Disp __x___ Dec _____ Seq. Nos.__1-8___ Type __dismiss__

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PRESENT: HON. LINDA S. JAMIESON

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WELLPATH HOLDINGS, INC., Index No. 54589/2021

Plaintiff, DECISION AND ORDER

-against-

XL INSURANCE AMERICA, INC.; THE PRINCETON EXCESS AND SURPLUS LINES INSURANCE COMPANY; CRUM & FORSTER SPECIALTY INSURANCE COMPANY; EVEREST INDEMNITY INSURANCE COMPANY; CERTAIN UNDERWRITERS AT LLOYD'S, LONDON SUBSCRIBING TO POLICY NO. VPC-CN 0001984-01; CERTAIN UNDERWRITERS AT LLOYD'S, LONDON SUBSCRIBING TO POLICY NO. AMR-64514-01; CERTAIN UNDERWRITERS AT LLOYD'S, LONDON SUBSCRIBING TO POLICY NO. AQS-191329; INDEPENDENT SPECIALTY INSURANCE COMPANY; INTERSTATE FIRE & CASUALTY COMPANY; GENERAL SECURITY INDEMNITY COMPANY OF ARIZONA; UNITED SPECIALTY INSURANCE COMPANY; LEXINGTON INSURANCE COMPANY; HOMELAND INSURANCE COMPANY OF NEW YORK; HDI GLOBAL SPECIALTY SE; WESTERN WORLD INSURANCE COMPANY; and SAFETY SPECIALTY INSURANCE COMPANY,

Defendants.

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The following papers numbered 1 to 33 were read on these motions:

Paper	Number
Notice of Motion, Affirmation and Exhibit	1
Memorandum of Law	2
Notice of Motion	3

Reply Memorandum of Law	28
Affirmation in Reply	29
Affirmation in Reply	30
Affirmation in Reply	31
Memorandum of Law and Exhibit in Reply	32
Affirmation in Reply	33

There are eight motions before the Court, all seeking to dismiss the complaint in its entirety. The first motion is filed by defendants XL Insurance America, Inc., Everest Indemnity Insurance Company, and Homeland Insurance Company of New York. The second motion is filed by defendants Certain Underwriters at Lloyd's, London Subscribing to Policy No. AMR-64514-01, General Security Indemnity Company of Arizona, United Specialty Insurance Company, and Lexington Insurance Company. The third motion is filed by defendant The Princeton Excess and Surplus Lines Insurance Company. The fourth motion is filed by defendant Western World Company. The fifth motion is filed by defendants Certain Underwriters at Lloyd's, London subscribing to Policy No. AQS-191329; HDI Global Specialty SE; and Safety Specialty Insurance Company. The sixth motion is filed by defendant General Security Indemnity Company of Arizona relating to a different insurance policy from that referenced in the second motion. The seventh motion is filed by defendants Interstate Fire & Casualty Company, Independent Specialty Insurance Company,

and Certain Underwriters at Lloyd's, London Subscribing to Policy No. VPC-CN-0001984-01. The eighth motion is filed by defendant Crum & Forster Specialty Insurance Company.

Plaintiff voluntarily discontinued its claims against the defendants which filed the second motion to dismiss. This motion is thus moot.

According to plaintiff, it provides medical and behavioral services at over 400 inpatient and residential treatment facilities, civil commitment centers, and correctional facilities throughout the US and in Australia. Plaintiff alleges that it "lost income because COVID-19, actually present[1] at its insured locations, caused direct physical loss by rendering the property uninhabitable and/or unfit for its intended use, and caused damage by causing a distinct, demonstrable, physical alteration of the property." Plaintiff thus treated fewer patients, and incurred greater costs, to remain open.

Plaintiff contends that COVID-19 changed "the content of air and character of surfaces at Wellpath's property, turning both into mechanisms for the spread of disease." Specifically, it argues that once aerosols "containing COVID-19 fall, they tangibly affect physical surfaces at Wellpath's property. The viral particles attach to the surface, transforming it into a

[1]In the complaint, plaintiff does not allege that the virus was actually found in its premises, but was "statistically certain" to be present.

'fomite.' A person who touches a fomite can get sick with COVID-19." Plaintiff asserts that "COVID-19 can exist on fomites for up to 28 days according to one study. This creates a damage continuum: infected persons shed viral particles which change the air, and the particles eventually settle on and alter surfaces." Plaintiff submitted claims to its insurers for its losses and costs, all of which were denied. This action followed.

Analysis

Defendants moved to dismiss the complaint under two separate sections of the CPLR. "On a motion to dismiss a pleading for failure to state a cause of action, the pleading is to be liberally construed, accepting all of the facts alleged therein to be true, and according the allegations the benefit of every possible favorable inference." *87-10 51st Ave. Owners Corp. v. Steadfast Ins. Co.*, 39 A.D.3d 700, 701, 835 N.Y.S.2d 295, 296 (2d Dept. 2007). "Under CPLR § 3211(a)(1), dismissal is warranted only if the documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claims. To be considered documentary, evidence must be unambiguous and of undisputed authenticity. What may be deemed 'documentary evidence' for purposes of this subsection is quite limited. Materials that clearly qualify as documentary evidence include documents such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable.

An insurance policy may be documentary evidence to support a CPLR § 3211(a)(1) motion to dismiss." *6593 Weighlock Drive, LLC v. Springhill SMC Corp.*, 71 Misc. 3d 1086, 1089-90, 147 N.Y.S.3d 386, 389-90 (Sup. Ct. Onandaga Co. 2021).

Plaintiff correctly points out that "When the terms of an insurance policy are 'clear and unambiguous, they must be given their plain and ordinary meaning, and courts should refrain from rewriting the agreement.'" (Citation omitted). As a recent Trial Court decision noted in a similar action involving a similar insurance policy, "Courts may not make or vary the contract of insurance to accomplish their notions of abstract justice or moral obligation." *Island Gastroenterology Consultants, PC v. Gen. Cas. Co. of Wisconsin*, 72 Misc. 3d 1221(A), 150 N.Y.S.3d 898 (Sup. Ct. Suffolk Co. 2021). Plaintiff asserts that "Evidence and experts knowledgeable on the relevant science must be considered," and that "[e]ven if the court is skeptical of Wellpath's position, where issues of fact are presented, the court should deny a motion to dismiss. Wellpath has adequately alleged that COVID-19 damaged its property; it is entitled to prove those allegations." Naturally, defendants disagree.

Defendants filed a main memorandum of law[2] in support of their motions, with separate additional memoranda for issues that

[2]The Court appreciates the efficiency in this.

were not common to all motions. Although the various policies differ in some respects, they share one critically important provision in common. The policies cover only "direct physical loss of, or direct physical damage to, property described in the PHYSICAL PROPERTY section set forth . . . ." "Damage" is defined as "direct physical loss of, or direct physical damage to INSURED PROPERTY arising from an 'occurrence' that takes place during the 'policy term.'" "Insured property" is defined as "physical property," specifically "real property" and "personal property."

This language has been litigated extensively recently in New York State and Federal Courts.[3] There seems to be a solid consensus in New York that "the clause 'direct physical loss of or damage to' (or substantially similar policy language) requires 'physical damage to the insured's property.'" *Hudson Valley Bone and Joint Surgeons, LLP v. CNA Financial Corp. & Nat'l Fire Ins. Co. of Hartford*, 2021 WL 4340987, at *4 (SDNY Sept. 23, 2021) ("numerous courts applying New York law have recently considered whether the presence of COVID-19 constitutes direct physical loss of or damage to property and uniformly answer this question in the negative."). As the Court in *Hudson Valley* explained, "the presence of the coronavirus does not physically alter property in

[3]Not surprisingly, it has also been litigated around the entire country. Plaintiff cites cases from other jurisdictions that support its position. None, however, are binding on this Court.

a permanent manner. The coronavirus is different from other physical or chemical contaminants, such as lead or asbestos, that have been found to cause 'direct physical loss or damage' to property. Instead, the coronavirus poses a temporary health hazard to the occupants of a building, whose threat to human health dissipates with the passage of time." *Hudson Valley*, *Id.* at *5.

A recent Suffolk County Trial Court agrees, stating that

> New York courts interpreting language that is substantially identical to the language in the insurance policies at bar have found that coverage is limited to losses involving physical damage to the insured's property, and they have declined to interpret such language to include "loss of use" of the property under New York law. New York courts have also found that the loss of use of premises due to COVID-19 related government orders does not trigger business-income coverage based on physical loss to property.
>
> Here, the insurance policies clearly require "direct physical loss of or damage to property." "Covered Property" is defined as "Buildings," "meaning the buildings and structures at the premises described in the Declarations," and "Covered Causes of Loss" are defined as "[r]isks of direct physical loss." The additional coverage for losses of Business Income due to a suspension of operations during a "period of restoration" only applies if the suspension was "caused by direct physical loss of or damage to property at the described premises." Moreover, the coverage for Extra Expenses during a "period of restoration" does not apply "if there [was] no direct physical loss or damage to the property at the described premises." The plaintiffs' interpretation of these and other provisions of the policies have been rejected by New York courts. The cases to the contrary upon which the plaintiffs rely are out-of-state cases that appear to represent a minority view. Accordingly, the court declines to follow them.

Island Gastroenterology. *Id.* Similarly, a Court in Kings County explained that "The phrase 'direct physical loss or damage' is unambiguous, and requires physical damage to the insured property itself as a condition for coverage. While the plaintiff correctly points to courts in other jurisdictions that have held that the presence of the COVID-19 virus might cause physical loss or damage to property, all New York courts applying New York law have reached the opposite conclusion, and have soundly rejected the argument that business closures due to the presence of the COVID-19 virus or due to New York State Executive Orders constitute physical loss or damage to property. Moreover, the mere presence of the COVID-19 virus in the air or on surfaces of a covered property does not qualify as damage to the property itself. Commonly, proof of a change or alteration of the insured premises is necessary to establish that it suffered damage or loss. Since the virus does not alter the insured's property, it is distinguishable from those cases cited by the plaintiff involving radiation, chemical dust and gas, asbestos and other contaminants which may persist and damage the property." *Benny's Famous Pizza Plus Inc. v. Sec. Nat'l Ins. Co.*, 72 Misc. 3d 1209(A), 149 N.Y.S.3d 883 (Sup. Ct. Kings Co. 2021). *See also 6593 Weighlock Drive, LLC v. Springhill SMC Corp.*, 71 Misc. 3d 1086, 1094, 147 N.Y.S.3d 386, 393 (Sup. Ct. Onandaga

Co. 2021) ("When presented with claims for monetary losses due to COVID-19 and concomitant government closures, New York state and federal courts construing similar policy language overwhelmingly have concluded that actual physical damage to property is required to trigger coverage; loss of use alone is insufficient."); *Mangia Rest. Corp. v. Utica First Ins. Co.*, 72 Misc. 3d 408, 148 N.Y.S.3d 606, 611–12 (Sup. Ct. Queens Co. 2021) ("Since the appearance of the Coronavirus pandemic, courts have continued to posit that actual physical damage is required before business interruption insurance coverage is paid. . . . [P]laintiff's claim that it suffered actual damage because the virus germs settled on the fixtures and food at the restaurant, and they were forced to clean surfaces of virus contaminants, is without merit. Contrary to plaintiff's contention, the direct physical damage or loss criteria of the subject policy was not triggered by such actions."); *Poughkeepsie Waterfront Development, LLC v. The Travelers Indemnity Co. of America*, 2021 WL 4392304, at *1 (SDNY Sept. 24, 2021) ("courts in this District and across the country have repeatedly rejected the legal theory now advanced by Plaintiff that 'loss of use' constitutes 'direct physical loss.'").

In sum, as explained by the Southern District of New York, only a few days ago, "while the Policy does not

expressly define the phrase 'direct physical loss or damage,' the presence of an undefined term does not necessarily render that term ambiguous. . . . As a matter of textual interpretation, the consensus among courts applying New York law is that the words 'direct' and 'physical,' which modify the phrase 'loss or damage,' require a showing of actual, demonstrable physical harm of some form to the insured premises. . . ." *The Chefs' Warehouse, Inc., v. Employers Ins. Co. of Wausau*, 2021 WL 4198147, at *7-9 (SDNY Sept. 15, 2021).

Here, as in *Chefs' Warehouse*, "Plaintiff attempts to discredit this consensus interpretation by claiming that it conflates the meaning of 'loss' and 'damage,' thus rendering language in the provision superfluous. However, courts applying New York law have understood 'physical loss' and 'physical damage' as distinct concepts: 'physical loss' may refer to circumstances in which a property's value is entirely lost, as through theft or complete destruction, whereas 'physical damage' may refer to circumstances in which property is harmed but not wholly obliterated. . . . Thus, it is Plaintiff's preferred reading — not the generally agreed-upon interpretation of this language — that violates a core principle of contractual interpretation." *Id.* Again, as *Chefs' Warehouse* found, "Having reviewed the relevant policy

language and found it to be unambiguous, the Court next considers whether Plaintiff has alleged facts sufficient to bring its claimed losses within the coverage afforded under the Policy. In this regard, Plaintiff contends that it has suffered physical harm because its 'property and the property of its direct and indirect customers has lost functionality and/or been rendered unusable for their intended purpose, and/or unsafe for normal human occupancy or continued use.' But as has already been discussed, courts applying New York law have been consistent in interpreting the phrase 'direct physical loss or harm' to exclude 'mere loss of use.'" *I*

Nothing that plaintiff argues convinces this Court that it should ignore the plethora of New York State and Federal cases that find that the policies at issue preclude plaintiff's claims. Accordingly, the Court grants the motions to dismiss in their entireties.[4]

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
September 29, 2021

Linda S. Jamieson

HON. LINDA S. JAMIESON
Justice of the Supreme Court

[4]Because the Court grants the motions to dismiss on the issue of physical loss or damage, it need not discuss the multiple other exclusions that could also bar plaintiff's claims.

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