

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

RETINA SPECIALISTS OF OHIO, LLC)	CASE NO.
5500 Ridge Rd., #208)	
Parma, Ohio 44129)	
)	JUDGE
Plaintiff,)	
)	
v.)	<u>COMPLAINT</u>
)	
SELECTIVE INSURANCE COMPANY)	(JURY DEMAND ENDORSED HEREIN)
OF AMERICA)	
40 Wantage Ave.)	
Branchville, NJ 07890)	
)	
Defendant.)	

Plaintiff Retina Specialists of Ohio, LLC for its Complaint against Defendant Selective Insurance Company of America states and alleges as follows:

1. Plaintiff is the owner and operator of optometry offices throughout Northeast Ohio which was forced to close its business facilities – through no fault of its own – as part of the State’s efforts to slow the spread of a global pandemic. The closures mandated by these orders present an existential threat to Plaintiff, and other small, local businesses that employ hundreds of Ohio residents. To protect its business from situations like these, which threaten the livelihoods of its employees and owners, based on factors wholly outside of its control, Plaintiff obtained business interruption insurance from Defendant Selective Insurance Company of America (“Selective”).

2. Plaintiff now brings this action against Selective to enforce its obligations under a commercial businessowners insurance policy sold and issued to Plaintiff, which provides coverage for losses incurred due to a “necessary suspension” of its operations, including when its business is forced to close due to a government order arising from a global pandemic.

3. On March 9, 2020, Governor Mike DeWine issued Executive Order 2020-01D, Declaring a State of Emergency in Ohio as a result of the global pandemic.

4. On March 11, 2020, the head of the World Health Organization declared a pandemic.

5. On March 15, 2020, Ohio Governor Mike DeWine and Amy Acton, M.D., M.P.H., Director of the Ohio Department of Health, issued a Public Health Order, closing all bars and restaurants except sales for carry-out beverage and food, in an effort to address the ongoing pandemic.

6. On March 17, 2020, Governor DeWine and Dr. Acton issued orders closing all polling locations.

7. On March 17, 2020, Governor DeWine and Dr. Acton issued orders regarding the Management of Non-essential Surgeries and Procedures throughout Ohio, and ordering that as of Wednesday, March 18, 2020, all non-essential or elective surgeries and procedures that utilized PPE should not be conducted.

8. On March 20, 2020, Governor DeWine and Dr. Acton issued orders to cease business operations at all hair salons, day spas, nail salons, barber shops, tattoo parlors, body piercing locations, tanning facilities and massage therapy locations.

9. On March 22, 2020, Governor DeWine and Dr. Acton issued an order that all persons stay at home unless engaged in essential work or activity.

10. As a result of the Orders identified in Paragraphs 3 and 5-9 (“Closure Orders”), Plaintiff has been forced to halt ordinary operations, resulting in substantial lost revenues and forcing the Plaintiff to shut down operations and permanently lay off employees.

11. But despite Selective's express promise in its Policy to cover the Plaintiff's business interruption losses when the government forces it to close, Selective has issued a denial for any losses related to the Closure Orders without first conducting any meaningful coverage investigation, let alone an investigation that would result in any reasonable justification for denial of the claim as is required under Ohio law.

12. Selective's denial of coverage is without justification and is contrary to the terms, obligations, and provisions of the Policy because as explained by Governor DeWine in his Order declaring a State of Emergency, and every other Order issued by Governor DeWine and Dr. Acton, the pandemic results in property damage and "direct physical loss of or physical damage" to Plaintiff's premises in that it can exist, contaminate, spread, and be contracted from surfaces and objects in and on premises.

13. Selective's cursory coverage denial is arbitrary and unreasonable, and inconsistent with the facts and plain language of the Policy at issue. This denial appears to be driven by the insurance industry's and Selective's desire to preempt its own financial exposure to the economic fallout resulting from the pandemic, rather than to initiate, as Selective is obligated to do, a thorough and fair investigation of the claims and a careful review of the Policy sold to Plaintiff in exchange for valuable premiums.

14. As a result of Selective's wrongful denial of coverage, Plaintiff files this action for a declaratory judgment establishing that it is entitled to receive the benefit of the insurance coverage purchased, for indemnification of the business losses it has sustained, for breach of contract, and for bad faith claims handling.

PARTIES

15. Plaintiff is an Ohio corporation, with its principal place of business in Parma Ohio.

16. Defendant Selective is a foreign insurance company engaged in the business of selling insurance contracts to commercial entities such as the Plaintiff in Ohio and elsewhere. Selective is incorporated in the State of New Jersey with its principal place of business in Branchville, New Jersey. It is licensed to draft policy forms, underwrite insurance policies, and sell insurance in the State of Ohio. It is registered to do business in the State of Ohio with the Ohio Department of Insurance.

JURISDICTION AND VENUE

17. This Court has subject matter jurisdiction because Plaintiff and Selective entered into a contract for insurance that covers property in Cuyahoga County, Ohio.

18. This Court has personal jurisdiction of Selective because it engages in commerce in Cuyahoga County, Ohio, takes applications and sells insurance policies in Cuyahoga County, Ohio, and entered into a contract of insurance with Plaintiff in Cuyahoga County, Ohio, and because Selective regularly conducts business throughout the State of Ohio and County of Cuyahoga, marketing, selling, underwriting, and issuing insurance policies.

19. Venue is proper because some or all of the facts giving rise to the claim for relief occurred in Cuyahoga County, Ohio.

FACTUAL ALLEGATIONS

20. Plaintiff incorporates by reference, as if fully set forth herein, the allegations set forth in paragraphs 1-19 above.

21. The Closure Orders were issued because of a global pandemic.

22. The Closure Orders were issued because the pandemic causes direct physical loss to property.

23. The Closure Orders prohibit Plaintiff and the public from having access to Plaintiff's business.

24. In exchange for substantial premiums, Selective sold Plaintiff its Commercial Business Owners policy, Policy No. S 1832496, having effective dates of November 30, 2019 through November 30, 2020 to Plaintiff ("Policy"). The Policy covered the following scheduled locations: 1155 State Route 303, Streetsboro, Ohio 44241; 518 West Ave., Tallmadge, Ohio 44278; 5500 Ridge Rd., Suite 208, Parma, Ohio 44129; 34950 Chardon Rd., Willoughby Hills, Ohio 44094; 1131 E. Broad St., Elyria, Ohio 44035; and 4338 Ridge Rd., Brooklyn, Ohio 44144. At the time of filing this Complaint, the entire Policy was not available to Plaintiff; however, upon information and belief, Defendant maintains an authentic duplicate of the Policy.

25. Plaintiff entered into the Policy with Selective, whereby Plaintiff agreed to make payments to Selective in exchange for Selective's promise to indemnify Plaintiff for losses including, but not limited to, business income losses at its scheduled locations set forth in Paragraph 24 ("Insured Property").

26. The Insured Property consists of optometry offices of Plaintiff which employs(ed) more than 50 employees. The Insured Property is owned and/or leased, managed, and/or controlled by Plaintiff.

27. The Policy is currently in full effect, providing property, business personal property, business income and extra expense, and additional coverages.

28. Plaintiff has faithfully paid policy premiums to Selective, specifically to provide additional coverages for “Business Income and Extra Expense Coverage” in the event of business closures by order of Civil Authority.

29. 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 scheduled premises is specifically prohibited by order of Civil Authority as the direct result of a covered cause of loss to property in the immediate area of Plaintiff’s scheduled premises. The additional coverage is identified as coverage under “Civil Authority” as part of the Policy’s “Section I - Property” section and Business Property Enhancement Endorsement, which changes the Policy’s “Section I – Property.”

30. The Policy is an all-risk policy, in that it provides that a covered cause of loss under the policy means direct physical loss or direct physical damage unless the loss is specifically, clearly and unambiguously excluded or limited by the Policy.

31. The Policy’s Civil Authority Coverage Section extends coverage to direct physical loss or damage that results in a covered cause of loss to the Property in the immediate area of the “scheduled premises.”

32. Based on information and belief, Selective has accepted the policy premiums with not intention of providing any coverage under the Policy’s Civil Authority Coverage Section due to a loss and shutdown from a pandemic.

33. The global COVID-19 pandemic has physically impacted both public and private property and physical spaces around the world, as well as the right of the general public to gather and utilize business locations. The currently-ranging pandemic has been exacerbated by the fact that it physically infects and remains active on surfaces of objects or materials, “fomites” for up to

twenty-eight days. The scientific community in the United States and indeed, across the world, including the World Health Organization, has recognized that the pandemic is a cause of real physical loss and damage.

34. The United States Congress has also recognized this fact. On March 18, 2020, eighteen (18) members of the United States Congress issued a letter to the Presidents and CEO's of the American Property Casualty Insurance Association, National Association of Mutual Insurance Companies, Independent Insurance Agents & Brokers of America, and Council of Insurance Agents and Brokers, and advised that business interruption insurance is intended to protect business against income losses as a result of disruption to their operations and recognizing income losses due to the pandemic, and that coverage under the such policies will help sustain America's business through "these turbulent times, keep their doors open, and retain employees on the payroll." They concluded that during "times of crisis, we must all work together. We urge you to work with your member companies and brokers to recognize financial loss due to the [pandemic] as part of policyholders' business interruption coverage."

35. Indeed, a number of countries including China, Italy, France and Spain have required fumigation of public areas prior to allowing them to re-open. A recent scientific study printed in the New England Journal of Medicine explains that COVID-19 is detectable for up to three hours in aerosols, up to four hours on copper, up to 24 hours on cardboard boxes, and up to three days on plastic and stainless steel. Notably, the most potent form is not airborne but rather present on physical surfaces.

36. The Closure Orders were issued and specifically reference evidence that the pandemic is causing directly physical property damage. In this case, the property that is damaged is in the immediate area of the Insured Property.

37. As a direct and proximate result of the Closure Orders, access to and business in connection with Plaintiff's Insured Property has been greatly limited and has suffered immensely.

38. As a further direct and proximate result of the Closure Orders, Plaintiff has been forced to deal with substantial loss in business.

39. Any effort by Selective to deny the reality that the pandemic causes physical loss and damage would constitute a false and potentially fraudulent misrepresentation that could endanger policyholders, such as the Plaintiff, and the public.

40. A declaratory judgment determining that the coverage provided under the Policy will prevent Plaintiff from being left without vital coverage acquired to ensure the survival of its business due to the unprecedented scale of the shutdown caused by the Closure Orders. As a result of the Closure Orders, Plaintiff has incurred, and continues to incur, a substantial loss of business income and additional expenses covered under the Policy.

41. Plaintiff submitted a claim under the Policy for business interruption losses.

42. Selective denied the claim despite that the Policy does not exclude losses as a result of pandemics.

43. There is no reasonable justification for Selective's denial of Plaintiff's claim.

44. Selective performed little to no investigation of Plaintiff's claim.

45. Selective's denial is contrary to the terms, conditions, agreements and promises made by Selective, for which Plaintiff paid substantial premiums.

46. At all times, Plaintiff has satisfied all of its obligations under the Policy.

COUNT I: DECLARATORY JUDGMENT

47. Plaintiff incorporates by reference, as if fully set forth herein, the facts and allegations set forth in paragraphs 1-46 above.

48. The Policy is an insurance contract under which Plaintiff paid Selective premiums for Selective's promise to pay Plaintiff's losses for claims covered by the Policy, such as business losses incurred as a result of the Closure Orders and pandemic forcing it to close business at its Insured Property.

49. Plaintiff has complied with all applicable provisions of the Policy, including payment of the premiums in exchange for coverage under the Policy.

50. An actual case or controversy exists regarding Plaintiff's rights and Selective's obligations under the Policy to reimburse Plaintiff for the full amount of losses incurred by Plaintiff in connection with the Closure Orders and the necessary interruption of its business stemming from the pandemic.

51. In accordance with Rule 57 of the Ohio Rules of Civil Procedure, and R.C. 2721.01 to 2721.15, inclusive, Plaintiff seeks a declaratory judgment from this Court declaring the following:

- (a) Plaintiff's losses incurred in connection with the Closure Orders and the and the necessary interruption of its businesses stemming from the pandemic are covered losses under the Policies, that the Closure Orders constitutes a prohibition of access to the Insured Property by a Civil Authority as defined in the Policy;
- (b) Selective has waived any right that it may have had to assert defenses to coverage or otherwise seek to bar or limit coverage for Plaintiff's losses by issuing a form denial without conducting any meaningful claim investigation as required under Ohio law;
- (c) that the Closure Orders trigger coverage because the Policy does not include an exclusion for a pandemic and actually extends coverage for physical loss or damage to the Insured Property;
- (d) To the extent Selective relies on an exclusion, the exclusion is ambiguous, conflicts with other promises contained in the Policy, requires a strained interpretation of the Policy, and results in illusory coverage;

- (e) Plaintiff has coverage for any future orders issued by the Governor and/or the Ohio Department of Health; and,
- (f) Selective is obligated to pay Plaintiff for the full amount of the losses incurred and to be incurred in connection with the covered business losses related to the Closure Orders and the necessary interruption of its businesses stemming from the pandemic.

COUNT II: BREACH OF CONTRACT

52. Plaintiff incorporates by reference, as if fully set forth herein, the facts and allegations set forth in paragraphs 1-51 above.

53. The Policy is a contract under which Plaintiff paid Selective premiums in exchange for Selective's promise to pay Plaintiff's losses for claims covered under the Policy, including the business losses incurred as a result of the pandemic, due to the direct physical damage to the immediate area of the Insured Property forcing Plaintiff to close its business operations, and due to the Closure Orders as a result of damage to property within the immediate area of the Insured Property.

54. Plaintiff has complied with all applicable provisions and obligations of the Policy, including payment of premiums in exchange for coverage under the Policy, and yet Selective has failed to comply with its obligations under the Policy's clear and unambiguous terms.

55. In the event any of the terms and conditions of the Policy are ambiguous, those terms and conditions must be interpreted in favor of Plaintiff and in favor of coverage, since Selective drafted the Policy and presented it to Plaintiff as a form contract without any ability of Plaintiff to modify any portions of it.

56. Selective communicated to Plaintiff that it would not pay claims under the Policy for business interruption losses.

57. Selective's denial of the claim is in breach of the terms and provision of the Policy.

58. As a proximate result of Selective's breach of the Policy, Plaintiff has sustained and continues to sustain damages for which Defendants are liable, in an amount to be established at trial.

COUNT III: BREACH OF THE DUTY OF GOOD FAITH AND FAIR DEALING

59. Plaintiff incorporates by reference, as if fully set forth herein, the facts and allegations set forth in paragraphs 1-58 above.

60. Every insurance policy contains an implied covenant of good faith and fair dealing.

61. Selective breached the implied covenant of good faith and fair dealing by wrongfully, and without reasonable justification and no reasonable investigation, denying coverage to the Plaintiff under the Policy. The breach of the implied covenant of good faith and fair dealing is ongoing as Plaintiff reserves the right to amend this Complaint as new facts are discovered and/or developed.

62. Plaintiff is informed and believes, and therefore alleges, that Selective has intentionally and maliciously, as part of a preconceived design, acted so as to deny Plaintiff the rightful benefits under the Policy.

63. Plaintiff is informed and believes, and therefore alleges, that Selective failed to conduct any reasonable investigation of the claim under the Policy, and instead issued a denial not based on reasonable justification, but rather in order to establish an industry-wide trend in response to the potential mammoth economic exposure that Defendant, and other similarly situated insurers face as a result of the global pandemic that claims for business losses under its policies will not be covered and to thwart other similarly situated business from seeking such benefits under their policies.

64. As a direct and proximate result of the breach of the implied covenant of good faith and fair dealing by Selective, Plaintiff has suffered, and will continue to suffer damages. Plaintiff has been forced to cease its business operations and yet is forced to continue to pay the expense associated with it, such as those related to occupancy, insurance, license fees, equipment, etc., all in a climate where nearly 16 million people have filed for unemployment benefits, while Selective reaped the benefit of huge premium dollars and promised policyholders, like Plaintiff, that business interruption claims would be paid.

WHEREFORE, Plaintiff respectfully prays that the Court:

1. Enter a declaratory judgment on Count I of the Complaint in favor of the Plaintiff and against Selective, declaring as follows:
 - (a) Plaintiff's losses incurred in connection with the Closure Orders and the and the necessary interruption of its businesses stemming from the pandemic are covered losses under the Policies, that the Closure Orders constitutes a prohibition of access to the Insured Property by a Civil Authority as defined in the Policy;
 - (b) Selective has waived any right that it may have had to assert defenses to coverage or otherwise seek to bar or limit coverage for Plaintiff's losses by issuing a form denial without conducting any meaningful claim investigation as required under Ohio law;
 - (c) that the Closure Orders trigger coverage because the Policy does not include an exclusion for a pandemic and actually extends coverage for physical loss or damage to the Insured Property;
 - (d) To the extent Selective relies on an exclusion, the exclusion is ambiguous, conflicts with other promises contained in the Policy, requires a strained interpretation of the Policy, and results in illusory coverage;
 - (e) Plaintiff has coverage for any future orders issued by the Governor and/or the Ohio Department of Health; and,

- (f) Selective is obligated to pay Plaintiff for the full amount of the losses incurred and to be incurred in connection with the covered business losses related to the Closure Orders and the necessary interruption of its businesses stemming from the pandemic.
2. Enter a judgment on Count II of the Complaint in favor of Plaintiff and against Selective and award damages for breach of contract in an amount to be proven at trial;
 3. Enter a judgment on Count III of the Complaint in favor of Plaintiff and against Selective for all compensatory damages in an amount in excess of Twenty-Five Thousand Dollars (\$25,000.00), plus attorneys' fees, costs, and punitive damages;
 4. Enter a judgment in favor of Plaintiff and against Selective in an amount equal to all attorneys' fees and related costs incurred for the prosecution of this coverage action, which amount to be established at the conclusion of this action;
 5. Award to Plaintiff and against Selective prejudgment interest, to be calculated according to law, to compensate Plaintiff for the loss of use of funds caused by Selective's breach of the Policy; and,
 6. Award Plaintiffs such other, further, and additional relief as this Court deems just and appropriate.

Respectfully submitted,

/s/ William J. Novak

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Attorneys for Plaintiff

JURY DEMAND

A trial by jury is hereby requested on all matters herein.

Respectfully submitted,

/s/ William J. Novak

WILLIAM J. NOVAK (0014029)

One of the Attorneys for Plaintiff

TO THE CLERK

Please serve the summons and a copy of this Complaint upon the Defendant via certified mail, return receipt requested, at the addresses set forth in the caption of the Complaint.

/s/ William J. Novak

WILLIAM J. NOVAK (0014029)

One of the Attorneys for Plaintiff