

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO.
F.B.N. 288136

VIENNA CAFÉ AND BISTRO, INC.,
a Florida For Profit Corporation, d/b/a
VIENNA CAFÉ AND BISTRO

Plaintiff,

-vs-

WHITE PINE INSURANCE COMPANY, a
foreign insurance company,

Defendant.

COMPLAINT FOR DECLARATORY RELIEF AND BREACH OF CONTRACT

Plaintiff, **VIENNA CAFÉ AND BISTRO, INC., d/b/a VIENNA CAFÉ AND BISTRO**
("VIENNA CAFÉ") sues the Defendant, **WHITE PINE INSURANCE COMPANY**, and
alleges:

JURISDICTION AND VENUE

1. This is an action for equitable relief in a declaratory proceeding to determine an insurance policy coverage issue, pursuant to Chapter 86 of the Florida Statutes and is within the jurisdiction of this Honorable Court.
2. This is also an action for breach of contract in excess of \$30,000.00 (Thirty Thousand dollars) and is within the jurisdiction of this Honorable Court.
3. Plaintiff **VIENNA CAFÉ AND BISTRO, INC., d/b/a VIENNA CAFÉ AND BISTRO**, is a Florida corporation authorized to and doing business in Broward County, Florida at 5722-5724 South Flamingo Road, Cooper City, FL 33330.
4. Defendant, **WHITE PINE INSURANCE COMPANY**, ("WHITE PINE") is and was

a foreign insurance company authorized to and doing business in the State of Florida.

5. At all times material, Defendant WHITE PINE, insured the Plaintiff and transacted insurance business in Broward County, Florida.

APPLICABLE INSURANCE COVERAGE

6. WHITE PINE issued a Commercial Lines Policy of insurance to Plaintiff for the policy period of January 26, 2020 to January 26, 2021. A copy of the policy is attached as **Exhibit "A."**

7. Plaintiff VIENNA CAFÉ is a public restaurant which prepares and serves food and alcohol and has been in operation since 2005. The pre-COVID-19 Civil Authority orders business hours were: Tuesday and Wednesday (9 am to 4 pm); Thursday (9 am to 9 pm); Friday and Saturday (9 am to 10 pm); Sunday (9 am to 4 pm). The business was closed on Mondays.

STATE, COUNTY AND MUNICIPAL ACTION OF CIVIL AUTHORITY ORDERS

STATE OF FLORIDA

8. On March 17, 2020, the Governor of the State of Florida signed and issued **Executive Order Number 20-68** pertaining to Emergency Management of COVID-19. A copy of that Order is attached as **Exhibit "B."**

9. Within the Governor's Executive Order, Section 3 provided that under Florida Statute 252.36 (5) (g), "a restaurant shall immediately limit its occupancy to 50% of its current building occupancy." It further provided that a minimum 6-foot distance between any group of patrons, with a limit of parties to no more than 10 individuals, would be allowed in the restaurant.

10. On March 20, 2020, the Governor of the State of Florida issued **Executive**

Order Number 20-70, which pertains to “Emergency Management-COVID-19- Broward and Palm Beach County Closures.” A copy of that Executive Order is attached as **Exhibit “C.”**

11. Within Executive Order No. 20-70, Section 1, Governor DeSantis ordered all restaurants, bars, taverns, pubs, night clubs, banquet halls, cocktail lounges, cabarets, breweries, cafeterias and any other alcohol and/or food service business establishment with seating over ten (10) people within the incorporated and unincorporated areas of Broward County and Palm Beach County to close on-premises service of customers. Notwithstanding the foregoing, the Order states, “such establishments may operate their kitchens for the purpose of providing delivery services, as authorized by Section 3 below, and employees, janitorial personnel, contractors and delivery personnel shall be allowed access to such establishments.”

12. The Plaintiff’s business is not an “essential service” exempted from the requirements of Executive Order No. 20-70.

13. Executive Order 20-70 authorizes the Broward County Administrator to enforce, relax, modify or remove the closures, as warranted. The Order further states, “The provisions of this order shall serve as minimum standards. Municipalities may impose more stringent standards within their jurisdictions.”

14. On March 20, 2017, Governor DeSantis signed **Executive Order Number 20-71**, entitled, “Emergency Management-COVID-19-Alcohol Sales, Restaurants, and Gyms which provides a suspension of alcohol sales on vendor premises for consumption on the premises unless the sales were of alcoholic beverages in sealed containers for consumption off-premises.” A copy of Executive Order Number 20-71 is attached as

Exhibit “D.”

15. Within Executive Order Number 20-71 is Section 2, which states:

Restaurants and Bars. I here by order all restaurants and food establishments licensed under Chapters 500, Florida Statutes, within the State of Florida to suspend on-premises food consumption for customers. Notwithstanding the foregoing, such establishments may operate their kitchens for the purpose of providing delivery or take-out services. Employees, janitorial personnel, contractors and delivery personnel shall be allowed access to such establishments for the purposes of delivery or take-out services. This Section amends and supersedes Executive Order 20-68, Sections 3(A)-(B).

16. On March 30, 2020, Governor DeSantis signed **Executive Order Number 20-89**, “Emergency Management-COVID-19-Miami-Dade County, Broward County, Palm Beach County, Monroe County Public Access Restrictions.” A copy of that Order is attached hereto as **Exhibit “E.”**

17. Executive Order Number 20-89 restricts public access to businesses and facilities deemed non-essential under guidelines established by Miami-Dade pursuant to its March 19, 2020 Emergency Order 07-20, and as modified by subsequent amendments and orders prior to March 30, 2020.

BROWARD COUNTY CIVIL ORDERS

18. On March 22, 2020 at 4:51 p.m. Eastern Time, the County Administrator of Broward County, Florida signed “**Broward County Administrator’s Emergency Order 20-01**,” which became effective at 12:01 a.m. on Monday, March 23, 2020. A copy of that Order is attached as **Exhibit “F.”**

19. Within Broward County Emergency Order 20-01, the County Administrator ordered that all “non-essential retail and commercial business locations...are ordered

closed except to the extent necessary to perform Minimum Basic Operations.” Restaurants are deemed essential, in Section 3m, but are subject to the limitations and requirements of the Governor’s Executive Orders 20-68, 20-70 and 20-71.

20. On March 26, 2020 at 1:30 p.m. the County Administrator of Broward County signed **Emergency Order 20-03, entitled “Directing Shelter-in-Place: Safer at Home Policy,”** a copy of which is attached as **Exhibit “G.”**

21. Within Emergency Order 20-03, the following is stated:

WHEREAS, this Emergency Order is necessary because of the propensity of the virus to spread person to person and also because the virus is physically causing property damage due to its proclivity to attach to surfaces for prolonged periods of time;

COOPER CITY MUNICIPAL CIVIL ORDERS

22. On March 14, 2020, the City Manager of the City of Cooper City declared a state of emergency, due to the COVID-19 crisis, pursuant to Chapter 13, Article V of the City’s Code of Ordinances.

23. On March 26, 2020, Joseph Napoli, City Manager for Cooper City, Florida, signed **“State of Emergency-Emergency Order #3.”** A copy of that Order is attached as **Exhibit “H.”**

24. Emergency Order #3 provides that subject to exceptions, all persons living within the City of Cooper City are ordered to remain in their homes, and all public and private gatherings of any number of people occurring outside a residence are prohibited, except for exempt activities. Certain travel activities were also prohibited. Essential businesses were defined as those set forth in Broward County Emergency Order 20-01. Restaurant activities were limited to take-out and delivery only, and subject to social distance

separation of at least 6 feet between patrons.

25. On May 15, 2020, Joseph Napoli, City Manager of Cooper City, signed **Emergency Order #8**, which in Section 7 allowed restaurants to utilize outdoor seating within the City, subject to compliance with certain terms and conditions. A copy of Emergency Order #8 is attached as **Exhibit "I."**

COUNT I- DECLARATORY RELIEF

26. The allegations of paragraphs 1 through and including 25 are restated and incorporated herein as if fully set forth.

27. The Commercial Lines Policy issued by Defendant White Pine to Plaintiff provides Commercial Property Coverage, including Building and Personal Property Coverage, Business Income (And Extra Expense) Coverage and Civil Authority coverages.

28. Initially and after the issuance of the Civil Authority orders set forth above, Plaintiff complied in all respects, including closure of business operations, and after being allowed to open partially, by significantly modifying the daily operations of the restaurant to prevent further losses, all of which has and will substantially affect business operations and revenues. Those losses are on-going for an indeterminate period of time.

29. Because of the COVID-19 crisis, and the aforementioned civil orders issued by the Governor of the State of Florida, the Broward County Administrator and the City Manager of Cooper City, the Plaintiff made a claim for insurance benefits against the Defendant, WHITE PINE, for monetary losses suffered due to lost business income, Civil Authority losses, and Extra Expense damages and closures, all incurred during required periods of closure and partial closure.

30. On May 20, 2020, the Plaintiff was advised by Defendant that with respect to the

submitted claim, there was a “Full Coverage Denial.” A copy of the denial letter is attached as **Exhibit “J.”**

31. Within the May 20, 2020 correspondence from Defendant to Plaintiff, WHITE PINE stated:

In order for coverage to apply, the policy requires direct physical loss or damage to Covered Property. Additionally, coverage is excluded for the enforcement of or compliance with any ordinance or law regulating the use of any property. Further, loss caused by a virus capable of inducing physical distress, illness or disease is specifically excluded and this exclusion applies to all coverage under all forms and endorsements that comprise the Policy, including but not limited to forms or endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority. In this case, based on the information provided and the above, there is no coverage for Business Income Interruption as a result of actions taken to stop or slow the spread of the Novel Coronavirus (Covid-19).

It is the position of White Pine Insurance Company that the above cited policy provisions and exclusions apply with respect to the claim being presented. Therefore, we must respectfully disclaim coverage and contend you are not entitled to benefits under the above captioned policy of insurance.

32. Section 86.011 of the Florida Statutes provides:

86.011 Jurisdiction of trial court.—The circuit and county courts have jurisdiction within their respective jurisdictional amounts to declare rights, status, and other equitable or legal relations whether or not further relief is or could be claimed. No action or procedure is open to objection on the ground that a declaratory judgment is demanded. The court’s declaration may be either affirmative or negative in form and effect and such declaration has the force and effect of a final judgment. The court may render declaratory judgments on the existence, or nonexistence:

- 1(1) Of any immunity, power, privilege, or right; or
- (2) Of any fact upon which the existence or nonexistence of such immunity, power, privilege, or right does or may depend, whether such immunity, power, privilege, or right now exists or will arise in the future. Any person seeking a declaratory judgment may also demand additional, alternative, coercive, subsequent, or supplemental relief in the same action.

33. Section 86.021 of the Florida Statutes provides:

86.021 Power to construe.—Any person claiming to be interested or who may be in doubt about his or her rights under a deed, will, contract, or other article, memorandum, or

instrument in writing or whose rights, status, or other equitable or legal relations are affected by a statute, or any regulation made under statutory authority, or by municipal ordinance, contract, deed, will, franchise, or other article, memorandum, or instrument in writing may have determined any question of construction or validity arising under such statute, regulation, municipal ordinance, contract, deed, will, franchise, or other article, memorandum, or instrument in writing, or any part thereof, and obtain a declaration of rights, status, or other equitable or legal relations thereunder.

34. Section 86.111 of the Florida Statutes states:

86.111 Existence of another adequate remedy; effect.—The existence of another adequate remedy does not preclude a judgment for declaratory relief. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar. The court has power to give as full and complete equitable relief as it would have had if such proceeding had been instituted as an action in chancery.

35. Plaintiff VIENNA CAFÉ disagrees with the denial of coverage and the reasoning of the Defendant WHITE PINE in the aforementioned correspondence, as follows:

A. The Defendant's position that there has been no direct physical loss to insured property is incorrect. In fact, COVID-19 *is* a cause of real physical loss and damage as it is physically affecting public and private property and physical spaces around the world, including in Broward County and Cooper City, Florida. COVID-19 stays for certain periods of time on surfaces of objects and materials, including tables, chairs, counter tops, door handles, cooking utensils and the property which is covered by the subject insurance policy. These areas and objects also require remediation to clean the surfaces of the Plaintiff's business property because there has been direct physical loss to Plaintiff's business establishment and the property therein.

B. Plaintiff disagrees with Defendant's denial of coverage, based on Defendant's

reliance on the “ordinance and law” language of the policy. That language materially conflicts with other portions of the insurance contract, including the “Action of Civil Authority” provisions of the policy.

C. While the policy contains language that attempts to exclude loss caused by a “virus capable of inducing physical distress, illness or disease” and claims that coverage is specifically excluded, the policy language provides no exclusion for a pandemic such as the COVID-19 pandemic which has affected the entire globe including Plaintiff’s business operations.

D. Nor does the policy provide any exclusion due to psychological and mental harm, and fear of a virus or pandemic.

36. Plaintiff has performed all conditions precedent to permit it to bring and maintain this cause of action, including, but not limited to, cooperating with the Defendant and paying all required premiums for the policy to apply.

37. Plaintiff maintains that under the terms of the aforementioned insurance policy issued by Defendant, that WHITE PINE is obligated to provide business interruption coverage, extra expense coverage and civil authority coverage to it due to the COVID-19 emergency.

38. All parties herein have or claim an interest which will be affected by the declaration of rights in this cause and are named herein due to their interests and claims under Section 86.091 of the Florida Statutes.

39. There is therefore a present and actual insurance coverage dispute between the Plaintiff and Defendant and the parties disagree over their respective rights and responsibilities under the contract of insurance and the facts of this loss, and there is a

practical and actual need for the resolution of this dispute. The Plaintiff is therefore entitled to a declaration of its rights in this controversy.

40. There is a bona fide adverse interest between the parties concerning powers, privileges, immunities, status and rights of each party.

41. Given the above, Plaintiff is seeking a determination from the Court about the existence or non-existence of its rights or privileges and is entitled to have those doubts removed. All parties to this Petition have an actual, present and adverse interest in the subject matter of this controversy.

42. In order to effectuate its rights, Plaintiff has had to retain the undersigned attorneys to represent it, and is entitled to an award of reasonable attorney's fees under Section 627.428 of the Florida Statutes and reasonable Legal Assistant fees under Section 57.104 of the Florida Statutes.

WHEREFORE, the Plaintiff, **VIENNA CAFÉ AND BISTRO, INC., d/b/a VIENNA CAFÉ AND BISTRO**, respectfully requests this Honorable Court:

(A). Accept jurisdiction of the parties and the subject matter of this insurance coverage controversy;

(B). Determine that WHITE PINE INSURANCE COMPANY owes coverage for Business Interruption Insurance, Extra Expense and Civil Authority coverage under the subject policy and declare Plaintiff's rights as raised by this Complaint between the parties under the terms of the contract of insurance and the facts of the losses;

(C). Determine there is insurance coverage in effect for Plaintiff's COVID-19 related Business Interruption losses, under the policy issued by WHITE PINE, since there has been direct physical loss to covered property suffered by the Plaintiff;

(D). Determine that Defendant's reliance on the "Ordinance and Law" language of the policy does not invalidate the claims made by Plaintiff for Business Interruption, Extra Expense and Civil Authority coverages;

(E). Determine the applicable policy of insurance does not exclude coverage for a global pandemic;

(F). Determine that while the policy contains language that a loss caused by a "virus capable of inducing physical distress, illness or disease" is specifically excluded, the policy provides no exclusion due to psychological and mental harm and fear of a virus and global pandemic.

(G). Determine Plaintiff is entitled to Extra Expense insurance coverage under the policy of insurance;

(H). Determine Plaintiff is entitled to Civil Authority insurance coverage under the policy of insurance; and

(I). Take any other action the Court deems necessary and proper, including but not limited to, the award of supplemental relief under to Section 86.061 of the Florida Statutes, reasonable attorney's fees under to Section 627.428 of the Florida Statutes, reasonable Legal Assistant fees under Section 57.104 of the Florida Statutes, pre-judgment damages from the date of breach of the policy to the present, post-judgment interest as provided by Section 55.03 of the Florida Statutes, and the taxable costs of this action under Sections 57.041, 57.071 and 86.081 of the Florida Statutes.

COUNT II-BREACH OF CONTRACT

43. The allegations of paragraphs 2 through and including 25 are incorporated herein as if fully set forth.

44. Plaintiff VIENNA CAFÉ AND BISTRO, INC., d/b/a VIENNA CAFÉ AND BISTRO and WHITE PINE entered into a contract for Commercial Lines insurance for the policy period of January 26, 2020 to January 26, 2021. A copy of the policy is attached as **Exhibit “A.”**

45. Plaintiff VIENNA CAFÉ is a public restaurant which prepares and serves food and alcohol and has been in operation since 2005.

46. At all times material, Plaintiff performed all of its duties, responsibilities and conditions precedent under the aforementioned contract of insurance.

47. Defendant WHITE PINE has failed to perform its part of the contract of insurance, and has materially breached its obligations to the Plaintiff under the insurance policy. Those breached obligations go to the essence of the insurance contract.

48. Because of the Defendant’s failure to materially perform under the insurance policy, Plaintiff has suffered monetary business interruption, Civil Authority and extra expense damages which should have been paid by Defendant under the aforementioned policy of insurance.

WHEREFORE, the Plaintiff, **VIENNA CAFÉ AND BISTRO, INC., d/b/a VIENNA CAFÉ AND BISTRO**, respectfully demands judgment against Defendant, **WHITE PINE INSURANCE COMPANY**, for compensatory, consequential and special damages, including, but not limited to loss of business income, Civil Authority, and extra expense damages as defined by the aforementioned policy of insurance, attorney’s fees under Section 627.428 of the Florida Statutes, Legal Assistant fees under to Section 57.104 of the Florida Statutes, pre-judgment damages from the date of breach of the policy to the present, post-judgment interest as provided by Section 55.03 of the Florida Statutes, and

the taxable costs of this action under to Section 57.041, and 57.071 of the Florida Statutes.

Dated this 6th day of July 2020.

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