IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

FRAN NAPLETON LINCOLN, INC., and NAPLETON 1050 INC. d/b/a NAPLETON CADILLAC OF LIBERTYVILLE,	)	
Plaintiffs,	)	
v.	)	No. 20 L 6767
MOTORISTS COMMERCIAL MUTUAL INSURANCE COMPANY, and CORKILL INSURANCE AGENCY, INC.,	)	
Defendants.	)	

ORDER

This matter coming to be heard on 1) the motion of defendant Motorists Commercial Insurance Company ("Motorists" or "defendant") to dismiss the complaint of plaintiffs Fran Napleton Lincoln, Inc. ("Fran Napleton") and Napleton 1050 Inc. d/b/a Napleton Cadillac of Libertyville ("Napleton 1050") (collectively "plaintiffs") pursuant to 735 ILCS 5/2-615, and 2) the motion of Corkill Insurance Agency, Inc. ("Corkill") to dismiss plaintiffs' complaint pursuant to 735 ILCS 5/2-615.

Facts

Plaintiffs' claims stem from losses they incurred as a result of the Covid-19 pandemic. Plaintiffs operate, manage and maintain automobile dealerships and repair shops. On March 15, 2020, Governor Pritzker issued an executive order closing all restaurants, bars and movie theaters in an effort to slow the spread of Covid-19. Governor Pritzker's executive order was expanded on March 16, 2020 to close all "non-essential business" until March 30, 2020. The executive order was again extended until May 30, 2020. On May 29, 2020, the State of Illinois began its "phase 3" of reopening allowing businesses to open with restrictions, including limiting

customer and employee occupancy and interactions. Plaintiffs allege on March 20, 2020, plaintiffs were forced to terminate, lay off, furlough or otherwise suspend the majority of their workforce. Plaintiffs allege the physical damage caused by Covid-19 caused them to restrict, slowdown, and/or cease ordinary business activities at its insured premises. Plaintiffs allege Covid-19, coupled with the Governor's executive orders, resulted in loss of business income, much of its labor force being furloughed or contracts cancelled and an increase in expenses to continue business operations.

Plaintiffs allege Motorists extended to it an all-risk commercial property insurance policy in exchange for substantial premiums. Plaintiffs seek recovery under the various provisions of the policies including "business personal property," "business income," "extra expense coverage", "civil authority, and "hazardous substances" provisions. Plaintiffs allege defendants' refusal to reimburse their losses is vexatious. At issue is whether the policies issued cover losses due to the Covid-19 pandemic and subsequent closure orders of Governor Pritzker.

Plaintiffs additionally allege defendant Corkill Insurance Agency, Inc. ("Corkill") failed to procure the proper insurance coverage when they sought an all-risk policy that provided broad commercial business interruption coverage. Plaintiff alleges on January 1, 2020 and March 3, 2020, failed to adhere to defendant Motorists' rules and procedures, failed to accurately represent to plaintiffs the limitations on the policy and negligently represented that public health emergencies were covered events under the policy.

Plaintiff filed a seven-count complaint including: Count I: Declaratory Judgment (against Motorists); Count II: Breach of Contract (against Motorists); Count III: Vexatious Misconduct - §155 (Motorists); Count IV: Negligence Misrepresentation (against Corkill); and Count V: Negligence (against Corkill).

Court's Analysis

Motorists' Motion to Dismiss ~ §2-615

Motorist moves for judgment on the pleadings pursuant to 735 ILCS 5/2-615. A §2-615 motion attacks the legal sufficiency of the complaint. It is based solely on defects on the face of the complaint rather than proof of underlying facts. *City of Chicago v. Beretta U.S.A. Corporation,* 213 Ill.2d 351, 364 (2004). The motion admits all well-pleaded facts as true, as well as all reasonable inferences that can be drawn from the facts, construing them most favorably to plaintiff. *Tuite v. Corbitt,* 224 Ill.2d 490, 509 (2006). It does not admit conclusions of law or factual conclusions unsupported by specifics. *Bagel v. American Honda Motor Co.,* 132 Ill.App.3d 82, 85 (1st Dist. 1985); *Harris Bank, N.A. v. Sauk Village Development,* 2012 IL App (1st) 120817 at ¶ 20. Cases are not to be tried at the pleadings stage, so a claimant need only show a possibility of recovery, not an absolute right to recovery, to survive a section 2-615 motion. *Platson v. NSM America, Inc.,* 322 Ill.App.3d 138, 143 (2d Dist. 2001).

Count I: Declaratory Judgment

The essential elements of a declaratory judgment action are: (1) a plaintiff with a legal tangible interest; (2) a defendant having an opposing interest; and (3) an actual controversy between the parties concerning such interests. *Beahringer v. Page,* 204 Ill. 2d 363, 372 (2003). "'Actual' in this context does not mean that a wrong must have been committed and injury inflicted. Rather, it requires a showing that the underlying facts and issues of the case are not moot or premature, so as to require the court to pass judgment on mere abstract propositions of law, render an advisory opinion, or give legal advice as to future events. The case must, therefore, present a concrete dispute admitting of an immediate and definitive determination of the parties' rights, the resolution of which will aid in the termination of the controversy or some

part thereof." *Underground Contractors Association v. City of Chicago*, 66 Ill. 2d 371, 375 (1977). Because the Court finds no breach of contract can exist on the facts before it, there is not an actual controversy between the parties and the Count is dismissed.

Count II: Breach of Contract

In order to state a claim for breach of contract, a plaintiff must show: (1) the existence of a valid and enforceable contract; (2) performance by the plaintiff; (3) a breach of the subject contract by the defendant; and (4) that the defendant's breach resulted in damages. *Unterschuetz v. City of Chicago*, 346 Ill. App. 3d 65, 69 (1st Dist. 2004); *International Supply Co. v. Campbell*, 391 Ill. App. 3d 439, 450 (2009). The parties do not dispute the existence of a valid and enforceable contract or that plaintiff performed under the contract with its payment of premiums. At issue is defendant's alleged breach of the contract by failing to make payment under the insurance policy.

In the case of a contract of insurance, the Illinois Supreme Court has long held that the burden rests with the insured to prove that the claim falls within the coverage of the relevant policy. *Addison Insurance Co. v. Fay*, 232 Ill. 2d 446, 453 (2009). Once the insured has demonstrated coverage, the burden shifts to the insurer to prove that a limitation or exclusion applies. *Id.* at 453-54; *Erie Insurance Exchange v. Compeve Corp.*, 2015 IL App (1st) 142508, ¶ 18. Under Illinois law, "[a]n insurer has the right to limit coverage on a policy, and where an insurer has done so, a court must give effect to the plain language of the limitation, absent a conflict with the law." *Phusion Projects, Inc. v. Selective Ins. Co.*, 2015 IL App (1st) 150172, ¶ 38. In construing an insurance contract, regular contract interpretation principles apply. The objective of the court is to ascertain the intent of the parties, construing the policy as a whole, with due regard to the risk undertaken, the subject matter of the policy and the purposes of the

entire contract. *Outboard Marine Corp. v. Liberty Mutual Ins. Co.*, 154 Ill. 2d 90 (1992). If words in the policy are unambiguous, the court must afford them their ordinary meaning. *Id.* But if words are susceptible to more than one reasonable interpretation, they are ambiguous, and the insurance policy should be construed in favor of the insured and against the insurer who drafted the policy. *Id.*

Plaintiffs seek recovery under its "all-risk" policy. Plaintiff contends the policy extends coverage to all "direct physical loss of or damage to Covered Property" unless expressly excluded. The Court must examine both issues: (a) is their "direct physical loss of Covered Property", and/or (b) is their "damage to Covered Property." Plaintiffs seek recovery pursuant to the following provisions in the policy: 1) Building and Personal Property Coverage; 2) Business Income & Extra Expense Coverage; and 3) Civil Authority Coverage Forms. Defendant's opening motion primarily argued the loss is excluded under the Virus Exclusion endorsement, but reserved its right to argue plaintiffs' claims are not covered losses under the policy. Plaintiffs respond that the Virus Exclusion is not relevant here where plaintiffs are alleging that the property was rendered unusable and business operations were suspended due to the Illinois government actions. Plaintiffs argue the loss of use is a recoverable loss. In reply, defendants briefly argue the Virus Exclusion applies to the provisions relied upon and that plaintiffs have not sustained a direct physical loss. Because the public policy is to err on the side to find insurance coverage, the Court reviews both whether the alleged loss is a covered loss or whether it is subject to an exclusion.

The relevant policy provisions are as follows:

Business and Personal Property Coverage Form

We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations Cause by or resulting from any Covered Cause of Loss.

Business Income (and Extra Expense) Coverage

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 Declaration and for which a Business Income Limit of Insurance is shown in the Declarations. The loss or damage must be caused by or a result from the Covered Cause of Loss. (pg. 27)

Extra Expense Coverage

Extra Expenses means necessary expenses you incur during the "period of restoration" that you would not have incurred if there had been no direct physical loss or damage to property caused by or resulting from a Covered Cause of Loss. (pg. 27)

[…]

Avoid or minimize the "suspension" of business and to continue operations at the described premises or at replacement premises or temporary locations, including relocation expenses and costs to equip and operate the replacement location or temporary location;

[…]

and to minimize the suspension of business if you cannot continue operations.

Civil Authority Coverage

In this Additional Coverage – Civil Authority, the described premises are premises to which this Coverage Form applies, as shown in the Declarations.

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 the following apply:

(1) Access to the are 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.

Exclusion of Loss Due to Virus or Bacteria

A. The exclusion set forth in paragraph B. applies to all coverage under all forms and endorsements that comprise this Coverage Part of Policy, 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.

Not Covered Losses

No Direct Physical Loss

The Court finds the alleged losses are not covered under the policy's business interruption coverage because there is neither *direct physical loss* of nor damage to insured property. Plaintiff argues its property was physically damaged by the presence of COVID-19 contagion on the surfaces at plaintiff's premises (complaint ¶¶57-68). Plaintiffs argue as a result, the contagion caused them to "restrict, slowdown, and/or cease ordinary business activities at its insured premises." (complaint ¶67.)

The Illinois Supreme Court has found "that to the average, ordinary person, tangible property suffers a "physical" injury when the property is altered in appearance, shape, color or in other material dimension. Conversely, to the average mind, tangible property does not experience "physical" injury if that property suffers intangible damage, such as diminution in value." *Travelers Ins. Co. v. Eljer Mfg., Inc.*, 197 Ill. 2d 278, 301 (2001). The temporary state of any contagion on surfaces of a business does not amount to an alteration of the property as contemplated. A thorough cleaning of the premises through ordinary means eliminates the contagion and makes clear that the presence of Covid-19 is temporary and not an alteration.

Plaintiffs seek to extend the body of asbestos cases to the Covid-19 arena. The argument is unavailing. To be sure, the health risks associated with Covid-19 and asbestos exposure are each serious and significant, but they are distinguishable. The Court in *Travelers* described asbestos as a physical injury because it was a:

> result of the presence of toxic asbestos fibers within the structures, as "the buildings and their contents (e.g., carpets, upholstery, drapes, etc.) are virtually contaminated or impregnated with asbestos fibers, the presence of which poses a serious healthy hazard to the human occupants," Thus this court concluded that the "the contamination of the buildings and their contents" due to the continuous release of these toxins constituted "physical injury" under the policies.

Asbestos is difficult to remediated and must be done by a licensed professional since it is embedded into the physical structure and systems of the physical property. Covid-19, on the other hand, is readily ameliorated. The coronavirus (Covid-19) is disseminated through different means (respiratory transmission) and exposure can be reduced significantly thorough prophylactic measures like proper masking, hand washing and social distancing. Moreover, surfaces can be cleaned with cleansers readily available in most grocery stores and hardware stores. Covid-19 contagion naturally dissipates and is easily killed through ordinary cleaning means. Simply put, Covid-19 impacts human health and behavior but not physical structures.

Unable to credibly argue direct physical injury, plaintiffs' claims arise from a suspension of its business operations by excluding employees and customers from its restaurant. The resultant loss of revenue is an economic loss, <u>not a physical injury</u> to covered property. Loss of use is not a covered loss under the policy.

<u>Business Interruption Coverage~ No Period of Restoration</u>

The unambiguous language of the Business Interruption provision is only applicable when the insured sustains interruption during a "period of restoration." The obvious import of the provision is for a time period to repair or rebuild property that sustained direct physical loss

or damage, *ie*. fire or flooding. The provision is only applicable if the suspension of its operations is caused by a direct physical loss. As indicated *supra*, plaintiffs are unable to allege any direct physical damage that caused its business to be interrupted while it repaired or restored the premises.

Civil Authority Coverage ~ No additional property implicated

Again, there is no coverage under this provision because plaintiffs are unable to allege that the covered damage is a result of physical injury. Further, the attempt to shoehorn the Governor's executive order as triggering this provision is disingenuous. The policy applies only to damage to property *other* than the described premises. There are no allegations in the complaint of damage to property other than at the insured premises or that the civil authority limited access to the covered premises as a result of physical damage to another property. A classic example where this would apply is if the building next door experienced a serious fire such that a civil authority limited access to the covered premises due to the physical damage to a surrounding structure; the coverage would be triggered. Here, however, plaintiffs attempt to stretch the application beyond a fair reading of the policy. The provision does not provide coverage.

Exclusion of Loss Due to Virus or Bacteria

A. The exclusion set forth in paragraph B. applies to all coverage under all forms and endorsements that comprise this Coverage Part of Policy, 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.

Defendant argues the language in the exclusion is clear and that any claims of coverage under the cited provisions are expressly excluded. Plaintiffs' responsive pleadings focus less on

the physical presence of the virus on the premises and urge the Court to focus on the actions of civil authority and the government rendering the premises unusable. Further plaintiffs argue the policy is ambiguous.

As indicated above, if the terms of an insurance policy are clear and unambiguous, then the Court must give them their plain, ordinary and popular meaning. Plaintiffs argue the language of the policy in general is ambiguous. Plaintiffs suggests the policy extends beyond just the physical property because, for example, it covers other intangibles relating to the physical property. In support of its argument that the policy does not exclude these Covid-19 losses, plaintiffs reference the existence of the disclaimer of electronic data loss, which is obviously not a physical building. Plaintiffs argue that the electronic data disclaimer, clearly not a physical building, would be unnecessary if the policy were only intended to cover the physical building. It is unclear if plaintiffs are, by extension, urging that had the parties intended to exclude the alleged losses, it could have and would have expressly disclaimed them. Plaintiffs argue the inclusion of the disclaimer demonstrates the "direct physical loss to property" provision does not necessarily exclude these losses, suggesting the exclusion is ambiguous.

The argument that the Virus Exclusion is ambiguous is not convincing. The language of the exclusion could not be more clear. Paragraph B of the provision provides defendant will **not** pay for loss or damage *caused by or resulting from any virus*. There is no limitation. Paragraph A unambiguously directs the insured that the virus exclusion applies to *all* coverage under *all* forms and endorsements *including* provisions that cover business income, extra expense or action of civil authority, each of the provisions under which plaintiff seeks recovery.

Plaintiffs pivot away from the virus causing the losses to the civil authority and government actions therefore removing it from the Virus Exclusion. It cannot be disputed that

the government actions were taken as a result of the virus. Absent the virus, the government actions would not have taken place.

Plaintiffs additionally argue there is no exclusion for pandemics and defendant could have expressly disclaimed pandemics, which it did not. The plain and unambiguous language of the policy indicates applicability to all viruses. Covid-19 is a virus. The history of insurance underwriting reveals these exclusions were drafted in response to the SARS virus and drafted with intention. The fact that Covid-19 has exploded to pandemic proportions is not relevantto determine the policy exclusion. The policy unambiguously excludes loss as a result of any virus.

Count III: Vexatious Misconduct ~ §155

§155 of the Illinois Insurance Code provides a remedy for an insured who encounters unnecessary difficulties when an insurer withholds policy benefits. *Bedoya v. Illinois Founders Insurance Co.*, 293 Ill. App. 3d 668, 679 (1997). In order to recover damages from an insurer for bad faith, the plaintiff must allege and prove that the defendant disputed the amount of the loss, delayed settling a claim or refused to provide coverage when coverage was not debatable. Further, plaintiff must plead and prove the defendant's action or delay was unreasonable and vexatious. The question of whether any given behavior is vexatious and unreasonable is a question of fact. *Boyd v. United Farm Mutual Reinsurance Co.,* 231 Ill. App. 3d 992, 999 (1992). Under Illinois law, however, where there is a *bona fide* dispute and where the Court finds there is no coverage owed under a policy, §155 sanctions are inappropriate. In light of this Court's finding of no coverage under the policy, the Count is dismissed.

Count IV: Negligence Misrepresentation

Corkill moves to dismiss the claim for negligent misrepresentation. To state a cause of action for negligent misrepresentation, plaintiffs must allege: (1) a false statement of material fact; (2) defendant's carelessness or negligence in ascertaining the truth of the statement; (3) an intention to induce plaintiffs to act; (4) reasonable reliance on the truth of the statement by plaintiffs; and (5) damage to plaintiffs resulting from this reliance. Thus, negligent misrepresentation has essentially the same elements as a fraud claim, except that the defendant need not know that the statement is false; rather his own carelessness or negligence in ascertaining the truth of the statement will suffice. *First Mercury Insurance Co. v. Ciolino*, 2018 IL App (1st) 171532, ¶ 1.

As a threshold matter, a complaint must "allege facts establishing a duty owed by the defendant to communicate accurate information." *Brogan v. Mitchell International, Inc.*, 181 Ill. 2d 178, 183 (1998). See also *Doe-3*, 2012 IL 112479, ¶ 28. The Illinois Supreme Court has recognized a duty to communicate accurate information only in two circumstances: (1) "to avoid negligently conveying false information that results in physical injury to a person or harm to property"; and (2) "where one is in the business of supplying information for the guidance of others in their business transactions." *Brogan*, 181 Ill. 2d at 184. See also *Hoover v. Country Mut. Ins. Co.*, 2012 IL App (1st) 110939, ¶ 45.

The first prong is quickly dispensed with. Plaintiffs make no allegations that they suffered any physical injury to a person or harm to property based on defendant's sale of an insurance policy.

Second, most cases addressing claims for negligent misrepresentation involve situations where a defendant who, in the course of their business or profession supplies information for the guidance of others in their business relations with third parties. *Hoover*, 2012 IL App (1st) 110939, ¶ 20. In *Hoover*, the plaintiffs filed a filed suit against the insurance broker alleging negligent misrepresentation. The *Hoover* plaintiffs alleged they sought an insurance policy that would cover full replacement of their home and its contents in the event of loss. Plaintiffs alleged the agent assured them that the policy had sufficient coverage. After an explosion destroyed the premises, the insurance company denied the claim for full coverage indicating the policy had a liability limit of 80% of the actual replacement cost. *Id.* ¶ 17. The appellate court found there could be no claim for negligent misrepresentation because the defendants were not in the business of providing information to the homeowners for guidance in their business transactions, and any information provided was merely ancillary to the sale of homeowners' insurance. *Id.* ¶ 47; see also *University of Chicago Hospitals v. United Parcel Service*, 231 Ill. App. 3d 602, 606 (1992) (the insurer could not be held liable for negligent misrepresentation because an insurance company is not in the business of supplying information for the guidance of others, but rather accepts risks in return for money).

In the case before this Court, the complaint alleges that Corkill is in the business of selling insurance but fails to allege facts that it is in the business of supplying information to plaintiffs for guidance in their business transactions with a third party. Because the insurance brokerage defendant here is different from the insurance company defendants in *Hoover* and *University of Chicago*, a claim for negligent misrepresentation may be possible.

Missing however from the complaint are sufficient facts to support the rest of the elements. Plaintiffs allege in conclusory fashion they sought an all-risk policy with no specific

detail. Plaintiffs make no allegations of what statement was ever made negligently, when any such statement was made, who made the statement and to whom, or even any circumstances surrounding the misstatement. Absent such specific factual allegations, the Court cannot infer any intention on the part of defendant to induce plaintiff to act and that plaintiff relied on statements to meet that end. In plaintiff's response to the motion, it argues the policy was procured, discussed, and negotiated, yet the complaint fails to provide any factual support for that contention. The Count is dismissed without prejudice.

Count V: Negligence

In order to plead a claim for negligence, the plaintiff must establish that the defendant owed the plaintiff a duty of care, which was breached, proximately causing an injury. *Industrial Enclosure Corp. v. Glenview Insurance Agency, Inc*., 379 Ill. App. 3d 434 (1st Dist. 2008); *Marshall v. City of Centralia,* 143 Ill. 2d 1 (1991). Whether a defendant owes a duty of care to a plaintiff is a question of law. *Marshall*, 143 Ill. 2d at 6. In the context of procurement by an insurance broker, "the primary function of an insurance broker as it relates to an insured is to faithfully negotiate and procure an insurance policy according to the wishes and requirements of his client." *Pittway Corp. v. American Motorists Insurance Co.*, 56 Ill. App. 3d 338, 346-47 (1977). As stated above, plaintiffs must allege what they requested, that defendant failed to procure the requested policy and that plaintiffs were unable to review the policy to see if it complied with its requests. The Count is dismissed without prejudice.

IT IS HEREBY ORDERED THAT:

1. Defendant Motorists Commercial Mutual Insurance Company's Motion to Dismiss plaintiffs' complaint pursuant to 735 ILCS 5/2-615 is granted with prejudice.

2. Defendant Corkill's Motion to Dismiss plaintiff's complaint pursuant to 735 ILCS 5/2-615 is granted with leave to replead.

3. Plaintiffs have 28 days, up to and including June 7, 2021 to replead Counts IV and V.

4. Defendant Corkill may have 28 days thereafter, to July 6, 2021 to answer or otherwise plead to the Amended Complaint.

5. This matter is set for status on July 12 , 2021 at 10:00 am. via Zoom. To attend hearing, go to www.zoom.us or telephone to 312-626-6799 and, when prompted, enter

Meeting ID: 830 6503 0480 and Password: 2007

ENTER: Judge Patrick J. Sherlock

MAY 10 2021

Circuit Court – 1942

Honorable Patrick J. Sherlock
Judge Presiding

May 10, 2021