UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

TORRE ROSSA, LLC, *individually, and on behalf of all others similarly situated*,	)	Case No.: 1:20 CV 1095
Plaintiff	)	JUDGE SOLOMON OLIVER, JR.
v.	)	
LIBERTY MUTUAL INSURANCE COMPANY,	)	
Defendant	)	ORDER

Currently pending before the court in the above-captioned case are Defendant Liberty Mutual Insurance Company's Motion for Judicial Notice (ECF No. 15) and Motion to Dismiss for Failure to State a Claim ("Motion") (ECF No. 16). For the reasons that follow, the court grants Liberty's Motion to Dismiss, and grants in part Liberty's Motion for Judicial Notice to the extent that Liberty asks this court to take judicial notice of the March 23, 2020 Ohio Department of Health ("ODH") order, and denies the Motion for Judicial Notice to the extent that it asks the court to take judicial notice of the March 15, 2020 ODH order and the Centers for Disease Control and Prevention ("CDC") guidance on cleaning and disinfecting the workplace.

I. BACKGROUND

A. Facts

Plaintiff Torre Rossa, LLC ("Plaintiff" or "Rossa") operates a restaurant in Beachwood, Ohio. (Compl. ¶1, ECF No. 1-1.) Due to the COVID-19 pandemic, on March 15, 2020, Ohio issued

an order restricting food and beverage sales to carry-out and delivery only, with no onsite consumption permitted. (*Id*. ¶ 25.) On March 23, 2020, Ohio ordered all non-essential business to cease operations. (*Id*. ¶ 26.) Rossa asserts that it did not qualify as an essential business and had to cease its retail operations. (*Id*.) The Complaint does not make clear as to what Rossa meant when it alleged that it "ceased its retail operations." As explained below, Liberty asks the court to take judicial notice of the two Ohio orders that Rossa referenced in the Complaint, and points out that the March 23, 2020 government order permitted restaurants to offer carry-out and delivery service. (Defs. Mem. in Supp. at PageID #173, ECF No. 16-3.) Because Rossa's allegation that it "had to cease its retail operations" may be read to suggest that the March 23, 2020 government order did not allow Rossa to continue to sell food for consumption off-premises, the court will take judicial notice of the fact that the March 23, 2020 government order permitted restaurant to conduct business via carry-out or delivery.

After ceasing its business operations, Rossa submitted a claim to its insurer, Defendant Liberty Mutual Insurance Company ("Defendant" or "Liberty"), under the Policy provisions for business income loss, extra expense, and civil authority coverage. (*Id*. ¶¶ 28, 32.) Rossa's request for coverage was subsequently denied on April 2, 2020. (*Id*.)

1. Relevant Coverage Provisions Under the Policy

This case centers around the meaning of the phrase "direct physical loss of or damage to" in the context of insurance coverage for property damage. In the Policy, the coverage provision makes clear that sustaining "direct physical loss of or damage to" Covered Property[1] is a prerequisite to

[1] The term Covered Property is defined in the Policy, and there is no dispute that the restaurant falls within the Policy's definition of Covered Property.

obtaining coverage. (Ex. 2. to Mot. at PageID #432, ECF No. 16-2.) In full, the coverage provision states:

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

(*Id.*) (emphasis added).

As explained above, Rossa submitted claims under its Business Income and Extra Expense and Civil Authority coverage provisions of the Policy. In relevant part, the Business Income provision states:

> 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 . . . [t]he loss or damage must be caused by or result from a Covered Cause of Loss.

(Ex. 2. to Mot. at PageID #449, ECF No. 16-2.) (emphasis added). In relevant part, the Extra Expense provision states:

> Extra Expense 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.
>
> We will pay Extra Expense (other than the expense to repair or replace property): (1) to avoid or minimize the "suspension" of business and to continue operations . . . (2)[to] minimize the "suspension" of business if you cannot continue "operations." We will also pay Extra Expense to repair or replace property[.]

(*Id.*)(emphasis added). In relevant part, the Civil Authority provision states:

> 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.

(*Id.* at PageID #450.)(emphasis added). According to Rossa, the Policy covers "all-risks," which means that "any loss resulting from direct physical loss or damage to the property must be covered unless specifically excluded." (Pl.'s Opp'n at PageID #922, ECF No. 17.) The term "all-risks" is not defined by the Policy, and the parties have not offered any facts to suggest that an "all-risks" policy should be interpreted differently than any other policy. In any event, Rossa alleges that it suffered a direct physical loss of or damage to its restaurant as a result of the COVID-19 pandemic and related business closure orders. (Compl. ¶ 30, ECF No. 1-1.)

2. Relevant Exclusions Under the Policy

The Policy includes several exclusions, however, the parties focus on the "Virus or Bacteria" exclusion, which provides Liberty will "not pay for loss, cost, or expense caused by, resulting from, or relating to any virus, bacterium, or other microorganism that causes disease, illness, or physical distress or that is capable of causing disease, illness, or physical distress." (Ex. 2 to Mot. to Dismiss, the Policy at PageID #257, ECF No. 16-2.)

B. Procedural History

On April 15, 2020, Torre Rossa, LLC filed its class-action Complaint in the Cuyahoga County Court of Common Pleas, asserting the following claims: (1) declaratory judgment (count one); (2) breach of contract (count two); and (3) breach of covenant of good faith and fair dealing (the "bad faith claim") (count three). (Compl., ECF No. 1.) In the Complaint, Rossa alleges that Liberty breached the insurance contract by denying coverage for Rossa and the putative classes' claims under the Business Income, Extra Expense, and Civil Authority Coverage provisions of the Policy. (*Id*. ¶¶ 58–67.) Rossa seeks a declaratory judgment, declaring that Liberty is required to pay for Rossa and the putative classes' losses under the terms of the Policy. (*Id*. ¶¶ 53–57.) On May 19, 2020, Liberty removed this case from the Cuyahoga County Court of Common Pleas to this court. (ECF No. 1.)

On December 30, 2020, Liberty filed a Motion to Dismiss (ECF No. 16) pursuant to Federal Rule of Civil Procedure 12(b)(6), asserting that Rossa is not entitled to coverage under the Policy. (ECF No. 16.) On January 11, 2021, Rossa filed its Response in Opposition to the Motion to Dismiss (ECF No. 17), to which Liberty replied (ECF No. 19) on January 28, 2021. In addition, the parties also filed several supplemental notices of authority. (ECF Nos. 21, 22, 23, 24, 25, 26.)

On December 30, 2020, Liberty filed a Motion for Judicial Notice (ECF No. 15), which asks the court to take judicial notice of two orders issued by ODH that were referenced in the Complaint as well as a publication from the CDC that offers guidance relative to cleaning and disinfecting the workplace. (Defs.' Mot. for Judicial Notice at PageID #119, ECF No. 15.) In the Motion for Judicial Notice, Liberty asserts that "[a]s official government documents that have been distributed to the public specifically to provide information about COVID-19 and the rules

governing the operation of businesses during the pandemic, these three exhibits plainly meet the criteria for judicial notice under Federal Rule of Evidence 201." (*Id*. at PageID #120.) Rossa did not oppose the Motion for Judicial Notice. The court declines to take judicial notice of the March 15, 2020 ODH order because Liberty does not provide any compelling reason as to why judicial notice of that order is necessary. However, for the reasons stated above, the court finds that it is appropriate to take judicial notice of the March 23, 2020 ODH order. Lastly, the court finds that it is unnecessary to take judicial notice of the CDC's guidance relative to cleaning and disinfecting the workplace—which Liberty cites in its Motion to Dismiss for the proposition that the virus does not cause physical damage to property because the CDC has stated that the virus can be wiped off of surfaces by cleaning the affected area—because there is nothing in the Complaint which suggests that a virus cannot be cleaned from a surface. (Defs. Mem. in Supp. at PageID #181, ECF No. 16-1.).

II. LEGAL STANDARD

The court examines the legal sufficiency of a plaintiff's claims under Federal Rule of Civil Procedure 12(b)(6). The United States Supreme Court clarified the law regarding what a plaintiff must plead in order to survive a motion made pursuant to Rule 12(b)(6) in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).When determining whether the plaintiff has stated a claim upon which relief can be granted, the court must construe the complaint in the light most favorable to the plaintiff, accept all factual allegations as true, and determine whether the complaint contains "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. The plaintiff's obligation "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555.

Even though a complaint need not contain "detailed" factual allegations, its "[f]actual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the Complaint are true." *Id.* A court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

Generally, when ruling on a Rule 12(b)(6) motion, the court is limited to the allegations of the complaint. *See Weiner v. Klais & Co.*, 108 F.3d 86, 88 (6th Cir. 1997) ("Matters outside of the pleadings are not to be considered by a court in ruling on a 12(b)(6) motion to dismiss."). Thus, when a defendant attaches matters outside of the pleadings to his 12(b)(6) motion, the court may treat the motion as one for summary judgment to be disposed of under Federal Rule of Civil Procedure 56, after providing all parties a reasonable opportunity to present all material pertinent to the motion. *Greenberg v. Life Ins. Co.*, 177 F.3d 507, 514 (6th Cir. 1999). However, a document that is attached to a defendant's 12(b)(6) motion can be considered as part of the pleadings, thereby precluding the conversion of the motion to one for summary judgment, if the document is referred to in the complaint and central to the plaintiff's claim. *Id.*; *see also Amini v. Oberlin College*, 259 F.3d 493, 502 (6th Cir. 2001). This exception inhibits "a plaintiff with a legally deficient claim" from "surviv[ing] a motion to dismiss simply by failing to attach a dispositive document on which it relied." *Weiner*, 108 F.3d at 89.

III. LAW AND ANALYSIS

A. Interpretation of the Policy Under Ohio Law

As explained above, Rossa filed this action seeking coverage for its economic losses associated with the COVID-19 pandemic and Ohio's related government shut-down orders. Liberty argues that Rossa's claims should be dismissed for three reasons: (1) Rossa fails to

plausibly allege a "direct physical loss of or damage to" property, as required to obtain coverage under the Business Income and Extra Expense provision of the Policy; (2) Rossa fails to plausibly allege that a Covered Cause of Loss,—namely, a "direct physical loss"—caused "damage to property other than property at the described premises," as required to obtain coverage under the Civil Authority provision of the Policy; and (3) Rossa's claims are barred by the Policy's Virus Exclusion. (Defs.' Mem. in Supp. at PageID #176, 183–184, 186–187, ECF No. 16-1.) Rossa counters that dismissal is inappropriate for three reasons: (1) the phrase "direct physical loss of or damage to" is ambiguous and "does not require tangible physical damage," (2) a government order terminating on-site patronage of restaurants is sufficient to trigger coverage under the Civil Authority provision of the Policy, and (3) the Virus Exclusion is ambiguous and does not apply to Rossa's losses that were caused by a "pandemic," not by a "virus." (Pl.'s Opp'n to Defs.' Mot. to Dismiss at PageID #922, 925–928, 934–935, ECF No. 17.) The court will address the parties' arguments in turn.

1. Business Income and Extra Expense Coverage

Rossa's request for coverage under the Business Income and Extra Expense provision of the Policy turns on the meaning of the phrase "direct physical loss of or damage to" property. On the one hand, Liberty asserts that under Ohio law, "an event does not cause 'physical loss' unless it adversely affects the structural integrity of the property." (Defs.' Mem. in Supp. at PageID #177, ECF No. 16-1.) On the other hand, Rossa maintains that physical loss does not require tangible damage to property, but rather may be satisfied either by the "loss of use" of the property or by the physical presence of the virus on the premises of the property. (Pl.'s Opp'n at PageID #928–933, ECF No. 17.)

This court has previously considered the meaning of the phrase "direct physical loss of or damage to" property in the context of a COVID-19 related insurance coverage dispute. *See Bridal Expressions LLC v. Owners Ins. Co.*, No. 1:20-CV-833, 2021 WL 1232399 (N.D. Ohio Mar. 23, 2021). After considering the plain meaning of the words "physical," "loss," and "damage," as well as the relevant case law interpreting similar policies, the court ultimately concluded that Ohio law requires a tangible injury to property to trigger insurance coverage for property damage. *Id*. at *6 (collecting cases).

Likewise, several courts in this district have rejected Rossa's argument that the "physical presence" of the virus on the property constitutes a physical loss under Ohio law. *See Ceres Enterprises, LLC v. Travelers Ins. Co.*, 520 F. Supp. 3d 949, 961–62 (N.D. Ohio 2021) (finding that "mere physical presence of the virus on its property does not constitute physical loss under the policy or Ohio law"); *Fam. Tacos, LLC v. Auto Owners Ins. Co.*, 520 F. Supp. 3d 909, 922 (N.D. Ohio 2021) (same); *see also Brunswick Panini's, LLC v. Zurich Am. Ins. Co.*, 520 F. Supp. 3d 965, 975 (N.D. Ohio 2021) (concluding that "[the] [p]laintiffs' allegations regarding the physical presence and/or impact of the coronavirus are insufficient under the *Twombly-Iqbal* analysis").

And most importantly, the Sixth Circuit recently considered the meaning of the phrase "direct physical loss of or damage to [property]," *See Santo's Italian Cafe LLC v. Acuity Ins. Co.*, No. 21-3068, 2021 WL 4304607 (6th Cir. Sept. 22, 2021), and expressly rejected the plaintiff's argument that Ohio's government shut-down orders constitute a "direct physical loss of or damage to property." *Id*. at *3. In doing so, the *Santo's Italian Café* court noted that "[a] loss of use simply is not the same as a physical loss." *Id*. Central to the court's reasoning in that case, was that "[t]he

novel coronavirus did not physically affect the property in the way, say, fire or water damage would." *Id*. Consequently, the court finds that neither the government shut-down orders nor the physical presence of COVID-19 particles constitute a "direct physical loss of or damage to" property. The thrust of Ohio law interpreting language similar to the provisions at issue is that a tangible harm to property is necessary to invoke insurance coverage for property damage. Indeed, as this court noted in *Bridal Expressions*, several courts in this district have cited the Ohio Eighth District Court of Appeals's decision in *Mastellone v. Lightning Rod Mut. Ins. Co.*, 884 N.E.2d 1130 (Ohio Ct. App. 2008), for the proposition that under Ohio law, insurance coverage for property damage requires tangible harm to property. *See Bridal Expressions,* 2021 WL 1232399, at *6 (collecting cases). Because Rossa fails to plausibly allege that it suffered a tangible harm to its property, the court finds that it has failed to state a claim for coverage under the Business Income and Extra Expense provision of the Policy.

2. Civil Authority Coverage

The court turns now to Rossa's request for coverage under the Civil Authority provision of the Policy, which, as Defendants point out, also turns on the meaning of "direct physical loss." (Defs.' Mem. in Supp. at PageID #183–184, ECF No. 16-1.) The Civil Authority coverage provision of the Policy states: "[w]hen 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." (Ex. 2. to Mot., the Policy at PageID #450, ECF No. 16-2.) (emphasis added). As Defendants point out, this provision only comes into play when a Covered Cause of Loss occurs, which is defined in the Policy as "**direct physical loss** unless the loss is excluded

or limited in this policy." (*Id*. at PageID #466; Defs. Mem. in Supp. at PageID #183, ECF No. 16-1.) (emphasis added).

Here, the court finds that Rossa fails to plausibly allege that a Covered Cause of Loss—namely, a direct physical loss—caused damage to *any* property, and as such, it is not entitled to recover under the Civil Authority provision of the Policy. Several courts in this district have examined similar policy language and reached the same conclusion. *See MIKMAR, Inc. v. Westfield Ins. Co.*, 520 F. Supp. 3d 933, 944 (N.D. Ohio 2021) (analyzing a similar civil authority coverage provision and determining that the plaintiff failed to plausibly allege a covered cause of loss, which was also defined as a direct physical loss, "[b]ecause the ordinary and plain meaning of [the term direct physical loss] does not apply to the conditions Covid-19 and the governmental responses to it brought about"); *Fam. Tacos, LLC*, 520 F. Supp. 3d at 921 (same); *Equity Plan. Corp.*, 2021 WL 766802, at *16 (same). Accordingly, the court finds that Rossa fails to plausibly allege facts sufficient to invoke coverage under the Civil Authority provision of the Policy.

Because the court finds that Rossa is not entitled to coverage under the Policy, it is unnecessary to address the issue of whether coverage would be barred by the Virus Exclusion of the Policy. *See Santo's*, 2021 WL 4304607, at *6 (declining to construe the virus exclusion of the policy after determining that the plaintiff had not plausibly alleged that it was entitled to coverage under the policy); *Dakota Girls, LLC*, 2021 WL 858489, at *9 (same); *Dharamsi v. Nationwide Mut. Ins. Co.*, No. 2:20-CV-2980, 2021 WL 1979085, at *5 (S.D. Ohio May 18, 2021) (same).

B. Resolution of Plaintiff's Claims

As explained above, Rossa asserts three claims for relief—a breach of contract claim, a declaratory judgment claim, and a bad faith claim—which are all premised upon its contention

that Liberty improperly denied Rossa's claims seeking coverage for its economic losses associated with COVID-19 and Ohio's related government shut-down orders.

As a result of the court's analysis above, the court hereby dismisses Rossa's second cause of action for breach of contract because Rossa does not plausibly allege that it is entitled to coverage under the Policy, and thus, that Liberty breached the contract by denying coverage to Rossa.

Rossa's bad faith claim also fails in light of the court's determination that Rossa did not plausibly plead a breach of contract by Liberty. *See Dakota Girls, LLC*, 2021 WL 858489, at *9 (explaining that "[b]ecause [the] [p]laintiffs have failed to state a claim for breach of contract, their bad faith claim necessarily fails as well") (citing *Gehrisch v. Chubb Grp. of Ins. Cos.*, 645 F. App'x. 488, 494 (6th Cir. 2016)).

Rossa asserts that its declaratory judgment claim should survive dismissal even if its other claims are dismissed because it "also seeks a judicial declaration that Plaintiff ha[s] coverage for any substantially similar civil authority order in the future that limits or restricts the public's access to Plaintiff's business establishments." (Pl.'s Opp'n at PageID #936, ECF No. 17 (citing Compl. ¶ 58, ECF No. 1-1).) But as Liberty points out, Rossa fails to offer plausible facts as to why the outcome would be different in regard to any future civil authority order. (Defs.' Reply at PageID #1009, ECF No. 19.) Moreover, Rossa's request for a declaration with respect to a hypothetical dispute in the future is insufficient to survive dismissal because it does not relate to a real controversy that exists between the parties in this case. Thus, Rossa's declaratory judgment claim fails for the same reason as its breach of contract claim—namely, Rossa does not plausibly allege that it is entitled to coverage under the Policy. Accordingly, the court grants Liberty's

Motion to Dismiss Rossa's declaratory judgment, breach of contract, and bad faith claims.

IV. CONCLUSION

For the foregoing reasons, the court grants in part and denies in part Liberty's Motion for Judicial Notice (ECF No. 15), and grants Liberty's Motion to Dismiss (ECF No. 16).

IT IS SO ORDERED.

/s/ SOLOMON OLIVER, JR.
UNITED STATES DISTRICT JUDGE

September 30, 2021