

Velva L. Price
District Clerk
Travis County
D-1-GN-20-007324
Jessica A. Limon

CAUSE NO. **D-1-GN-20-007324**

UNCLE NICKY’S, LLC BDA UNCLE
NICKY’S ITALIAN SPECIALTIES,
Plaintiff,

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IN THE **261ST** JUDICIAL

VS.

DISTRICT COURT OF

BLACKBOARD INSURANCE
COMPANY,
Defendant.

TRAVIS COUNTY, TEXAS

PLAINTIFF’S ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW UNCLE NICKY’S, LLC DBA UNCLE NICKY’S ITALIAN SPECIALTIES, Plaintiff, and makes and files this the Original Petition and complains of BLACKBOARD INSURANCE COMPANY, Defendant, and for cause of action shows:

DISCOVERY CONTROL PLAN

1. Discovery should be under Level 3 of Rule 190 of the Texas Rules of Civil Procedure. Plaintiff requests the Court enter a Docket Control Order within 60 days of the Defendant filing an Answer.

PARTIES AND SERVICE

2. The Plaintiff is a private individual who resides in Travis County, Texas, and may be served with process through the undersigned counsel.
3. Defendant Blackboard Insurance Company (“Insurer”) is a Fire and Casualty company authorized to do business in Texas. It may be served through its registered agent, Corporation Service Company, 211 E. 7th Street., Ste. 620, Austin, Texas 78701.
4. At this time, Plaintiff requests the Clerk issue a citation against Insurer as described above and to send the citations via email/U.S. Mail to the undersigned for private process.

JURISDICTION AND VENUE

5. This Court has jurisdiction and venue is proper in Travis County, Texas, in that the loss made the basis of this suit that occurred in Travis County, Texas, and the damages are within the jurisdictional limits of the Court.

INTRODUCTION

6. Plaintiff, Uncle Nicky's LLC DBA Uncle Nicky's Italian Specialties ("Uncle Nicky's"), files this petition against Defendant, Blackboard Insurance Company, ("Insurer"), for its denial of benefits for the business interruption sustained by Uncle Nicky's as a result of the "Food Establishment Rules - Emergency Rule Adoption," issued March 13, 2020 (Exhibit 1), the "Order of Control for Bars and Restaurants," Issued March 17, 2020 (Exhibit 2), each issued by the City of Austin, and "Travis County Judge Order No. 2020-2", issued March 17, 2020, (Exhibit 3) by Travis County. (Collectively, "The Orders"). These orders prohibited all dine-in services at restaurants in the County and within the City's limits, and Uncle Nicky's business is offering dine-in fine dining experiences. Despite the extensive interruption of Uncle Nicky's business, Insurer summarily denied its claim while the Order was still in Place.

FACTS

A. Plaintiff Uncle Nicky's obtained insurance coverage for its business from Defendant Blackboard Insurance Company.

7. Plaintiff Uncle Nicky's provides dining and food services in Austin, Travis County, Texas. It is owned, in part, by Chef Nic Yanes. The restaurant specializes in Italian food and beverages. It offers a casual dining experience in a restaurant setting. It is located in Hyde Park, Austin, Travis County.
8. Insurer issued commercial policy number JMIGRAY00001HIBPP-34972-01 to Uncle Nicky's

(“The Policy”). (Exhibit 4). The Policy was for the effective term from January 1, 2020 to January 1, 2021. The Policy included coverage for Loss of Business Income. The Policy covered the premises of Uncle Nicky’s located at 4222 Duval St., Austin, Texas 78751.

B. The Coronavirus 2019 Global Pandemic Causes Damage, including in Travis County

9. The Coronavirus disease was first detected toward the end of 2019, emerging in China. The World Health Organization proposed the nomenclature COVID-19, standing for coronavirus disease 2019.
10. On January 30, 2020, the World Health Organization declared the virus a public health emergency of international concern. In February 2020, coronavirus deaths began to be reported outside of China. Throughout February 2020, Coronavirus infections were reported in a growing number of locations around the world, including in the Philippines, Japan, Europe, South Korea, Iran, Latina America, Sub-Saharan Africa, and the United States.
11. On March 11, 2020, the World Health Organization characterized the Coronavirus/Covid-19 as a pandemic. On March 13, 2020 a national emergency was declared in the United States of America. On March 15, 2020, the United States Centers for Disease Control and Prevention advised no gatherings of 50 or more people in the United States. The next day, the President advised citizens to avoid groups of more than 10.
12. The Coronavirus has caused hundreds of thousands of deaths throughout the United States, with the death toll increasing every day, and the numbers of reported cases growing exponentially. The economy has been devastated by business interruptions in Travis County, The State of Texas, the United States , and worldwide.
13. Coronavirus cases in Texas spiked in March 2020, and a growing number of municipalities

issued quarantine directives. The numbers of reported Coronavirus cases have spread throughout Texas Counties, curtailing business, social, and economic activities throughout the State. Correspondingly, the entire nation experienced spikes in infections and deaths, with a growing number of citizens subjected to quarantine orders and business shutdowns.

14. The scientific community recognizes the Coronavirus as a cause of real physical loss and damage.
15. The Coronavirus is physically impacting public and private property, and physical spaces in communities around the world.
16. The global pandemic is exacerbated by the fact that the potentially deadly virus physically infects and stays on the surfaces of objects and materials for weeks. The duration of the virus' lethal staying power, and the conditions upon which the virus can continue to propagate and infect people, are known facts under continued scrutiny by the scientific community. The virus can physically infect and stay on surfaces for weeks, up to twenty-eight days under some estimates. Moreover, because of the ongoing Coronavirus pandemic, which is ranging in Travis County, a significant component of the public health crisis is the risk of continued contamination of the surface of objects and materials which could propagate infection. Therefore, the coronavirus has caused damage, including damage to property, as a result of the staying power of the virus and the communicability of disease from exposure to the surface of objects and materials.
17. For example, China, Italy, France, and Spain implemented the cleaning and fumigating of public areas prior to allowing them to re-open publicly due to the intrusion of microbials.
18. The physical contamination of surfaces with communicable Coronavirus is a well-recognized

cause of physical damage and a reason that civil authorities have issued quarantine orders.

C. The Civil Authorities Closed Plaintiff's Business, Causing a Cessation of Business Activity

19. On March 13, 2020, The City of Austin adopted Emergency Rules (Exhibit 1). The Emergency Rules governed food enterprises and required that restaurants (1) display a sign provided by Austin Public Health, (2) make hand sanitizer available, (3) disinfect and sanitize commonly touched surfaces, and (4) adopt and implement a policy that provides for the immediate exclusion of food handlers from duties if they develop a fever greater than or equal to 100.4° F during their shift.
20. On March 16, 2020, The Travis County Judge issued an Order (Exhibit 3). The Order prohibited public and private gatherings in The City of Austin, including that food establishments close dining areas.
21. On March 17, 2020 The Mayor of the City of Austin issued an Order (Exhibit 2). The Order prohibited public and private gatherings in The City of Austin, including that food establishments close dining areas.
22. On March 19, 2020, Governor Abbot issued Executive Order No. GA-08 relating to COVID-19 preparedness and mitigation, which prohibited certain business activities in order to contain the Coronavirus.
23. Also on March 19, 2020, John W. Hellerstedt, M.D., the Commissioner of the Texas Department of State Health Services, in accordance with Section 81.082(d) of the Texas Health and Safety Code, declared a state of public health disaster for the entire State of Texas for the first time since 1901.
24. Thus, by executive order of Travis County and the City of Austin, all restaurants in Travis

County and the City of Austin, including the insured premises, were required to stop all dine-in services.

25. While the Orders permit take-out and delivery service of food from restaurants, Uncle Nicky's does not have a drive-through and has never had a take-out or delivery service clientele, so that the orders effectively resulted in a suspension of business at Uncle Nicky's.
26. A cause of civil authorities' closure of businesses, including Plaintiff's, is the contamination of property outside of the insured premises with the Coronavirus.

D. The Policy Covers Plaintiff's Damage and Losses Sustained and Costs and Expenses Incurred

27. The damage and loss sustained by Uncle Nicky's as a result of the Coronavirus are covered by The Policy (Exhibit 4) issued by Defendant to Plaintiff, and no exclusions or defenses alleviate Defendant's obligation to Plaintiff under The Policy.
28. Contamination, and potential contamination, of the insured premises by the Coronavirus constitutes a direct physical loss needing remediation to clean the surfaces of, and the surfaces of objects at, the establishment.
29. The Policy promises to "pay for direct physical loss of or damage to Covered Property at the premises described in the declaration caused by or resulting from any Covered Cause of loss."
30. Uncle Nicky's has sustained direct physical loss and/or damage to property arising from and/or related to the Coronavirus, Coronavirus contamination, the threat of Coronavirus contamination, and/or the Civil Authority response related to the Coronavirus.
31. The Policy promises to "pay for the actual loss of Business Income you sustain due to the necessary suspension of your "operations' during the "period of restoration."
32. The Policy promises to pay "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...”

33. Uncle Nicky’s has sustained a suspension of dine-in services as a result of the Coronavirus.
34. Uncle Nicky’s has sustained loss of income and incurred expenses as a result of civil authorities prohibiting access to the insured premises.
35. The commercial, business, and property losses and damages, business interruption, income losses sustained, and costs and expenses incurred, as a result of the Coronavirus and the civil authority response to the Coronavirus, are covered by the policy. Defendant owes Plaintiff compensation for Uncle Nicky’s damages, losses, costs, and expenses arising from and related to the Coronavirus, Coronavirus contamination, the threat of Coronavirus contamination, and/or the Civil Authority response related to the Coronavirus.

E. Defendant Denied Plaintiff’s Claim

36. In compliance with the prerequisites for coverage, including the notice prerequisites, Uncle Nicky’s submitted a claim for coverage for the damage and losses sustained and costs and expenses incurred as a result of the Coronavirus, as more fully discussed herein, fulfilling all notice provisions in the policy.
37. The claim Plaintiff submitted to Defendant under the policy was summarily denied without any meaningful investigation.
38. The letter from Defendant, dated April 14, 2020, offered only that it was denying the claim because there was no direct physical loss of, or damage to property. (Exhibit 5).
39. The reason Defendant’s letter proffers for denying coverage is inaccurate, and denied by Plaintiff.

COUNT I - BREACH OF CONTRACT

40. Plaintiff reinstates and incorporates all the paragraphs above into this claim for relief as if fully set forth herein.
41. Plaintiff entered into a contract with Defendant for insurance coverage, including coverage for business income, extra expenses and Civil Authority closure.
42. Plaintiff suffered property damage and loss of business income and extra expenses covered by the Policy.
43. Defendant breached its contract with Plaintiff by denying coverage and denying Plaintiff's claim.
44. Plaintiff has been damaged by the breach, at a minimum, in the amount of unpaid insurance proceeds.
45. All conditions precedent that are material to coverage for Plaintiff's claim have been performed.

COUNT II - VIOLATION OF THE TEXAS INSURANCE CODE §541.060

46. Plaintiff reinstates and incorporates all the paragraphs above into this claim for relief as if fully set forth herein.
47. Defendant misrepresented a material fact and policy provision relating to the coverage at issue in violation of Tex. Ins. Code. §541.060(a)(1). Namely, despite its knowledge that Uncle Nicky's property was contaminated by the virus, and Uncle Nicky's sustained business income loss as a result, Defendant stated that there was no covered loss to the Insured Premises.
48. Defendant failed at all material times to effectuate a prompt, fair, and equitable settlement of Plaintiff's claim, after its liability had become reasonably clear, in violation of Tex. Ins. Code.

§541.060(a)(2)(4). Defendant's liability because reasonably clear when it had notice of the widespread contamination of property by the coronavirus and issuance of executive orders prohibiting business activities. Instead of promptly investigating and paying Uncle Nicky's claim, defendant summarily denied the claim.

49. Defendant violated Tex. Ins. Code §541.060(a)(7) by refusing to pay Uncle Nicky's claim without conducting a reasonable investigation or any analysis with respect to the claim. Defendant has conducted no investigation as to Uncle Nicky's business income loss before it denied the claim.

50. Defendant's violations were done knowingly.

51. Plaintiff is entitled to actual damages, as well as any and all consequential damages, statutory penalties, and punitive damages as provided by law.

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

52. Plaintiff reinstates and incorporates all the paragraphs above into this claim for relief as if fully set forth herein.

53. Defendant owed Plaintiff a duty of good faith and fair dealing in connection with the investigation and resolution of claims under the Policy.

54. Such duty obligated Defendant to not deny liability to Plaintiff when its liability under the policy was reasonably clear.

55. Defendant's liability was reasonably clear when it had notice of the widespread contamination of property by the coronavirus and issuance of execute orders prohibiting certain business activities.

56. Defendant violated and continues to violate its duty of good faith and fair dealing by denying

liability to Plaintiff under the Policy and continuing to refuse to pay Plaintiff the sums due and owing to Plaintiff under the Policy.

57. Defendant's acts and omissions constituting a breach of duty of good faith and fair dealing were and continue to be committed with actual awareness that they are wrongful and that they are inflicting harm on Plaintiff. Defendant's violation of the duty of good faith and fair dealings is grossly negligent, malicious, and/or fraudulent. Defendant's violation of the duty of good faith and fair dealing, therefore, warrants and authorizes the imposition of punitive or exemplary damages.
58. Plaintiff has suffered and will continue to suffer actual damages as a result of Defendant's breach of the duty of good faith and fair dealing.

COUNT IV - DECLARATORY JUDGMENT ACTION

59. Plaintiff restates and incorporates all the paragraphs above into this claim for relief as if fully set forth herein.
60. Pursuant to Tex. Civ. Prac. & Rem. Code §37.001, et. seq., the Court may declare rights, status, and legal relations whether or not further relief is or could be claimed, and before or after breach of contract.
61. Plaintiff seeks a judgment declaring that the Policy provides coverage to Uncle Nicky's for (1) the damage to the Insured Premises by the Coronavirus; (2) business income loss and extra expenses resulting from the interruption of Uncle Nicky's operation due to the damage to the Insured Premises by the Coronavirus; and (3) the business income loss and extra expenses Uncle Nicky's sustained as a result of Uncle Nicky's inability to access and use the Insured Premises due to executive orders and other actions taken by civil authorities.

62. Plaintiff also seeks a declaratory judgment that it has fulfilled any and all preconditions, notices, and duties owed to Defendant under The Policy.

COUNT V – COSTS UNDER CIV. PRAC. & REM. CODE CHS. 37 & 38

63. Plaintiff reinstates and incorporates all the paragraphs above into this claim for relief as if fully set forth herein.

64. Plaintiff is entitled to recover costs and reasonable and necessary attorney fees that are equitable and just under the tex. Civ. Prac. & Rem. Code §37.009, because this is a suit for declaratory relief. Plaintiff is also entitled to recover its costs and reasonable attorney’s fees under Tex. Civ. Prac. & Rem. Code §38.001 and all applicable provisions of the Tex. Ins. Code.

CONDITIONS PRECEDENT

65. All conditions precedent to Plaintiff’s claim for relief have been performed or have occurred.

REQUESTED RELIEF

66. For these reasons, Plaintiff asks that the Court render judgment (1) declaring that the policy issued by Defendant provides coverage for Plaintiff’s property loss as a result of coronavirus pandemic, and the business income loss and extra expenses Plaintiff sustained due to the property loss and the actions taken by civil authorities as requested herein, and (2) awarding the Plaintiff the following damages:

- a. Actual damages for the full amount of property loss, business income loss and extra expenses sustained by Plaintiff as a result of the Coronavirus and actions taken by civil authorities;
- b. Actual damages of all amounts owed under the contract;
- c. Treble damages under Texas law;

- d. Attorneys' fees and costs pursuant to Tex. Civ. Prac. & Rem. Code Sections 37.009 and 38.001, Tex. Inc. Code Section 542.60, and Tex. Ins. Cod CH. 542A;
- e. Penalties as provided by Sections 542.058(a) and 542.060(a) of the Texas Ins. Code;
- f. Actual damages caused by the Defendants wrongful conducts, including but not limited to the benefits wrongfully withheld and attorneys' fees and court costs;
- g. Exemplary damages; and,
- h. Pre- and post-judgment interest to the extent permitted by law.

67. Pursuant to Texas R. Civ. P. 47, Plaintiff's damages include monetary relief over \$200,000 but not more than \$1,000,000. Plaintiff's counsel offers this statement for informational purposes only as required by Tex. R. Civ. P. 47 and reserves the right to change or amend it as the evidence deems necessary. The amount of monetary relief actually awarded, however, will ultimately be determined by a jury.

TEX. R. CIV. P. 193.7 NOTICE

68. Pursuant to Tex. R. Civ. P. 193.7, Plaintiff hereby gives notice of intent to utilize items produced in discovery against the producing party.

REQUEST FOR DISCLOSURE

69. Pursuant to Rule 194, Plaintiff requests disclosure, within 50 days of service of this request, the information or material described in Rule 194.2.

JURY TRIAL

70. Plaintiff demands a trial by jury and tenders the appropriate fee with this petition.

PRAYER

WHEREFORE PREMISES CONSIDERED, Plaintiff prays that the Defendant be cited to

appear and answer the above cause and that upon a trial of the case, Plaintiff have judgment, jointly and severally against the Defendant for the damages listed above.

Respectfully submitted,



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