* (2022) ___ Cal.App.5th ___ [2022 WL 4377163, *1-2].).)

Grech asserts that in the phrase, "direct physical loss of or damage to property," the word "loss" must mean something other than physical damage because, otherwise,

the phrase "physical damage" would be redundant. Grech contends that the "loss" portion of the phrase encompasses restrictions on use. The relevant phrase from the policies is: ". . . caused by direct physical loss of or damage to property at premises which are described in the Declarations."

Grech is focusing on the word "loss," and glossing over the word "physical." It is not merely a "loss" that is required, it is a "physical loss," i.e., a tangible item is missing. A physical loss could include property that is lost to the owner but not damaged, e.g., property that is stolen or misplaced. For example, the declarations include $25,000 in coverage for "Loss of Master Key." Because "loss" can refer to property that is intact but missing, we conclude physical loss and physical damage are not redundant.

In the FAC, Grech alleged that its property was physically undisturbed, but Grech suffered restrictions on how it could use its property. Because Grech did not allege any physical damage to or physical loss of its property, Grech's insurance claims were not covered by the business interruption portion of its policy. Therefore, the breach of contract and bad faith causes of action necessarily fail. (*Waller v. Truck Ins. Exchange, Inc.*, *supra*, 11 Cal.4th at p. 36.) On appeal, Grech does not assert that it could amend the FAC to state a claim. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126 [plaintiff bears the burden of proving defect can be cured by amendment].) Accordingly, we conclude the trial court did not err by sustaining the demurrer without leave to amend.

DISPOSITION

The judgment is affirmed. Travelers is awarded its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

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MILLER
Acting P. J.

We concur:

FIELDS
J.

MENETREZ
J.