

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

TREO SALON, INC.,

Plaintiff,

v.

**WEST BEND MUTUAL
INSURANCE COMPANY,**

Defendant.

Case No. 20-cv-1155-SPM

MEMORANDUM AND ORDER

McGLYNN, District Judge:

This matter is currently before the Court on Defendant West Bend Mutual Insurance Company's ("West Bend") motion for reconsideration pursuant to Federal Rule of Civil Procedure 54(b) (Doc. 58). Within the motion, West Bend cites to recent Seventh Circuit decisions and asks this Court to reconsider its previous Order denying West Bend's motion to dismiss (Doc. 34). Plaintiff Treo Salon, Inc. ("Treo") filed a response to West Bend's motion arguing against dismissal (Doc. 61). The Court has reviewed the record and for the reasons outlined below, West Bend's motion is **GRANTED**.

PROCEDURAL BACKGROUND

On October 30, 2020, West Bend removed this case, which sought coverage for losses incurred as a result of Treo's business being shut down during the COVID-19 pandemic, from the Third Judicial Circuit of Illinois in Madison County, Illinois (Docs. 1, 1-1). On December 4, 2020, after obtaining an extension of time, West Bend

filed a motion to dismiss for failure to state a claim, along with supporting memorandum of law (Docs. 17, 18). Specifically, West Bend contended Treo's insurance policy coverage was not triggered by Governor Pritzker's business shutdown orders issued during the COVID-19 pandemic (*Id.*). On January 4, 2021, Treo filed its response in opposition to the motion to dismiss (Doc. 19). Within their response, Treo asserted that the "Communicable Disease" provision was triggered by the Pandemic and resulting shutdown orders (*Id.*). On January 19, 2021, West Bend filed its reply to plaintiff's response reiterating that its policy did not apply in this case (Doc. 20). On February 26, 2021, oral argument was conducted remotely before this Court (Doc. 25).

At the hearing, West Bend's argument focused on two prerequisites that must be satisfied for coverage to be triggered: (1) Communicable disease/outbreak at the insured's premises; and (2) Business closed due to that outbreak (Doc. 17). West Bend stressed that COVID-19 was a global pandemic that was not particular to Treo's business and that Treo has not and cannot establish that any governmental order was "due to" any outbreak on their premises (*Id.*).

Treo countered that they paid an additional premium for the communicable disease coverage, which covered lost income due outbreak of communicable disease that closed its business (Doc. 19). Treo claimed to have met the triggers set forth by West Bend and asserted their right to coverage under their policy (*Id.*). Treo argued that there was a communicable disease/outbreak and that its business was shut down because of said outbreak (*Id.* at 5). Further, Treo stressed that any ambiguity must be construed in favor of coverage (*Id.*).

On March 29, 2021, and April 15, 2021, respectively, West Bend sought and obtained leave to file supplemental authority, to wit: *Paradigm Care & Enrichment Ctr., LLC v. West Bend Mut. Ins. Co.*, 529 F. Supp. 3d 927 (E.D. Wis. 2021)¹; and, *Blue Coral, LLC v. West Bend Mutual Ins. Co.*, 533 F. Supp. 3d 279 (E.D.N.C. 2021) (Docs. 27 and 32). Following both filings, Treo filed responses distinguishing the cases as neither binding nor precedential because they were from other jurisdictions and involved different factual circumstances than those at issue (Docs. 28 and 31).

On May 10, 2021, the Court denied West Bend's motion to dismiss, concluding that Treo stated a claim sufficient to survive the motion (Doc. 34). At that time, the Court was "not prepared to determine whether the endorsement is ambiguous or contains ambiguous conditions" (*Id.*). Instead, the Court determined that "Treo has sufficiently pled a cause of action against West Bend and has plausibly alleged they are entitled to coverage" (*Id.*).

On February 15, 2022, the Court granted a Joint Motion to Stay pending Seventh Circuit rulings (Doc. 49). On May 3, 2022, the Seventh Circuit ruled in *Paradigm Care* that insureds failed to state a claim for coverage under the communicable disease provision if there was no causal connection between the business closure and a disease outbreak. *Paradigm Care & Enrichment Ctr., LLC v. West Bend Mut. Ins. Co.*, 33 F. 4th 417, 423 (7th Cir. 2022). On May 27, 2022, the Seventh Circuit reiterated this holding in *Green Beginnings, LLC. Green Beginnings, LLC v. West Bend Mut. Ins. Co.*, 2022 WL 1700139 (7th Cir. May 27, 2022).

¹ This case was ultimately affirmed by the Seventh Circuit on May 3, 2022, *Paradigm Care & Enrichment Center, LLC v. West Bend Mutual Insurance Company*, 33 F.4th 417 (7th Cir. 2022).

In light of the recent decisions by the Seventh Circuit, this Court held a status conference on August 8, 2022, at which time the stay was lifted. West Bend was also granted a 21-day leave to file a motion to reconsider this Court's prior Order of May 10, 2021, which denied the motion to dismiss. Accordingly, on August 26, 2022, West Bend filed the instant motion for reconsideration along with supporting memorandum of law, relying upon the precedent set forth in *Paradigm Care* and *Green Beginnings* decisions (Docs. 58, 59). On September 28, 2022, Treo filed a response in opposition (Doc. 61), and West Bend's reply was filed on October 5, 2022 (Doc 63).

LEGAL STANDARD

Motions to reconsider other than final judgments are governed by Rule 54(b). *Pivot Point Int'l, Inc. v. Charlene Prod. Inc.*, 816 F. Supp. 1286, 1287 (N.D. Ill. 1993). To prevail on a motion for reconsideration, the party must present either newly discovered evidence or establish manifest error of law or fact. *LB Credit Corp. v. Resolution Trust Corp.*, 49 F.3d 1263, 1267 (7th Cir. 1995). "Manifest error" is not demonstrated by disappointment of the losing party, rather, it is the wholesale disregard, misapplication, or failure to recognize controlling precedent. *Sedrak v. Callahan*, 987 F. Supp. 1063, 1069 (N.D. Ill. 1997). The party may not use the motion for reconsideration to introduce new evidence that could have been presented earlier. *Id.* A motion to reconsider under 54(b) may also be appropriate where there has been a "controlling or significant change in the law of facts since the submission of the issue to the Court." *Bank of Waunakee v. Rochester Cheese Sales, Inc.*, 906 F.2d 1185,

1191 (7th Cir. 1990) (*quoting Above the Belt, Inc. v. Mel Bohannon Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983)).

West Bend does not rehash previously litigated arguments, but rather introduces controlling Seventh Circuit precedent that was unavailable prior to the initial filing of this case. Therefore, the motion to reconsider is proper.

DISCUSSION

An insurance policy under Illinois law “is to be construed as a whole, giving effect to every provision, if possible.” *Paradigm*, 33 F.4th at 420 (*quoting Sandy Point Dental, P.C. v. Cincinnati Ins. Co.*, 20 F.4th 327, 331 (7th Cir. 2021)). “If the words used in the policy are clear and unambiguous, they must be given their plain, ordinary, and popular meaning.” *Id.* The policy language must be “subject to more than one reasonable interpretation” before it is deemed ambiguous; ambiguity does not arise “simply because the parties disagree to its meaning.” *Sandy Point*, 20 F.4th at 331. To survive a motion to dismiss, Treo must plausibly allege that they are entitled to coverage under a reasonable interpretation of the language in their policies. In light of the holding in *Paradigm*, Treo did not.

Treo asserts that they purchased the “Communicable Disease Business Income and Extra Coverage” because they understood the Defendant would “pay for direct physical loss or damage to Covered Property at the premises ... caused by or resulting from any Covered Cause of Loss.” Treo argues that because the Communicable Disease provision is listed as a subsection of the general statement, they then are entitled to coverage due to the government-enforced COVID-19 shutdown order.

The Seventh Circuit recently ruled in *Paradigm* that the question of the precise degree of the phrase “due to” is irrelevant because it clearly requires “some degree of causation between the shutdown order and a communicable disease outbreak at the insured premises.” *Paradigm*, 33 F.4th 417 at 422. Here, the executive shutdown orders were in no way caused by a COVID-19 outbreak at Treo. The orders were a “general prophylactic measure to slow, suppress, and stop the spread of COVID-19.” *Id.* “The Illinois shutdown orders were not promulgated because of conditions at [the plaintiff’s] insured premises – they applied to the entire State of Illinois.” *Green Beginnings*, 2022 WL 1700139 at 1. Therefore, no causal connection existed between the shutdown order and a COVID-19 outbreak on the premises of Treo that would trigger the communicable disease provision of their commercial property insurance plan.

Further, the executive orders were legal documents, and the Court is not obliged to accept complaint allegations that are inconsistent with the plain meaning of those documents. *Paradigm*, 33 F.4th 417 at 423; *Bilek v. Fed. Ins Co.*, 8 F.4th 581, 586 (7th Cir. 2021).

CONCLUSION

It is without question that the COVID-19 Pandemic caused financial hardships to businesses in Illinois like Treo. However, the Seventh Circuit has spoken, and this Court must follow that precedent. The losses alleged are simply not covered under the “Communicable Disease” provision of Treo’s insurance policy. The motion to reconsider the motion to dismiss is **GRANTED** in accordance with the Seventh Circuit’s most recent rulings in *Paradigm* and *Green Beginnings*. Simply stated, this

Court can no longer find that Treo has plausibly alleged that they are entitled to coverage under the West Bend policy, with or without the communicable disease endorsement. Accordingly, this case is dismissed with prejudice and the Clerk is directed to enter judgment.

IT IS SO ORDERED.

DATED: November 9, 2022

s/ Stephen P. McGlynn
STEPHEN P. McGLYNN
U.S. District Judge