

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

KUTEST KIDS EARLY INTERVENTION CO.,

Plaintiff,

v.

LIBERTY MUTUAL INSURANCE COMPANY
and OHIO SECURITY INSURANCE COMPANY,

Defendants.

Civil Action No.: 1:20-cv-11169

COMPLAINT

Plaintiff Kutest Kids Early Intervention Co., files this Complaint for declaratory judgment and damages against Defendants Liberty Mutual Insurance Company and Ohio Security Insurance Company (collectively, “Defendant” and/or “Liberty Mutual”), alleging the following:

NATURE OF THE CASE

1. This is a civil action seeking declaratory relief and damages arising from Plaintiff’s contract of insurance with Liberty Mutual.
2. On March 16, 2020, Pennsylvania state and local authorities issued orders mandating Plaintiff to close its business in response to the COVID-19 pandemic.
3. Plaintiff had in place commercial insurance issued by Liberty Mutual, and expected it would cover, among other damages, business income losses from a pandemic and closure by a civil authority.

4. Plaintiff's insurance policy provides coverage for all non-excluded business losses. The policy does not contain an exclusion for pandemic, and it includes coverage for a loss resulting from a closure by Order of civil authority. Therefore, the policy provides coverage for Plaintiff's losses.

5. Nevertheless, Liberty Mutual denied Plaintiff's claim for coverage.

6. As a result, Plaintiff is entitled declaratory relief that its business is covered under Plaintiff's insurance policy for all business losses that have been suffered and sustained, as well as an award of monetary damages for Liberty Mutual's breach of the policy.

THE PARTIES

7. At all relevant times, Plaintiff Kutest Kids Early Intervention ("Plaintiff"), a Pennsylvania corporation, maintained its principal place of business at 3502 Scotts Lane, Philadelphia, Pennsylvania 19129.

8. Upon information and belief, at all relevant times, Defendant Liberty Mutual Insurance Company, a Massachusetts corporation, maintained its principal place of business at 175 Berkeley Street, Boston, Massachusetts 02116.

9. Upon information and belief, at all relevant times, Defendant Ohio Security Insurance Company, a New Hampshire corporation, maintained its principal place of business at 175 Berkeley Street, Boston, Massachusetts 02116.

JURISDICTION

10. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §1332 because complete diversity of citizenship exists between Plaintiff and each Defendant and the amount in controversy is greater than \$75,000.

11. Plaintiff is a citizen of Pennsylvania.

12. Each Defendant is a citizen of Massachusetts.

13. Venue is proper in the District of Massachusetts pursuant to 28 U.S.C. §1391(b)(1) because each Defendant resides in this District. Venue is also proper pursuant to 28 U.S.C. §1391(b)(3) because each Defendant is subject to this Court's personal jurisdiction.

FACTUAL BACKGROUND

A. Insurance Coverage

14. On or about October 24, 2019, Plaintiff purchased insurance from Liberty Mutual, policy number ***0107 (the "Policy")(redacted in accordance with Fed. R. Civ. Pro. 5.2(a)), expecting to be insured against losses, including, but not limited to, business income losses at its premises located at 3502 Scotts Lane in Philadelphia, Pennsylvania (the "Insured Premises"). The policy is attached as Exhibit 1.

15. Plaintiff purchased from Liberty Mutual, among other coverages, Business Income and Extra Expense loss coverage for losses sustained due to the suspension of business operations, and coverage for closure by Order of Civil Authority.

16. Plaintiff did not participate in the drafting of its Liberty Mutual Policy.

17. Plaintiff did not participate in the negotiation of its Liberty Mutual Policy.

18. Plaintiff possessed no power or ability to alter or negotiate any terms contained in the Liberty Mutual Policy.

19. The Liberty Mutual Policy is an "all-risks" policy which provides coverage for the Insured Premises unless specifically excluded.

20. The Liberty Mutual Policy provided that the insurance coverage applied to the actual loss of business income sustained due to the suspension of operations caused by "direct

physical loss of or damage” to property at the Insured Premises. This coverage is identified as “Business Income.” See Ex. 1, p. 7 of 61, Section I.A.5(f).

21. The Liberty Mutual Policy also provided that the insurance coverage applied to extra expense that would not have been incurred if there had been no direct physical loss or damage to property at the Insured Premises. This coverage is identified as “Extra Expense”. See Ex. 1, p. 9 of 61, Section I.A.5(g).

22. In addition, the Liberty Mutual Policy provided that the insurance coverage applied to the actual loss of business income sustained and the extra expenses incurred when access to the Insured Premises is prohibited by order of civil authority as the result of a covered cause of loss to property in the area of Plaintiff’s Insured Premises. This coverage is identified as “Civil Authority.” See Ex. 1, p. 10 of 61, Section I.A.5(i).

23. The reasonable expectation of Plaintiff was that the Business Income, Extra Expense, and Civil Authority coverage contained in the Policy provided coverage when a pandemic and/or a civil authority forced closure of its business.

24. The Liberty Mutual Policy does not exclude the losses suffered by Plaintiff, and thereby the Policy does provide coverage for the losses incurred by Plaintiff.

25. Plaintiff suffered direct physical loss or damage within the definition of the Policy.

26. Plaintiff’s loss of use of the Insured Premises constitutes physical loss or damage.

27. The virus and bacterium exclusion contained in the Policy does not apply because Plaintiff’s losses were not directly caused by a virus, bacterium or other microorganism.

28. Instead, Plaintiff's losses were caused by a pandemic and the civil authority orders issued by Pennsylvania Governor Tom Wolf and the City of Philadelphia to mitigate the spread of COVID-19.

B. Coronavirus Pandemic

29. COVID-19 is a highly contagious airborne virus which rapidly spread across the world, including the United States.

30. COVID-19 was declared a pandemic by the World Health Organization on January 20, 2020.

31. On March 6, 2020, Pennsylvania Governor Tom Wolf issued a Proclamation of Disaster Emergency as a result of COVID-19.

32. On March 16, 2020, Governor Wolf announced that Pennsylvania was imposing mitigation efforts to curtail the spread of COVID-19 uniformly across the Commonwealth, and called upon non-essential businesses to close.

33. On March 16, 2020, an Emergency Order was issued by the Office of the Mayor and Department of Public Health of the City of Philadelphia ordering the closure of all non-essential businesses.

34. On March 19, 2020, Governor Wolf issued an Order requiring all non-life sustaining businesses in Pennsylvania to cease operations and close all physical locations.

35. On March 23, 2020, Governor Wolf issued a Stay-at-Home Order for residents of Philadelphia County, among several other counties.

36. On April 1, 2020, Governor Wolf extended the Stay-At-Home Order to the entire Commonwealth of Pennsylvania.

37. As of June 18, 2020, there were 24,732 cases of COVID-19 cases in Philadelphia, and 1,513 deaths¹.

38. Plaintiff provides treatment and services to developmentally delayed children and their families.

39. The treatment Plaintiff provides includes physical therapy, speech therapy, occupational therapy, and specialized instruction.

40. Plaintiff's services are provided at the Insured Premises, and in children's homes throughout the City of Philadelphia.

41. The Insured Premises includes a therapy center for children and an indoor playground.

42. As a result of Civil Authority Orders, and the ongoing pandemic, Plaintiff's Insured Premises closed on March 16, 2020, and remains closed.

43. Since March 16, 2020, while the Insured Premises has remained closed, Plaintiff has provided tele-services for families that have opted in to receive the services.

44. Plaintiff's in-person practice is highly susceptible to rapid person-to-person and person-to-property contamination of COVID-19.

45. Given the nature of Plaintiff's business, Plaintiff and its Insured Premises were physically impacted by actual COVID-19 contamination and/or the probability of COVID19 contamination and Civil Authority mitigation efforts.

46. As a result of the pandemic and resulting Civil Authority orders, Plaintiff suffered business income losses which are covered by the Liberty Mutual Policy.

¹ <https://www.phila.gov/programs/coronavirus-disease-2019-covid-19/updates/> (Accessed on June 19, 2020).

47. Plaintiff faithfully paid premiums to Liberty Mutual for coverage to ensure the survival of the business due to the business closure caused by a pandemic and/or ordered by the Civil Authority.

48. It was Plaintiff's reasonable expectation that if a pandemic occurred and/or if civil authorities forced closure of Plaintiff's business, the loss of income would be covered under the Policy.

49. As a result of the pandemic and Civil Authority orders, Plaintiff incurred, and continues to incur, a substantial loss of business income and additional expenses covered under the Liberty Mutual Policy.

50. On or about May 20, 2020, Plaintiff submitted a notice of loss to Liberty Mutual claiming a business income loss.

51. On or about May 22, 2020, Liberty Mutual sent Plaintiff a letter denying coverage under the Policy.

COUNT I
DECLARATORY RELIEF

52. Plaintiff incorporates by reference each paragraph of this Complaint as if fully set forth herein.

53. Under 28 U.S.C. §§2201 and 2202, this Court has jurisdiction to declare the rights and other legal relations of the parties in dispute.

54. Plaintiff's Policy is an insurance contract under which Liberty Mutual was paid premiums in exchange for promises to pay losses for claims covered by the Policy.

55. In the Policy, Liberty Mutual promised to pay for losses of business income sustained as a result of perils not excluded under the Policy.

56. Plaintiff suffered losses of business income due to direct physical loss and/or physical damage at the Insured Premises.

57. These losses triggered Business Income, Extra Expense, and Civil Authority coverage under the Policy, and additional coverages applicable to the losses claimed in this action.

58. Plaintiff has complied with all applicable provisions of its Policy, including payment of premiums.

59. Liberty Mutual, without justification, dispute that the Policy provides coverage for Plaintiff's losses.

60. Plaintiff seeks a Declaratory Judgment that its Policy provides Business Income, Extra Expense, and Civil Authority coverage because of losses attributable to the pandemic and civil authority actions; and that Liberty Mutual is obligated to pay for the full amount of Plaintiff's losses.

61. An actual controversy exists between Plaintiff and the Liberty Mutual because Liberty Mutual denied Plaintiff's claim for coverage.

62. Plaintiff's interest in the Liberty Mutual Policy and declaratory relief is direct, substantial, quantifiable, and immediate.

63. Declaratory Judgment is appropriate in the manner requested herein by Plaintiff.

COUNT II
BREACH OF CONTRACT

64. Plaintiff incorporates by reference each paragraph of this Complaint as if fully set forth herein.

65. Plaintiff's Policy is an insurance contract under which Liberty Mutual was paid premiums in exchange for promises to pay losses for claims covered by the Policy.

66. The Policy includes coverage for Business Income, Extra Expense, Civil Authority and additional coverages applicable to the losses claimed in this action.

67. Plaintiff is entitled to recover all losses caused by the COVID-19 pandemic and/or civil authority orders.

68. Liberty Mutual was advised of Plaintiff's claims and demand for coverage under the Liberty Mutual Policy.

69. Plaintiff complied with all requirements of the Policy.

70. Liberty Mutual breached the terms and provisions of Policy by denying the claims of Plaintiff for all losses caused the pandemic and the civil authority orders.

71. The breach of the indemnification obligations under the Liberty Mutual Policy by Liberty Mutual has caused Plaintiff to suffer substantial loss and harm in excess of \$75,000.

72. Liberty Mutual is required to pay Plaintiff all covered losses caused by COVID-19 and civil authority orders including Business Income, Extra Expense, Civil Authority, and other coverages under the Liberty Mutual Policy.

REQUEST FOR RELIEF

Plaintiff Kutest Kids Early Intervention Co. requests that the Court enter judgment in its favor and against Defendants Liberty Mutual Insurance Company and Ohio Security Insurance Company, as follows:

A. As to Count I, a declaration that:

- i. All Business Income, Extra Expense, and Civil Authority losses and expenses incurred and sustained based on the facts and circumstances set forth above are insured and covered under Plaintiff's Policy; and,

ii. Defendants are obligated to pay for the full amount of the Business Income, Extra Expense, and Civil Authority losses and expenses sustained and incurred, and to be sustained and incurred, based on the facts and circumstances set forth above;

B. As to Count II, a Judgment awarding monetary damages for breach of contract in an amount to be determined at trial.

C. An order requiring Defendants Liberty Mutual Insurance Company and Ohio Security Insurance Company to pay both pre-and post-judgment interest on any amounts awarded;

D. An award of costs and attorneys' fees; and

E. Such other or further relief as may be appropriate.

DEMAND FOR JURY TRIAL

The Plaintiff hereby demands at trial by jury as to all issues so triable.

Dated: June 19, 2020

ZILBERBERG EINHORN KARPEL, P.C.
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