72 Misc.3d 1209(A)
Unreported Disposition
(The decision is referenced in
the New York Supplement.)
This opinion is uncorrected and will not be
published in the printed Official Reports.
Supreme Court, Kings County, New York.

BENNY'S FAMOUS PIZZA PLUS INC., Plaintiff,
v.
SECURITY NATIONAL
INSURANCE COMPANY, Defendant.

512131/2020
|
Decided on July 1, 2021

Attorneys and Law Firms

Attorneys for Plaintiff: Benny's Famous Pizza Plus Inc., LAW OFFICE OF MITCHELL J. WINN, PLLC, 585 Stewart Avenue, Suite 544, Garden City, NY 11530, (516) 385-6300

Attorneys for Defendant: Security National Insurance Company, Kevin F. Buckley, Esq., Jodi S. Tesser, Esq., Mound Cotton Wollan & Greengrass LLP, One New York Plaza New York, NY 10004, (212) 804-4200

Opinion

Lillian Wan, J.

***1** The following e-filed documents, listed by NYSCEF document number (Motion 01) 5-17, 21-27 and 29 were read on the defendants' motion seeking dismissal of the complaint.

This is a pre-answer motion by the defendant, Security National Insurance Company (hereinafter Security), to dismiss the complaint pursuant to CPLR § 3211(a)(1) based on documentary evidence in the form of the commercial insurance agreement between the parties, and pursuant to CPLR § 3211 (a)(7) for failure to state a cause of action. The complaint contains one cause of action for breach of contract, and seeks insurance coverage for business loss and extra expenses allegedly incurred because of the COVID-19 global pandemic. For the reasons set forth below, the defendant's motion is granted.

In support of the motion, the defendant submits the pleadings, insurance agreement, Governor Cuomo's Executive Orders 202.3, 202.6, 202.7, and 202.8, and transcripts of court proceedings and orders of dismissal in other cases that have addressed the issues presented here.

An insurance policy was issued by Security to the plaintiff, effective September 30, 2019 to September 30, 2020, which included coverage for loss of business income and extra expenses based on the COVID-19 pandemic. In response to the plaintiff's claim under the insurance policy, the defendant sent the plaintiff a denial letter dated April 1, 2020, which stated in sum and substance, that the claim was not covered under the virus exclusion of the policy, and that there was no direct physical loss or damage to the property as required by the terms of the contract. The plaintiff commenced this action, alleging that Security breached the insurance agreement with respect to the plaintiff's restaurant business located at 4514 13th Avenue in the County of Kings, City and State of New York, by denying the claim.

The plaintiff's complaint alleges that it is entitled to coverage under the "Additional Coverages" for "Civil Authority" provision of the insurance agreement. The civil authority referred to by the plaintiff involves the Executive Orders issued by Governor Andrew Cuomo in March of 2020, which compelled all non-essential New York State businesses to reduce, and then cease all in-person operations. Further, the complaint alleges that although the insurance policy contains a virus exclusion endorsement, that exclusion does not apply here because its business interruption was not caused by a virus per se, but rather by civil authority in the form of the Executive Orders issued by Governor Cuomo. The plaintiff also contends that the virus exclusion should not apply because the language of the insurance agreement does not explicitly state that the exclusion applies under the "Additional Coverages" for "Civil Authority" section of the policy. It further asserts that the virus exclusion endorsement does not contain an anti-concurrent clause, as do other exclusions in the policy, and therefore the COVID-19 virus can be a concurrent cause of loss, along with civil authority.

***2** The defendant argues that the insurance agreement at issue does not cover a loss of business income or extra expense unless it arises out of a direct physical loss of or damage to property. The defendant maintains that the complaint does not allege that the plaintiff sustained a physical loss or damage to its property, and in any event such damage or loss cannot result from the COVID-19 virus.

Further, the defendant argues that a claim for coverage under civil authority must also fail because under that provision the civil authority orders at issue are required to have been promulgated due to direct physical loss of or damage to property other than the plaintiff's premises, and must prohibit access to the premises. The defendant contends that the plaintiff has not pled that there was damage to other property that prohibited access to its premises, and that the Executive Orders cited in the complaint do not prohibit such access. According to the defendant, even if the plaintiff properly pled facts alleging that it sustained damage to the property, the claim would still fail because the plaintiff has also alleged that the cause of the civil action resulting in a loss of business income was a "virus," which is specifically excluded under the civil authority provision of the insurance agreement.

In support of its argument, the defendant maintains that New York courts have repeatedly rejected claims asserting that government restrictions on the use of the premises unaccompanied by a physical loss triggers insurance coverage. The defendant notes that the complaint does not allege that the virus spread to the premises and infected surfaces within the premises, or that it physically damaged the plaintiff's property. The defendant cites to *Michael Cetta, Inc. v Admiral Indem. Co.*, 566 F Supp 3d 168 (SDNY 2020), in which the plaintiff filed a class action alleging that the insurance company breached the policy by failing to provide business interruption coverage based on governmental orders to close non-essential businesses due to COVID-19. Referring to the dictionary meaning of "physical" and "loss" the court held that the provision requiring "direct physical loss of or damage to" connotes a negative alteration of the tangible condition of the property, and granted the defendant's motion to dismiss. The defendant also relies on *10012 Holdings, Inc. v Sentinel Ins. Co., Ltd.*, —— F Supp 3d ——, No. 20 Civ. 4471 (LGS), 2020 WL 7360252, at *2 (SDNY Dec. 15, 2020), in which the court held that the complaint did not state a claim for "loss" of the insured property. The court found that regardless of how the public health response to the virus may have affected the plaintiff's business, "nothing in the complaint plausibly supports an inference that COVID-19 and the resulting civil orders physically damaged plaintiff's property." S*ee Tappo of Buffalo, LLC v Erie Ins. Co.*, No. 20-CV-754V(Sr), 2020 WL 7867553, at *4 (WDNY Dec. 29, 2020) (finding that policy language providing coverage for "direct physical loss or damage" unambiguously requires some form of actual, physical damage to the insured premises to trigger coverage); *see also* NYSCEF Doc. No. 13, transcript of proceedings in *Social Life Magazine, Inc. v Sentinel Ins. Co.*, No. 1:20-cv-03311-VEC, Dkt. No. 24-1 (SDNY May 14, 2020). The defendant argues that to the extent that the plaintiff relies on cases that have held to the contrary, they are distinguishable as they involve situations in which the loss of use was the result of the presence of something harmful in the insured premises, which are not applicable to the circumstances presented in the instant case. Similarly, with respect to the plaintiff's claim under the civil authority provision of the insurance agreement, the defendant contends that courts have repeatedly dismissed cases where the complaints have not identified any neighboring property that was damaged by COVID-19. *See Michael Cetta, Inc.*, 506 F Supp 3d 168.

The plaintiff opposes the motion, and argues that the defendant's motion should be denied because it has failed to meet its burden of establishing that the plaintiff has not properly pled a cause of action for breach of contract under New York's liberal pleading requirements. The plaintiff contends that it has asserted facts alleging direct physical loss or damage to its property, as contemplated by the insurance agreement, in paragraphs 9 through 16 of the complaint. The paragraphs referenced by the plaintiff contain a statement of facts concerning the COVID-19 virus, including a comprehensive dissertation on its manner of spread, i.e. poor ventilation, droplets that remain on surfaces for hours to days, and the fact that the droplets are physical objects that travel and attach to surfaces and cause harm. In the complaint, the plaintiff also cites to various news articles and science publications concerning COVID-19 and its manner of transmission by touching surfaces where virus droplets are present. The plaintiff contends that this amounts to physical damage to the property as required under the policy.

***3** The plaintiff relies heavily on a New Jersey lower court case, *Optical Services USA v Franklin Mut. Ins. Co.*, No. BER-L-3681-20, 2020 WL 5806576 (NJ Super. Ct. Law Div. Aug. 13, 2020), involving the issue of the physical damage requirement. Relying on New Jersey appellate case law, the court held that "physical" can mean more than material alteration or damage, and that it was incumbent on the insurer to clearly and specifically rule out coverage in the circumstances where it was not to be provided. It went on to hold that "[t]here is an interesting argument that physical damage occurs where a policy holder loses functionality of their property by operation of civil authority such as the entry of an executive order [that] results in a change to the property." The plaintiff cites to a number of cases in other jurisdictions where physical damage was held to apply

to situations other than COVID-19, where the insured lost functionality of the premises. *See* *Travco Ins. Co. v Ward*, 715 F Supp 2d 699 (ED Va. 2010) (toxic gases released by defective drywall rendering a home uninhabitable); *Essex Ins. Co. v BloomSouth Flooring Corp.*, 562 F3d 399 (1st Cir 2009) (an unpleasant odor rendering the property unusable); and *Motorists Mutual Ins. Co. v Hardinger*, 131 Fed Appx 823 (3rd Cir 2005) (bacterial contamination of a home's water supply).

The plaintiff further maintains that the virus exclusion is ambiguous as it relates to the COVID-19 pandemic vis-à-vis the standard virus exclusion, and that the ambiguity in the insurance agreement should be interpreted in favor of coverage. The plaintiff relies on a recent case, *Urogynecology Specialist of Florida. LLC v Sentinel Ins. Co., Ltd.*, 489 F Supp 3d 1297 (MD Fla. 2020), in which the Florida court held that there was no binding case law on the issue of the interplay between the COVID-19 pandemic and the standard virus exclusion to merit dismissal. The court noted that denying losses stemming from the COVID-19 pandemic "does not logically align with the grouping of the virus exclusion with other pollutants such that the [p]olicy necessarily anticipated and intended to deny coverage for these kinds of business losses." *Id.* at 1302. In reliance on *Studio 417, Inc. v Cincinnati Insurance Company*, 478 F Supp 3d 794 (WD Mo. 2020), the plaintiff also contends that an "all-risk" business interruption policy, such as the one in the instant case, provides coverage for all loss unless specifically excluded. In that case, the Missouri court held that COVID-19 can cause physical loss under "all-risk" business interruption policies which require a physical alteration to the premises.

Based on the record before the Court, the defendant has established its prima facie entitlement to dismissal of the complaint pursuant to CPLR §§ 3211(a)(1) and (a)(7). A party seeking dismissal pursuant to CPLR § 3211(a)(1) on the ground that its defense is founded upon documentary evidence has the burden of submitting documentary evidence that resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim. *Mazur Bros. Realty, LLC v State of New York*, 59 AD3d 401 (2d Dept 2009); *Epifani v Johnson*, 65 AD3d 224 (2d Dept 2009); *see also* *Leon v Martinez*, 84 NY2d 83 (1994). A motion to dismiss based on CPLR § 3211(a)(1) may be granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law. *Porat v Rybina*, 177 AD3d 632 (2d Dept 2019); *see also Phillips v Taco Bell Corp.*,152 AD3d 806 (2d Dept 2017); *Goshen v Mutual Life Ins. Co. of NY*, 98 NY2d 314 (2002). In order to be considered documentary, the evidence must be "unambiguous and of undisputed authenticity" and "essentially unassailable." *Torah v Dell Equity, LLC*, 90 AD3d 746, 746—747 (2d Dept 2011), quoting *Fontanetta v John Doe 1*, 73 AD3d 78 (2d Dept 2010) and *Suchmacher v Manana Grocery*, 73 AD3d 1017 (2d Dept 2010) (internal quotation marks omitted); *see also Yue Fung USA Enters., Inc. v Novelty Crystal Corp.*, 105 AD3d 840 (2d Dept 2013).

***4** A policyholder bears the initial burden of showing that its insurance agreement covers the claimed loss. *See* *Roundabout Theatre Co. v Continental Cas. Co.*, 302 AD2d 1 (1st Dept 2002). The phrase "direct physical loss or damage" is unambiguous, and requires physical damage to the insured property itself as a condition for coverage. *Id.* at 6-7. 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. *See e.g.* *Buffalo Xerographix, Inc. v. Sentinel Insurance Company*, Ltd., No. 1:20-cv-520, 2021 WL 2471315 (WDNY June 16, 2021); *Office Solution Group, LLC v National Fire Insurance Company of Hartford*, No. 1:20-cv-4736-GHW, 2021 WL 2403088 (SDNY June 11, 2021); *Deer Mountain Inn LLC v Union Insurance Company*, No. 1:20-cv-0984, 2021 WL 2076218 (NDNY May 24, 2021); *Kim-Chee LLC v Philadelphia Indemnity Ins. Co.*, —— F Supp 3d ——, No. 1:20-cv-1136, 2021 WL 1600831 (WDNY April 23, 2021); *Rye Ridge Corp. v Cincinnati Insurance Company*, —— F Supp 3d ——, No. 20 Civ. 7132, 2021 WL 1600475 (SDNY April 23, 2021); *Mohawk Gaming Enterprises, LLC v Affiliated FM Insurance Co.*, —— F Supp 3d ——, No. 8:20-CV-701, 2021 WL 1419782 (NDNY April 15, 2021); *6593 Weighlock Drive, LLC v Springhill SMC Corporation*, —— NYS3d ——, 71 Misc 3d 1086 (Sup Ct, Onandaga County, April 13, 2021); *Mangia Restaurant Corp. v Utica First Insurance Company*, —— NYS3d ——, 2021 NY

Slip Op 21121 (Sup Ct, Queens County, March 30, 2021); *Sharde Harvey, DDS, PLLC v Sentinel Insurance Company, Ltd.,* No. 20-CV-3350 (PGG) (RWL), 2021 WL 1034259 (SDNY March 18, 2021)*; DeMoura v Continental Casualty Company,* —— F Supp 3d ——, No. 20-CV-2912 (NGG) (SIL), 2021 WL 848840 (EDNY March 5, 2021)*; Food for Thought Caterers Corp. v Sentinel Insurance Company, Ltd.,* —— F Supp 3d ——, No. 20-cv-3418 (JGK), 2021 WL 860345 (SDNY March 6, 2021)*; Visconti Bus Serv., LLC v Utica Natl. Ins. Group*, 71 Misc 3d 516 (Sup Ct, Orange County, February 12, 2021); *Soundview Cinemas Inc. v Great Am. Ins. Group*, 71 Misc 3d 493 (Sup Ct, Nassau County, February 8, 2021); *Michael J. Redenburg, Esq., PC v Midvale Indemnity Company*, —— F Supp 3d ——, No. 20 Civ. 5818 (PAE), 2021 WL 276655 (SDNY January 27, 2021).

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. *See Kim-Chee*, 2021 WL 1600831, at *4. Commonly, proof of a change or alteration of the insured premises is necessary to establish that it suffered damage or loss. *Id.* 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. *See* *Buffalo Xerographix, Inc.*, 2021 WL 2471315, at *4.

Here, the plaintiff has failed to meet its burden of showing that the insurance agreement covers the alleged loss. *See* *Roundabout Theatre Co.*, 302 AD2d at 6. The documentary evidence submitted by the defendant, in the form of the applicable insurance agreement, is of undisputed authenticity, unambiguous and undeniable, and has established defenses to the plaintiff's claims as a matter of law, requiring dismissal of the complaint. *See Mangia Restaurant Corp.,* 2021 WL 1705760.

Further, in considering a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7), a court "must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Lubonty v U.S. Bank N.A.*, 159 AD3d 962, 963 (2d Dept 2018) (internal quotation marks omitted). The essential elements for pleading a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of his or her contractual obligations, and damages resulting from the breach. *See Dee v Rakower*, 112 AD3d 204 (2d Dept 2013). Here, even affording the complaint a liberal construction, the plaintiff has failed to state a valid cause of action for breach of contract. *See Jeffrey M. Dressel, D.D.S., P.C. v Hartford Ins. Co. of the Midwest, Inc.*, No. 20-CV-2777 (KAM)(VMS), 2021 WL 1091711 (EDNY March 22, 2021).

***5** As such, the defendant's motion seeking dismissal under CPLR §§ 3211(a)(1) and (a)(7) is granted.

Accordingly, it is hereby

ORDERED, that defendant's motion seeking dismissal of the complaint is granted.

This constitutes the decision and order of the Court.

All Citations

Slip Copy, 72 Misc.3d 1209(A), 149 N.Y.S.3d 883 (Table), 2021 WL 3121495, 2021 N.Y. Slip Op. 50684(U)