

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

BALLAS NAILS & SPA, LLC,

Plaintiff,

v.

TRAVELERS CASUALTY
INSURANCE COMPANY OF
AMERICA,

Defendant.

Civil Action No. 4:20-cv-1155
JURY TRIAL DEMANDED

PLAINTIFF’S COMPLAINT

Plaintiff, BALLAS NAILS & SPA, LLC (“Plaintiff”), by and through its attorneys, Molner Law Group, LLC, alleges the following against Defendant, TRAVELERS CASUALTY INSURANCE COMPANY OF AMERICA (“Defendant”):

I. NATURE OF THE ACTION

1. Plaintiff’s Complaint is an action seeking declaratory relief arising from Plaintiff’s contract of insurance with Defendant.

2. As the court is undoubtedly aware, SARS-CoV-2, the novel coronavirus that causes the COVID-19 disease, has produced a global pandemic. To protect its business if it suddenly had to suspend operations for reasons

outside of its control, or if it had to act to prevent further property damage, Plaintiff purchased insurance coverage from Defendant, including property coverage, as set forth in Businessowners Property Coverage Special Form (Form No. MP T1 02 02 05).

3. In light of global pandemic, state and local government orders nationwide (“Civil Authority Orders”) mandated that all non-essential in-store businesses must shut down, including Plaintiff’s personal care services (nail salon) business.

4. Defendant’s Businessowners Property Coverage Special Form provides “Business Income and Extra Expense” coverage, which promises to pay for loss of income sustained due to the necessary suspension of operations due to direct physical loss or damage to the Covered Property.

5. Defendant’s Businessowners Property Coverage Special Form also provides “Civil Authority” coverage, which promises to pay for loss caused by a civil authority that prohibits access to the insured premises.

6. Defendant’s Businessowners Property Coverage Special Form, under the section entitled “Duties in the Event of Loss or damage” mandates that Plaintiff must, in the event of loss or damage to the Covered Property, “[t]ake all reasonable steps to protect the Covered Property from further damage, and keep a record of your expenses necessary to protect the Covered Property, for

consideration in the settlement of the claim.” This is commonly referred to as “Sue and Labor” coverage.

7. Plaintiff was forced to suspend or reduce business due to COVID-19 and the resultant closure orders issued by civil authorities in Missouri.

8. Defendant refused to pay Plaintiff under its Business Income and Extra Expenses, Civil Authority, and Sue and Labor coverages for the losses incurred by civil authority orders requiring the necessary suspension of business, and any efforts to prevent further property damage or to minimize the suspension of business and continue operations. Indeed, Plaintiff was advised by its insurance agent that Travelers would not pay under its policy for the losses Plaintiff suffered due to COVID-19 and the resultant civil authority orders.

II. JURISDICTION AND VENUE

9. This Court has jurisdiction over this action under 28 U.S.C. § 1332, because the matter of controversy exceeds the sum or value of \$75,000, and because Defendant and Plaintiff are citizens of different states.

10. Venue and personal jurisdiction in this District are proper under 28 U.S.C. § 1391 because Defendant does or transacts business within this District, and a material portion of the events at issue occurred in this District.

III. THE PARTIES

11. Plaintiff Ballas Nails & Spa, LLC is a Missouri limited liability corporation and maintains its principal place of business in the City of St. Louis, Saint Louis County, State of Missouri.

12. Plaintiff's member is Ly T Ho – who is a citizen of the State of Missouri.

13. Plaintiff owns, operates, manages, and/or operates a personal care services (nail salon) business, located at or about 731 N. New Ballas Road, City of St. Louis, St. Louis County, State of Missouri. (“Covered Property”).

14. Upon information and belief, Defendant is an insurance company incorporated in the State of Connecticut with its principal place of business in the State of Connecticut.

IV. FACTUAL BACKGROUND

A. Insurance Coverage

15. In return for the payment of premium, Defendant issued Policy No. 680-8J732539-19-42 to Plaintiff for a policy period of October 22, 2019 to October 22, 2020. Policy No. 680-8J732539-19-42 is attached hereto as Exhibit A.

16. Plaintiff performed all of its obligations under the Policy, including payment of premiums. The Covered Property is Ballas Nails & Spa at 731 N. New Ballas Road, Saint Louis, Missouri.

17. In many parts of the world, property insurance is sold on a specific peril basis. Such policies cover the risk of loss if that risk of loss is specifically listed (e.g., hurricane, earthquake, H1N1, etc.). Most property policies sold in the United States, however, including those sold by Defendant, are all-risk property damage policies. These types of policies cover damage except for risks that are expressly and explicitly excluded.

18. The language of the Policy is “adhesionary” language, meaning that Plaintiff was not a participant in negotiating or drafting the Policy’s contents and provisions. Plaintiff possessed no leverage or bargaining power to alter or negotiate the terms of the Policy.

B. The Covered Cause of Loss

19. With respect to the Businessowners Property Coverage Special Form, Defendant agreed to pay for “Covered Causes of Loss,” meaning risks of direct physical loss unless the loss is limited or excluded in the policy. Businessowners Property Coverage Special Form is attached hereto as Exhibit B.

20. Losses due to COVID-19 are a Covered Cause of Loss under Plaintiff’s policy with the Property Coverage Special Form.

21. The Policy has an exclusion for Ordinance or Law, which states, in part, that the Defendant will not pay for loss or damage caused directly or indirectly by,

- (1) The enforcement of any ordinance or law:
 - (a) Regulating the construction, use or repair of any property; or
 - (b) Requiring the tearing down of any property, including the cost of removing its debris.
- (2) This exclusion, Ordinance or Law, applies whether the loss results from:
 - (a) An ordinance or law that is enforced even if the property has not been damaged[.]

(Ex. B at 22)

22. The Policy's exclusion for Ordinance or law does not apply to the business losses incurred by Plaintiff here because the COVID-19 Executive Orders issued by a state and local executives do not have the same force of law as an ordinance or regulation that is issued by a state legislature.

23. The Policy has an exclusion for "delay, loss of use or loss of market." (Ex. B at 24). This exclusion does not apply to the losses incurred by Plaintiff here because the exclusion contemplates indirect loss, while Plaintiff suffered a direct loss.

24. The Policy has an exclusion for "[c]ontamination by other than pollutants." (Ex. B at 25). This exclusion does not apply here because the Policy defines Pollutants as "any solid, liquid, gaseous or thermal irritant or

contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, waste, and any unhealthful or hazardous building materials[.]” (Ex. B at 38). This exclusion does not apply here because COVID-19, an infectious virus caused the global pandemic and resultant orders.

25. The Policy has an exclusion stating, in part, that:

We will not pay for loss or damage caused by or resulting from any of the following under Paragraphs a. and c. But if an excluded cause of loss that is listed in Paragraphs a. and b. below results in a Covered Cause of Loss, we will pay for the resulting loss or damage caused by that Covered Cause of Loss.

b. Acts of decisions, including the failure to act or decide, of any person, group, organization or governmental body.

(Ex. B at 26).

26. The Policy’s foregoing exclusion does not apply to the losses incurred by Plaintiff here because Plaintiff has alleged that its losses are covered losses. Thus, under the plain language of this exclusion, Defendant “will pay for the resulting loss or damage.”

27. The Policy has an endorsement titled “Exclusion of Loss Due to Virus or Bacteria” (IL T3 82 05 13), which states that:

A. The exclusion set forth in Paragraph B. applies to all coverage under all forms and endorsements that comprise this Coverage Part or 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, rental value or action of civil authority.

- B. We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.

28. The foregoing exclusion does not apply to Plaintiff's loss was not caused by the virus, there is no evidence that the virus has ever been on the Plaintiff's premises.

29. The presence of virus or disease can constitute physical damage to property, as the insurance industry has recognized since at least 2006. When preparing so-called "virus" exclusions to be placed in some policies, but not others, the insurance industry drafting arm, ISO, circulated a statement to state insurance regulators that included the following:

Disease-causing agents may render a product impure (change its quality or substance), or enable the spread of disease by their presence on interior building surfaces or the surfaces of personal property. When disease-causing viral or bacterial contamination occurs, potential claims involve the cost of replacement of property (for example, the milk), cost of decontamination (for example, interior building surfaces), and business interruption (time element) losses. Although building and personal property could arguably become contaminated (often temporarily) by such viruses and bacteria, the nature of the property itself would have a bearing on whether there is actual property damage. An allegation of property damage may be a point of disagreement in a particular case.

C. Businessowners Property Special Coverage Form

30. In the Property Coverage Special Form, Defendant agreed to pay for its insured's actual loss of Business Income sustained due to the necessary suspension of its operations during the "period of restoration" caused by direct physical loss of or damage to property. (Ex. B. at 2-3).

31. "Business Income" means "(a) Net Income (Net Profit or Loss before income taxes) that would have been earned or incurred, including . . . (b) Continuing normal operating expenses incurred, including payroll." (Ex. B at 2).

32. Defendant also agreed to pay for "Extra Expense (other than the expense to repair or replace property) to: (a) [a]void or minimize the "suspension" of business and to continue "operations" at the described premises . . . or (b) [m]inimize the "suspension" of busines if you cannot continue operations." (Ex. B at 3).

33. The Policy defines Extra Expense as the "reasonable and necessary expenses you incur during the 'period of restoration' that you would not have incurred if there had been no direct physical loss of or damage to property caused by or resulting from a Covered Cause of Loss." (Ex. B at 3).

34. "Suspension" means "the partial or complete cessation" of business activities at the Covered Property. (Ex. B at 39).

35. "Period of Restoration" means the period of time that:

(1) Begins:

- (i) For Business Income coverage: (a) With the date of direct physical loss or damage, if the Declarations show Immediately for Period of Restoration – Time Period; or (b) 72 hours after the time of direct physical loss or damage, if the Declarations show 72 hours for Period of Restoration – Time Period; or
- (ii) For Extra Expense coverage with the date of direct physical loss or damage;

Caused by or resulting from any Covered Cause of Loss at the described premises; and

(2) Ends on the earlier of:

- (i) The date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality; or
- (ii) The date when business is resumed at a new permanent location[.]

(Ex. B at 37).

36. The Defendant also agreed to pay for Business Income and reasonable and necessary Extra Expense sustained “by action of civil authority that prohibits access to the described premises.” The civil authority coverage begins twenty-four (24) hours after the time the action was taken and applies for a period of three consecutive weeks after the coverage begins. (Ex. B at 16).

37. Under the section entitled “Duties in the Event of Loss or damage,” Defendant mandates that Plaintiff must, in the event of loss or damage to the Covered Property, “[t]ake all reasonable steps to protect the Covered Property

from further damage, and keep a record of your expenses necessary to protect the Covered Property, for consideration in the settlement of the claim.” This is commonly referred to as “Sue and Labor” coverage.

38. The scientific community, and those personally affected by COVID-19, understand it as cause of real physical loss and damage. Contamination of the Covered Property would be a direct physical loss requiring remediation to clean the salon’s highly contaminable surfaces.

39. The presence of COVID-19 has caused civil authorities throughout the country to issue orders requiring the suspension of business at a wide range of establishments, including civil authorities with jurisdiction over Plaintiff’s business.

40. On March 13, 2020, the City of St. Louis announced that the COVID-19 situation was rapidly evolving and declared a public health emergency.¹

41. As the COVID-19 pandemic continued to spread, both the City and County of St. Louis issued Stay at Home Orders.

42. On March 21, 2020, the St. Louis County Director of Health & Hospitals/ Health Commissioner issued an executive order that required individuals living in the City of St. Louis to remain at home, except to “perform

¹ <https://www.stlouis-mo.gov/government/departments/health/communicable-disease/covid-19/orders/health-commissioner-order-1.cfm> (accessed August 18, 2020).

tasks essential to the health and safety of individuals[.]”² Additionally, all businesses were “allowed to maintain the value of inventory and infrastructure, provide security, process payroll or employee benefits, or facilitate employees working remotely, *but are required to cease all other activities.*” (emphasis added). Plaintiff’s personal care services (nail salon) business was not amongst the businesses that were exempt from the restrictions imposed in the Order. The order went into effect on March 23, 2020.

43. On April 3, 2020, Missouri’s Director of the Department of Health and Senior Services issued a “Stay at Home Order,” which stated that individuals residing in Missouri shall avoid leaving their homes.³

44. On April 16, 2020, the St. Louis County Director of Health & Hospitals/ Health Commissioner extended and slightly amended the initial Order, with no definite ending date. Plaintiff’s personal care services (nail salon) business remained amongst the list of businesses restricted by the Order.⁴

45. On May 11, 2020, the St. Louis County Director of Health & Hospitals/ Health Commissioner issued an Order that allowed a limited re-opening. The Order went into effect on May 18, 2020.⁵

² <https://www.stlouis-mo.gov/government/departments/health/communicable-disease/covid-19/documents/upload/Health-Commission-s-Order-5-03-21-2020.pdf>

³ <https://governor.mo.gov/priorities/stay-home-order> (accessed August 20, 2020).

⁴ <https://www.stlouis-mo.gov/government/departments/health/communicable-disease/covid-19/orders/health-commissioner-order-7.cfm> (accessed August 18, 2020).

⁵ <https://www.stlouis-mo.gov/government/departments/health/communicable-disease/covid-19/orders/copy-of-health-commissioner-order-8.cfm> (accessed August 18, 2020).

46. The above-referenced orders by St. Louis City, St. Louis County, and Missouri officials were issued in response to the rapid spread of COVID-19. These orders, as they relate to the closure of “non-essential” businesses, demonstrate an awareness on the part of both state and local governments that COVID-19 causes damage to property.

47. The Orders prohibited access to Plaintiff’s Covered Property, and the area immediately surrounding Covered Property, in response to dangerous physical conditions resulting from a Covered Cause of Loss.

48. As a result of the presence of COVID-19 and the Orders, Plaintiff lost Business Income and incurred Extra Expense.

49. Losses caused by COVID-19 and the related orders issued by local, state and federal authorities triggered the Business Income and Extra Expense, Civil Authority, and Sue and Labor provisions of Defendant’s policy.

50. Defendant has failed to provide the coverages for Plaintiff’s losses and has failed to pay for all of Plaintiff’s losses. Defendant has denied all coverage for Plaintiff’s claim. A copy of Defendant’s denial letter of August 11, 2020 is attached as Exhibit C.

V. CLAIMS FOR RELIEF

COUNT I

DECLARATORY JUDGMENT – BUSINESS INCOME AND EXTRA EXPENSE COVERAGE

51. Plaintiff repeats and realleges paragraphs one (1) through fifty (50) as if fully set forth in Count I.

52. Plaintiff's insurance policy is a contract under which Defendant was paid premiums in exchange for its promise to pay Plaintiff's Business Income and Extra Expense losses for claims covered by the policy.

53. Plaintiff has complied with all applicable provisions of the policies and/or those provisions have been waived by Defendant or Defendant is estopped from asserting them, and yet Defendant has abrogated its insurance coverage obligations pursuant to the policies' clear and unambiguous terms and has wrongfully and illegally refused to provide coverage to which Plaintiff is entitled.

54. An actual case or controversy exists regarding Plaintiff's rights and Defendant's obligations under the policy to reimburse Plaintiff for the full amount of Business Income and Extra Expense losses incurred by Plaintiff in connection with the suspension of its business stemming from the COVID-19 pandemic.

55. Pursuant to 28 U.S.C. § 2201, Plaintiff seeks a declaratory judgment from this Court declaring the following:

- i. Plaintiff's Business Income and Extra Expense losses incurred in connection with the Orders and the necessary interruption of its businesses stemming from the COVID-19 pandemic are insured losses under its policy; and
- ii. Defendant is obligated to pay Plaintiff for the full amount of the Business Income and Extra Expense losses incurred and to be incurred in connection with the Orders during the period of restoration and the necessary interruption of its businesses stemming from the COVID-19 pandemic.

COUNT II
DECLARATORY JUDGMENT – CIVIL AUTHORITY COVERAGE

56. Plaintiff repeats and realleges paragraphs one (1) through fifty (50) as if fully set forth in Count II.

57. Plaintiff's insurance policy is a contract under which Defendant was paid premiums in exchange for its promise to pay Plaintiff's Civil Authority losses for claims covered by the policy.

58. Plaintiff has complied with all applicable provisions of the policy and/or those provisions have been waived by Defendant or Defendant is estopped from asserting them, and yet Defendant has abrogated its insurance coverage

obligations pursuant to the policies' clear and unambiguous terms and has wrongfully and illegally refused to provide coverage to which Plaintiff is entitled.

59. An actual case or controversy exists regarding Plaintiff's rights and Defendant's obligations under the policy to reimburse Plaintiff for the full amount of Civil Authority losses incurred by Plaintiff in connection with the suspension of its business stemming from the COVID-19 pandemic.

60. Pursuant to 28 U.S.C. § 2201, Plaintiff seeks a declaratory judgment from this Court declaring the following:

- i. Plaintiff's Civil Authority losses incurred in connection with the Orders and the necessary interruption of its businesses stemming from the COVID-19 pandemic are insured losses under its policy; and
- ii. Defendant is obligated to pay Plaintiff for the full amount of the Civil Authority losses incurred and to be incurred in connection with the Orders during the period of restoration and the necessary interruption of its business stemming from the COVID-19 pandemic.

COUNT III
DECLARATORY JUDGMENT – SUE AND LABOR COVERAGE

61. Plaintiff repeats and realleges paragraphs one (1) through fifty (50) as if fully set forth in Count III.

62. Plaintiff's insurance policy is a contract under which Defendant was paid premiums in exchange for its promise to pay Plaintiff's reasonable incurred expenses to protect Covered Property.

63. Plaintiff has complied with all applicable provisions of the policy and/or those provisions have been waived by Defendant or Defendant is estopped from asserting them, and yet Defendant has abrogated its insurance coverage obligations pursuant to the policies' clear and unambiguous terms and has wrongfully and illegally refused to provide coverage to which Plaintiff is entitled.

64. An actual case or controversy exists regarding Plaintiff's rights and Defendant's obligations under the policy to reimburse Plaintiff for the full amount Plaintiff reasonably incurred to protect Covered Property from further damage by COVID-19.

65. Pursuant to 28 U.S.C. § 2201, Plaintiff seeks a declaratory judgment from this Court declaring the following:

- i. Plaintiff's reasonably incurred expenses to protect Covered Property from further damage by COVID-19 are insured losses under its policy; and
- ii. Defendant is obligated to pay Plaintiff for the full amount of expenses it reasonably incurred to protect Covered Property from further damage by COVID-19.

VI. REQUEST FOR RELIEF

WHEREFORE, Plaintiff, respectfully requests that the Court enter judgment in its favor and against Defendant as follows:

- a. For a declaration that the Orders constitute a prohibition of access to Plaintiff's Insured Property.
- b. Entering declaratory judgments on Counts I-III in favor of Plaintiff as follows:
 - i. Business Income and Extra Expense, Civil Authority, and Sue and Labor losses incurred in connection with the Orders and the necessary interruption of Plaintiff's business stemming from the COVID-19 pandemic are insured losses under Plaintiff's policies;
 - ii. Defendant is obligated to pay for the full amount of the Business Income and Extra Expenses, Civil Authority, and Sue and Labor losses incurred and to be incurred related to COVID-19, the Orders and the necessary interruption of Plaintiff's business stemming from the COVID-10 pandemic;
- c. Ordering Defendant to pay both pre- and post-judgment interest on any amounts awarded;
- d. Ordering Defendant's to pay attorneys' fees and costs of suit; and

e. Ordering such other and further relief as may be just and proper.

VII. JURY DEMAND

Plaintiff hereby demands a trial by jury on all claims so triable.

RESPECTFULLY SUBMITTED,

August 27, 2020

By: /s/ Mark D. Molner, Esq.

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