

**UNITED STATES DISTRICT COURT FOR
SOUTHERN DISTRICT OF NEW YORK**

ELITE UNION INSTALLATIONS, LLC

Plaintiff,

vs.

**NATIONAL FIRE INSURANCE
COMPANY OF HARTFORD**

Defendant.

COMPLAINT

JURY TRIAL DEMANDED

Plaintiff, Elite Union Installations, LLC (hereinafter “Elite” or “Plaintiff”), brings this Complaint, alleging against Defendant, National Fire Insurance Company of Hartford (hereinafter “National Fire Insurance” or “Defendant”), and avers as follows:

I. NATURE OF THE CASE

1. This is a civil action seeking declaratory relief arising from Plaintiff’s contract of insurance with the Defendant.

2. In light of the global coronavirus disease 2019 (“COVID-19”) pandemic and state and local government orders (“Civil Authority Orders”) mandating that all non-essential in-store businesses must shut down, and the suffering of physical harm and impact and damages, within Plaintiff’s business premises and/or within the immediate area surrounding and outside its business premises, Plaintiff shut the doors of his business to customers on March 16, 2020.

3. Plaintiff’s insurance policy provides coverage for all non-excluded business losses and thus provides coverage here.

4. As a result, Plaintiff is entitled to declaratory relief that it is covered for all business losses that have been suffered and sustained in an amount estimated to be greater than \$150,000.00.

II. JURISDICTION

5. This court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332, because there is complete diversity of citizenship between Plaintiff and the Defendant. Further, Plaintiff has suffered business losses in an amount greater than \$150,000.00. The amount in controversy necessary for diversity jurisdiction over a declaratory judgment action is measured by the value those business losses. *Id.* at § 1332(a).

6. The Court has personal jurisdiction over Defendant because at all relevant times it has engaged in substantial business activities in the State of New York. At all relevant times Defendant transacted, solicited, and conducted business in New York through its employees, agents, and/or sales representatives, and derived substantial revenue from such business in New York.

7. Venue is proper in this district pursuant to 28 U.S.C. § 1391(a) because a substantial portion of the wrongful acts upon which this lawsuit is based occurred in this District. Venue is also proper pursuant to 28 U.S.C. § 1391(c) because Defendant is a corporation that has substantial, systematic, and continuous contacts in the State of New York, and as a result it is subject to personal jurisdiction in this District.

8. The acts and/or omissions complained of took place, in whole or in part, within the venue of this Court.

III. PARTIES

9. At all relevant times, Plaintiff is a limited liability corporation authorized to do business and doing business in the State of New York, County of New York City. Elite is and

has been the owner, operator, manager, and/or controls Elite with a primary location at 19 West 34th Street, New York, New York 10001 (hereinafter “Insured Properties”).

10. At all relevant times, National Fire Insurance is a corporation doing business in the County of New York, State of New York, subscribing to Policy Number 6013994631 issued to the Plaintiff for the period of June 27, 2019 to June 27, 2020. *See* Policy Declaration page, attached hereto as Exhibit 1. Defendant is transacting the business of insurance in the State of New York and within the County of New York and the basis of this suit arises out of such conduct.

IV. FACTUAL BACKGROUND

A. Insurance Coverage

11. On or about June 27, 2019, Defendant entered into a contract of insurance with the Plaintiff, whereby Plaintiff agreed to make payments to Defendant in exchange for Defendant’s promise to indemnify the Plaintiff for losses including, but not limited to, business income losses at its primary location in New York County at 19 West 34th Street, New York, New York 10001.

Elite is a business which is owned, leased by, managed, and/or controlled by the Plaintiff. Elite specializes in office project and furniture installation and maintenance.

12. The Insured Properties are covered under a policy issued by Defendant is covered under a policy issued by the Defendant with policy number believed to be 6013994631. *See* Ex. 2 (hereinafter “Policy”).

13. The Policy is currently in full effect, providing, among other things property, business personal property, business income and extra expense, contamination coverage, and additional coverages between the period of June 27, 2019 to June 27, 2020.

14. Plaintiff faithfully paid policy premiums to Defendant, specifically to provide, among other things, additional coverages in the event of business interruption or closures by order of Civil Authority.

15. Under the Policy, insurance is extended to apply to the actual loss of business income sustained and the actual, necessary and reasonable extra expenses incurred when access to the business is specifically prohibited by order of civil authority. This additional coverage is identified as coverage under “Civil Authority.”

16. The Policy is an all-risk policy, insofar as it provides that covered perils under the policy means physical loss or physical damage unless the loss is specifically excluded or limited in the Policy.

17. An all-risk policy such as that purchased by Plaintiff is one that protects against catastrophic events, such as the one occurring now, globally, involving the Covid-19 Pandemic that has resulted in the widespread, omnipresent and persistent presence of Covid-19 in and around Plaintiff’s Insured Properties.

18. Plaintiff’s all-risk policy includes coverage for business interruption, which is standard in most all-risk commercial property insurance policies, along with coverage for extended expenses.

19. Plaintiff purchased the aforementioned Policy expecting to be insured against losses, including, but not limited to, business income losses at the dental practice.

20. Plaintiff purchased, among other coverages, business interruption coverage for closure by Order of Civil Authority.

21. Based upon information and belief, the Policy provided by Defendant included language that is essentially standardized language adopted from and/or developed by the ISO

(“Insurance Service Office”). The ISO, founded in 1971, provides a broad range of services to the property and casualty insurance industry. In addition to form policies, ISO collects and manages databases containing large amounts of statistical, actuarial, underwriting, and claims information, fraud-identification tools, and other technical services. ISO describes itself as follows: “ISO provides advisory services and information to many insurance companies. ... ISO develops and publishes policy language that many insurance companies use as the basis for their products.” ISO General Questions, Verisk, <https://www.verisk.com/insurance/about/faq/> (last visited June 5, 2020); see also Insurance Services Office (ISO), Verisk, <https://www.verisk.com/insurance/brands/iso/> (last visited June 5, 2020).

22. The language in the Policy is language that is “adhesionary” in that Plaintiff was not a participant in negotiating or drafting its content and provisions.

23. Plaintiff possessed no leverage or bargaining power to alter or negotiate the terms of the Policy, and more particularly, Plaintiff had no ability to alter, change or modify standardized language derived from the ISO format.

24. Plaintiff purchased the Policy with an expectation that it was purchasing a policy that would provide coverage in the event of business interruption and extended expenses, such as that suffered by Plaintiff as a result of Covid-19.

25. At no time had Defendant, or its agents, notify Plaintiff that the coverage that Plaintiff had purchased pursuant to an all-risk policy that included business interruption coverage, had exclusions and provisions that purportedly undermined the very purpose of the coverage, of providing benefits in the occurrence of business interruption and incurring extended expenses.

26. The purported exclusions of the Policy that Defendant has or is expected to raise in defense of Plaintiff's claim under the Civil Authority coverage of the Policy are contradictory to the provision of Civil Authority Order coverage and violates public policy of the State of New York as a contract of adhesion and hence not enforceable against Plaintiff.

27. Access to Plaintiff's business was prohibited by Civil Authority Orders and the Policy provides for coverage for actual loss of business sustained and actual expenses incurred as a covered loss caused by the prohibitions of the Civil Authority Orders in the area of Plaintiff's Insured Properties.

28. The reasonable expectations of Plaintiff was that the business interruption coverage included coverage when a civil authority forced closure of the business for an issue of public safety in the immediate area surrounding the Insured Properties.

29. The Policy does not exclude the losses suffered by Plaintiff and therefore, the Policy does provide coverage for the losses incurred by Plaintiff.

30. Plaintiff suffered direct physical loss or damage within the definitions of the Policy as loss of use of property, as here, constitutes loss or damage.

31. The fungi, wet rot, dry rot, and microbes exclusions do not apply because Plaintiff's losses were not directly caused by fungi, wet rot, dry rot, and/or microbes. Instead, Plaintiff's losses were caused by the entry of Civil Authority Order, particularly those by Governor Cuomo and by the State of New York, to mitigate the spread of COVID-19.

32. Based on information and belief, the Defendant has accepted the policy premiums with no intention of providing any coverage for business losses or the Civil Authority extension due to a loss and shutdown.

33. Based on information and belief, Defendant has accepted the policy premiums with no intention of providing any coverage for business losses or the Civil Authority extension due to a loss and shutdown from a virus pandemic.

34. On or about May 27, 2020, Plaintiff contacted its insurance agent about making a claim under the policy. Yet, Plaintiff has not received a substantive response from Defendant.

B. The Coronavirus Pandemic

35. The scientific community, and those personally affected by the virus, recognize the Coronavirus as a cause of real physical loss and damage. It is clear that contamination of the Insured Property would be a direct physical loss requiring remediation to clean the surfaces of the restaurant.

36. The virus that causes COVID-19 remains stable and transmittable in aerosols for up to three hours, up to four hours on copper, up to 24 hours on cardboard and up to two to three days on plastic and stainless steel. *See* <https://www.nih.gov/news-events/news-releases/new-coronavirus-stable-hours-surfaces> (last visited May 29, 2020).

37. The CDC has issued a guidance that gatherings of more than 10 people must not occur. People in congregate environments, which are places where people live, eat, and sleep in close proximity, face increased danger of contracting COVID-19.

38. The global Coronavirus pandemic is exacerbated by the fact that the deadly virus physically infects and stays on surfaces of objects or materials, “fomites,” for up to twenty-eight (28) days.

39. China, Italy, France, and Spain have implemented the cleaning and fumigating of public areas prior to allowing them to re-open publicly due to the intrusion of microbials.

C. Civil Authority

40. On March 7, 2020, New York Governor Andrew Cuomo declared a Disaster Emergency for the entire state of New York as a result of COVID-19.

41. On March 12, 2020, Governor Cuomo set restrictions on large gatherings.

42. On March 20, 2020, the State of New York issued a stay-at-home order that all non-essential workers must stay at home as a result of the COVID-19 pandemic. To date, this order has been extended to at least May 15, 2020.

43. As of March 23, 2020, Governor Cuomo ordered all “non-essential businesses” statewide to be closed. This Order remains in effect as of this filing.

44. On April 17, 2020, the State of New York ordered all individuals over the age of two to wear a face covering when in a public place.

45. Further, on April 10, 2020 President Trump seemed to support insurance coverage for business loss like that suffered by the Plaintiff:

REPORTER: Mr. President may I ask you about credit and debt as well. Many American individuals, families, have had to tap their credit cards during this period of time. And businesses have had to draw down their credit lines. Are you concerned Mr. President that that may hobble the U.S. economy, all of that debt number one? And number two, would you suggest to credit card companies to reduce their fees during this time?

PRESIDENT TRUMP: Well it's something that we've already suggested, we're talking to them. ***Business interruption insurance***, I'd like to see these insurance companies—you know you have people that have paid. When I was in private I had business interruption. When my business was interrupted through a hurricane or whatever it may be, I'd have business where I had it, I didn't always have it, sometimes I had it, sometimes, I had a lot of different companies. ***But if I had it I'd expect to be paid***. You have people. ***I speak mostly to the restaurateurs***, where they have a restaurant, they've been paying for 25, 30, 35 years, business interruption. They've never needed it. All of a sudden they need it. And I'm very good at reading language. I did very well in these subjects, OK. And I don't see the word pandemic mentioned. Now in some cases it is, it's an exclusion. But in a lot of cases I don't see it. I don't see it referenced. And they don't want to pay up. I

would like to see the insurance companies pay if they need to pay, if it's fair. And they know what's fair, and I know what's fair, I can tell you very quickly. But business interruption insurance, that's getting a lot money to a lot of people. And they've been paying for years, sometimes they just started paying, but you have people that have never asked for business interruption insurance, and they've been paying a lot of money for a lot of years for the privilege of having it, and then when they finally need it, the insurance company says 'we're not going to give it.' We can't let that happen.

https://youtu.be/_cMeG5C9TjU (last visited on May 29, 2020) (emphasis added).

46. The President is articulating a few core points:
 - a. Business interruption is a common type of insurance, especially for restaurants.
 - b. Businesses pay in premiums for this coverage and should reasonably expect they'll receive the benefit of the coverage.
 - c. This pandemic should be covered unless there is a specific exclusion for pandemics.
 - d. If insurers deny coverage, they would be acting in bad faith.

47. These Orders and proclamations, as they relate to the closure of all “non-life-sustaining businesses,” evidence an awareness on the part of both state and local governments that COVID-19 causes damage to property. This is particularly true in places where business is conducted, such as Plaintiff's, as the requisite contact and interaction causes a heightened risk of the property becoming contaminated.

48. Plaintiff's business is unable to open its doors as a direct consequence of the Civil Authority stay-at-home orders for public safety issued by the Governor of New York and the State of New York generally. Accordingly, Plaintiff has submitted a claim to Defendant related to such losses.

D. Impact on Elite Union Installations, LLC

49. As a result of the Orders referenced herein, Plaintiff shut its physical office doors on March 16, 2020 and continues to be shutdown.

50. Initially, Plaintiff's business was able to continue to operate outside of the office doors as construction projects were deemed essential and able to operate under Governor Cuomo's March 23, 2020 Order. https://www.enr.com/external_headlines/story?region=newyork&story_id=2DXMyG5wqR9Kz5gVyr6moR6BMLWuhZP84XQ0peJcVbAhjHQ6RNEbFxl7Ng9ljNzadIQqu9m3Pf7rg7BPCD6diONFM5pj070W0vicsZzab1hefe9Ctv1OVr8jFrmv&images_premium=1&define_caption=1 (Last visited June 10, 2020).

51. On March 27, 2020, New York narrowed the definition of essential construction, closing most projects in the state with the exception that essential construction may continue, which included roads, bridges, transit facilities, utilities, hospitals or health care facilities, affordable housing, and homeless shelters. <https://esd.ny.gov/guidance-executive-order-2026> (Last visited June 10, 2020).

52. Plaintiff's business does not include the aforementioned "essential" construction and was forced to cease operations at this time.

53. As a further direct and proximate result of the Civil Authority Orders, Plaintiff has been forced to lay off approximately twenty (20) employees.

54. Plaintiff's business is not a closed environment, and because people – staff, clients, delivery personnel, construction workers, subcontractors, and others – constantly cycle in and out of the office, there is an ever-present risk that the office is contaminated and/or would be become and would continue to be contaminated.

55. The virus is physically impacting Elite. As a result of the Orders, the business and its members are unable to meet and coordinate with clients and subcontractors, initiate deliveries

and manage projects, perform installation of projects, meet and coordinate with intra-office personnel as well as perform several other essential business functions.

56. The entry of the Civil Authority Orders to mitigate health risks to the public by attempting to prevent COVID-19 contamination, through the closing businesses and ordering persons to stay at home resulted in a physical impact on Plaintiff's business and Insured Properties.

57. Plaintiff specifically sought coverage for business interruption losses and extended expenses and paid premiums for such coverage and with an expectation that the Policy he purchased provided such coverage, with no disclosures to the contrary being made to Plaintiff by Defendant or its agents.

58. Plaintiff had no choice but to comply with the Civil Authority Orders, for failure to do so would have exposed Plaintiff and his business to fines and sanctions. Plaintiff's compliance with mandates resulted in Plaintiff suffering business losses, business interruption and extended expenses of the nature that the Policy covers and for which Plaintiff's reasonable expectation was that coverage existed in exchange for the premiums paid.

59. Any effort by the Defendant to deny the reality that the virus causes physical loss and damage would constitute a false and potentially fraudulent misrepresentation that could endanger the Plaintiff and the public.

60. A declaratory judgment determining that the coverage provided under the Policy will prevent the Plaintiff from being left without vital coverage acquired to ensure the survival of the business due to the shutdown caused by the civil authorities' response is necessary. As a result of these Orders, Plaintiff has incurred, and continues to incur, among other things, a substantial loss of business income and additional expenses covered under the Policy.

**V. CAUSE OF ACTION
DECLARATORY RELIEF**

61. Plaintiff re-alleges and incorporates by reference into this cause of action each and every allegation set forth in each and every paragraph of this Complaint.

62. The Declaratory Judgment Act, 28 U.S.C. § 2201(a), provides that in “a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.” 28 U.S.C. § 2201(a); *see also Principal Life Ins. Co. v. Minder*, No. CIV A 08-5899, 2009 WL 1917096 (E.D. Pa. July 1, 2009); *Miller v. Liberty Mut. Grp.*, 97 F. Supp. 2d 672 (W.D. Pa. 2000).

63. An actual controversy has arisen between Plaintiff and the Defendant as to the rights, duties, responsibilities and obligations of the parties under the Policy in that Plaintiff contends and, on information and belief, the Defendant disputes and denies that:

- a. The Orders constitute a prohibition of access to Plaintiff’s Insured Properties;
- b. The prohibition of access by the Orders has specifically prohibited access as defined in the Policy;
- c. The Orders trigger coverage;
- d. The Policy provides coverage to Plaintiff for any current and future closures in New York County due to physical loss or damage directly or indirectly from the Coronavirus and/or pandemic circumstance under the Civil Authority coverage parameters;
- e. The Policy’s exclusions for virus and bacteria do not apply to the circumstances presented in the lawsuit and the kind and types of damages and losses suffered by Plaintiff;
- f. Defendant’s denial of coverage for losses sustained that were caused by the entry of the Civil Authority Orders referenced, and Plaintiff’s adherence to the Civil Authority Orders violates public policy;

- g. The under the circumstances of this Pandemic and the entry of the Civil Authority Orders referenced, Plaintiff's had no choice but to comply with the Civil Authority Orders, and that Plaintiff's compliance resulting in Plaintiff suffering business losses, business interruption and extended expenses is therefore a covered expense;
- h. The Policy provides business income coverage in the event that Coronavirus has directly or indirectly caused a loss or damage at the insured premises or immediate area of the Insured Properties; and
- i. Resolution of the duties, responsibilities and obligation of the parties is necessary as no adequate remedy at law exists and a declaration of the Court is needed to resolve the dispute and controversy.

64. Plaintiff seeks a Declaratory Judgement to determine whether the Orders constitute a prohibition of access to Plaintiff's office as Civil Authority as defined in the Policy.

65. Plaintiff further seeks a Declaratory Judgement to affirm that the Order triggers coverage.

66. Plaintiff further seeks a Declaratory Judgment to affirm that the Policy provides coverage to Plaintiff for any current and future closures of businesses such as Plaintiff's in New York County due to physical loss or damage from the Coronavirus and/or the pandemic and the policy provides business income coverage in the event that Coronavirus has caused a loss or damage at the Insured Properties.

67. Plaintiff does not seek any determination of whether the Coronavirus is physically in or at the office, amount of damages, or any other remedy other than declaratory relief.

VI. PRAYER FOR RELIEF

WHEREFORE, Plaintiff herein prays as follows:

- a. For a declaration that the Orders constitute a prohibition of access to Plaintiff's Insured Properties.
- b. For a declaration that the prohibition of access by the Orders is specifically prohibited access as defined in the Policy.

- c. For a declaration that the Orders trigger coverage under the Policy.
- d. For a declaration that the Policy provides coverage to Plaintiff for any current and future closures in New York County due to physical loss or damage directly or indirectly from the Coronavirus and/or pandemic circumstance under the Civil Authority coverage parameters.
- e. For a declaration that the Policy's exclusions for virus and bacteria do not apply to the circumstances presented in the lawsuit and the kind and types of damages and losses suffered by Plaintiff.
- f. For a declaration that Defendant's denial of coverage for losses sustained that were caused by the entry of the Civil Authority Orders referenced, and Plaintiff's adherence to the Civil Authority Orders violates public policy.
- g. For a declaration that under the circumstances of this Pandemic and the entry of the Civil Authority Orders referenced, Plaintiff's had no choice but to comply with the Civil Authority Orders, and that Plaintiff's compliance resulting in Plaintiff suffering business losses, business interruption and extended expenses is therefore a covered expense.
- h. For a declaration that the Policy provides coverage to Plaintiff for any current, future and continued closures of non-essential businesses due to physical loss or damage directly or indirectly from the Coronavirus.
- i. For a declaration that the Policy provides business income coverage in the event that Coronavirus has directly or indirectly caused a loss or damage at the Plaintiff's Insured Properties or the immediate area of the Plaintiff's Insured Properties.
- j. For such other relief as the Court may deem proper.

TRIAL BY JURY IS DEMANDED

Dated: June 10, 2020

Respectfully submitted,

/s/ Daniel P. Buttafuoco

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