

At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 1st day of July 2021.

PRESENT:

CARL J. LANDICINO, J.S.C.

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HARRY BASSETT III EXECUTOR FOR ESTATE
OF JOSEPHINE ALONGE.,

Index No.: 512144/2020

Plaintiff,

DECISION AND ORDER

-against-

WESCO INSURANCE COMPANY,

Motion Sequence #1

Defendant.

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Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion:

Papers Numbered (NYSCEF)

Notice of Motion/Cross Motion and

Affidavits (Affirmations) Annexed 5-15,

Opposing Affidavits (Affirmations)..... 20-26,

Reply Affidavits (Affirmations)

Memorandum of Law 16, 27, 28

After a review of the papers and oral argument the Court finds as follows:

This lawsuit arises out of a breach of insurance contract claim made by Plaintiff Harry Bassett, III, as the Executor of the Estate of Josephine Alonge (hereinafter referred to as the "Plaintiff") against Defendant Wesco Insurance Company (hereinafter referred to as the "Defendant"). The Plaintiff contends in his Verified Complaint that his claim against the Defendant relates to an insurance policy issued by the Defendant to the Plaintiff in relation to 7601-7603 Fifth Avenue, Brooklyn, New York (hereinafter the referred to as the "Premises"). The Plaintiff argues that the policy insured the Premises against all loss resulting from damage caused by the action of civil authority. The Plaintiff contends that as a result, the Defendant breached its

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agreement with the Plaintiff when it refused to make payment for said loss, including loss of business income, it allegedly suffered as a result of the government imposed restrictions related to the COVID 19 virus and the ensuing pandemic.

The Defendant now moves (motion sequence #1) for an order, pursuant to CPLR 3211(a)(1)(7), dismissing the Plaintiff's Complaint as against them. The Defendant contends that the insurance contract at issue does not cover a loss of business income unless it arises out of a direct physical loss of or damage to property. The Defendant argues that any loss related to restrictions imposed in relation to the COVID-19 virus is not covered. The Defendant argues that a review of the insurance policy in furtherance of this CPLR 3211(a)(1) application shows conclusively that the Plaintiff does not have a valid claim against the Defendant for breach of contract. The Defendant also contends that pursuant to CPLR 3211(a)(7) the Plaintiff has failed to properly plead a cause of action for breach of contract. The Defendant argues that the Plaintiff has failed to plead that the claimed loss was due to direct physical loss of or damage to property as required by the subject policy (the "Policy").

The Plaintiff opposes the motion. The Plaintiff contends that the under the terms of the Policy the Plaintiff should be covered for losses it suffered as a result of the COVID-19 pandemic and the related government restrictions and regulations. The Plaintiff also contends that the term "direct physical loss" in the policy at issue is ambiguous and speaks against granting the Defendant's motion pursuant to CPLR 3211(a)(1). The Plaintiff further asserts that it is well settled that ambiguities must be read against the insurer-drafter, and in favor of the plaintiff insured. The Plaintiff contends that he has sufficiently plead a cause of action for breach of contract because the complaint makes reference to the Policy and the "Plaintiff's complaint does allege both physical damage to the premises to support the applicability of the general Business Income

Coverage, and that the government acted because of ‘dangerous physical conditions’ at the premises to support Civil Authority coverage.” The Plaintiff also contends that the while the Policy does include a “virus exclusion” it is too early in the proceeding to make the determination that this exclusion applies to COVID 19.

Motion Sequence #1

On a CPLR 3211 motion to dismiss, the court will accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove his or her claims, of course, plays no part in the determination of a prediscovery CPLR 3211 motion to dismiss.

Kinnear v. Cefoli, 184 AD3d 628, 123 N.Y.S.3d 509, 510 [2d Dept 2020].

Pursuant to CPLR §3013, “[s]tatements in a pleading should be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense” Furthermore, “[a]lthough on a motion to dismiss plaintiff’s allegations are presumed to be true and accorded every favorable inference, conclusory allegations - claims consisting of bare legal conclusions with no factual specificity - are insufficient to survive a motion to dismiss.” *Godfrey v. Spano*, 13 N.Y. 3d 358, 373, 892 N.Y.S.2d 272, 278 [2009].

“[W]here evidentiary material is adduced in support of the motion, the court must determine whether the proponent of the pleading has a cause of action, not whether the proponent has stated one” (*Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 46 AD3d 530, 530 [2007]; see *Meyer v. Guinta*, 262 AD2d 463, 464 [1999]). A motion to dismiss based on documentary evidence may be appropriately granted “only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; see *Leon v. Martinez*, 84

NY2d at 88, *Lucia v. Goldman*, 68 AD3d 1064, 1065 [2009]; *Mazur Bros. Realty, LLC v. State of New York*, 59 AD3d 401, 402 [2009]).

Feggins v. Marks, 171 AD3d 1014, 1015-6, 99 N.Y.S.3d 45, 47 [2d Dept 2019].

“As a general rule, the construction of terms and conditions of an insurance policy that are clear and unambiguous presents a question of law to be determined by the court.” *Commercial Union Ins. Co. v. Liberty Mut. Ins. Co.*, 36 AD3d 645, 645, 828 N.Y.S.2d 479, 480 [2d Dept 2007].

“Any ambiguity, however, must be construed against the insurer as the drafter of the policy.” *NIACC, LLC v. Greenwich Ins. Co.*, 51 AD3d 883, 884, 857 N.Y.S.2d 723, 724 [2d Dept 2008].

“Such exclusions or exceptions from policy coverage must be specific and clear in order to be enforceable, and they are not to be extended by interpretation or implication, but are to be accorded a strict and narrow construction.” *Gaetan v. Firemen's Ins. Co. of Newark*, 264 AD2d 806, 808, 695 N.Y.S.2d 608, 610 [2d Dept 1999].

The Policy

The Policy at issue provides coverage for damages or loss at the Premises, unless otherwise excluded. The Policy provides for coverage as follows:

A. Coverage

1. Business Income

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.

5. Additional Coverages

a. Civil Authority

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 and necessary Extra Expense 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. Civil Authority Coverage for Business Income will begin 72 hours after the time of the first action of civil authority that prohibits access to the described premises and will apply for a period of up to four consecutive weeks from the date on which such coverage began. Civil Authority Coverage for Extra Expense will begin immediately after the time of the first action of civil authority that prohibits access to the described premises and will end: (1) Four consecutive weeks after the date of that action; or (2) When your Civil Authority Coverage for Business Income ends; whichever is later.

Discussion

The Court finds that the terms of the Policy at issue are sufficiently clear and unambiguous to be determined pursuant to CPLR 3211(a)(1). The Defendant has agreed to insure only for the loss of business income and only in the event of direct physical loss of or damage to property at premises.¹ In the instant proceeding, the Plaintiff does not claim that he suffered “direct physical damage” to any property. Instead, the Complaint states that “by reason of the [subject COVID-19 restrictions], Plaintiff, along with all ‘non-essential’ New York State businesses was compelled to reduce, and then cease, all in person business operations.” The Defendant is correct that economic loss, in relation to the restrictions stated, which is not associated with physical damage to property, does not trigger coverage for loss of business income. As such, the insurance contract terms serve to utterly refute the claims made by the Plaintiff for breach of insurance contract.

¹ The aspect of Defendant’s motion for dismissal under CPLR 3211(a)(7) is denied as academic.

“New York law rejects the notion that economic loss unaccompanied by physical damage to property triggers coverage for loss of business income.” *Soundview Cinemas Inc. v. Great Am. Ins. Grp.*, No. 605985-20, 2021 WL 561854 [Sup Ct, Nassau County 2021]. The United States District Court, Northern District, also held in *Deer Mountain v. Union Insurance Co.* that “under New York law, the loss that Plaintiff complains of—the loss of use of property for its intended, economically beneficial purpose as a result of the Closure Orders—is not the type of ‘direct physical loss of ... property’ the Policy contemplates.” *Deer Mountain Inn LLC v. Union Ins. Co.*, No. 120CV0984BKSDJS, 2021 WL 2076218, [N.D.N.Y. May 24, 2021]; *see also Mohawk Gaming Enterprises, LLC v. Affiliated FM Ins. Co.*, No. 8:20-CV-701, 2021 WL 1419782, at *2 [N.D.N.Y. Apr. 15, 2021].

Prohibition of Access

The Policy terms also provide that additional coverage under the Civil Authority Provision of the Policy is not available to the Plaintiff under the facts contained in the Complaint. As stated above, the Plaintiff’s Complaint fails to allege any physical damage to the Subject Premises in relation to the actions taken in response to COVID 19. Even assuming that the Plaintiff suffered business losses due to COVID-19 related government action, this does not constitute a damage to the property that would result in coverage under the Policy. *See Sharde Harvey, DDS, PLLC v. Sentinel Ins. Co., Ltd.*, No. 20CV3350PGGRWL, 2021 WL 1034259, at *17 [S.D.N.Y. Mar. 18, 2021]; *Michael Cetta, Inc. v. Admiral Indem. Co.*, No. 20 CIV. 4612 (JPC), 2020 WL 7321405, at *11 [S.D.N.Y. Dec. 11, 2020], *appeal withdrawn*, No. 21-57, 2021 WL 1408305 [2d Cir. Mar. 23, 2021].

Coverage in relation to civil authority is premised on government action that prevents access to the property as a result of damage to that property or to an adjoining property. *In Visconti Bus v. Utican Nat'l Ins. Grp.*, the Court held that New York State COVID restrictions did not satisfy the Civil Authority Provision in an insurance policy under circumstances where access to the Premises was not prohibited. *See Visconti Bus Serv., LLC v. Utica Nat'l Ins. Grp.*, 71 Misc. 3d 516, 534, 142 N.Y.S.3d 903, 916 [Sup Ct, Orange County 2021]; *see also Mangia Rest. Corp. v. Utica First Ins. Co.*, No. 713847/ 2020, 2021 WL 1705760, at *5 [Sup Ct, Queens County 2021]; *Food for Thought Caterers Corp. v. Sentinel Ins. Co., Ltd.*, No. 20-CV-3418 (JGK), 2021 WL 860345, at *7 [S.D.N.Y. Mar. 6, 2021]; *Michael Cetta, Inc. v. Admiral Indem. Co.*, No. 20 CIV. 4612 (JPC), 2020 WL 7321405, at *1 [S.D.N.Y. Dec. 11, 2020], *appeal withdrawn*, No. 21-57, 2021 WL 1408305 [2d Cir. Mar. 23, 2021]. The Plaintiff has made no claim that the Plaintiff or his tenants were denied access to the Premises.

Virus/Bacteria Exclusion

The Policy also contains a section entitled “NEW YORK – EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA”, which provides in pertinent part:

COMMERCIAL PROPERTY COVERAGE PART

A. The exclusion set forth in Paragraph B. applies to all coverage under all forms and endorsements that comprise this Coverage Part, including but not limited to forms or endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority.

B. We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.

C. The terms of the exclusion in Paragraph B., or the inapplicability of this exclusion to a particular loss, do not serve to create coverage for any loss that would otherwise be excluded under this Coverage Part.

The terms of this section of the Policy are clear and unambiguous in as much as the language provides that the Defendant “will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.” The Court finds that the Plaintiff’s claim is also excluded in that it is based upon claims that the loss was caused by the COVID 19 virus. It is clear that the above exclusion bars any such claim. See *Soundview Cinemas Inc. v. Great Am. Ins. Grp.*, No. 605985-20, 2021 WL 561854 [Sup Ct, Nassau County 2021]; see also *6593 Weighlock Drive, LLC v. Springhill SMC Corp.*, No. 4799/2020, 2021 WL 1419049 [Sup Ct, Onondaga County 2021].

As a result, the Defendant’s motion to dismiss the Plaintiff’s complaint pursuant to CPLR 3211(a)(1) is granted.

Based on the foregoing, it is hereby ORDERED as follows:

The Defendant’s motion made pursuant to CPLR 3211(a)(1) (motion sequence #1) is granted and the complaint is dismissed. The remaining relief sought is denied as academic.

The foregoing constitutes the Decision and Order of the Court.

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Carl J. Landicino, J.S.C.

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