STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

CARROLS RESTAURANT GROUP, INC.,

Plaintiff,

v.

AMERICAN GUARANTEE AND LIABILITY INSURANCE COMPANY,

Defendant.

DECISION

INDEX NO. 815430/2021

HON. HENRY NOWAK, J.S.C.
Justice Presiding

This action was commenced on November 15, 2021. Plaintiff Carrols Restaurant Group, Inc. (Carrols) seeks to have the defendant, American Guarantee and Liability Insurance Company (AGLIC), provide insurance coverage for business losses due to dining room closures stemming from the executive orders addressing the Covid-19 pandemic. In its complaint, Carrols requests a declaration that its claims trigger the gross earnings, civil authority, attraction property, and protection and preservation of property provisions of their policy; and that no policy exclusions apply. Carrols also seeks actual, special, compensatory and consequential damages, in addition to pre and post judgment interest and litigation expenses.

AGLIC moves to dismiss the complaint pursuant to CPLR 3211(a) (1) and (7), which Carrols opposes. The court has considered the papers filed as Document Nos. 1-11, 18-26 and 28 in the New York State Courts Electronic Filing (NYSCEF) system.

Summary of Facts

Carrols is a Delaware corporation with its principal place of business at 968 James Street, Syracuse, New York. Carrols operates 1,009 Burger King and 65 Popeyes restaurants across 23

states. AGLIC is a New York insurance company authorized to write, sell and issue insurance policies regarding property and business income coverage nationwide, which includes Carrols' policy, number ERP0271969-02 (the policy).

The policy covers "direct physical loss of or damage caused by a Covered Cause of Loss to Covered Property" (NYSCEF Doc. No. 7, Ex. A to Complaint, § 1.01). It defines a "Covered Cause of Loss" as "[a]ll risks of direct physical loss of or damage from any cause unless excluded" (*id.* at § 7.11). The policy specifically excludes:

- "Contamination, and any cost due to Contamination including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy, except as provided by the Radioactive Contamination Coverage of this Policy (*id.* at § 3.03.01.01);

- Loss or damage arising from the enforcement of any law, ordinance, regulation or rule regulating or restricting the . . . installation . . . improvement, modification . . . occupancy, operation or other use (*id.* at § 3.03.01.03);

- Loss or damage arising from delay, loss of market, or loss of use (*id.* at § 3.03.02.01);

- Indirect or remote loss or damage (*id.* at § 3.03.02.02); [and]

- Loss or damage resulting from the Insured's suspension of business activities, except to the extent provided by this Policy" (*id.* at § 3.03.02.05).

While the policy covers the actual time element loss that Carrols sustains, the "Time Element Loss must result from the necessary Suspension of the Insured's business activities at an Insured Location . . . *due to direct physical loss of or damage to Property*. . . caused by a Covered Cause of Loss" (*id.* at § 4.01.01 [emphasis added]). "[D]irect physical loss of or damage" is also required for coverage in the event that Carrols' business activities are suspended due to an "order of civil or military authority that prohibits access to the Location," because the civil or military

order "must result from a civil authority's response to direct physical loss of or damage caused by a Covered Cause of Loss to property not owned, occupied, leased or rented by the Insured" (*id.* at § 5.02.03).[1]

Carrols' insurance claims stem from closure orders during the Covid-19 pandemic. Due to these orders, Carrols closed their in-restaurant dining rooms, reduced seating capacity, reduced operating hours, and closed playgrounds. In addition, Carrols installed plexiglass barriers, sneeze guards, hand sanitizer stations, and social distancing signage at their insured properties. As part of a resulting employee policy shift, Carrols began requiring health screenings, temperature checks, and mask protocols. All of these changes were the sole result of the circumstances imposed by the pandemic response.

Due to these changes, resulting costs and lost revenue, Carrols seeks to invoke coverage under their insurance policy. AGLIC has thus far denied coverage under the theory that the policy does not cover the types of loss exhibited in Carrols' restaurants.

Legal Analysis

"An insured seeking to recover for a loss under an insurance policy has the burden of proving that a loss occurred and also that the loss was a covered event within the terms of the policy" (*Vasile v Hartford Acc. & Indem. Co.*, 213 AD2d 541, 541 [2d Dept 1995]; *see also Consolidated Rest. Operations, Inc. v. Westport Ins. Corp.*, 205 AD3d 76, 80 [1st Dept 2022]; *United States Dredging Corp. v. Lexington Ins. Co.*, 99 AD3d 695, 696 [2d Dept 2012]). "[I]n

[1] Similarly, "direct physical loss of or damage to property" must be present at an "Attraction Property" for that coverage to apply, and "actual or imminent physical loss or damage" to Carrols' properties is necessary for "protection and preservation of property" coverage.

determining a dispute over insurance coverage, we first look to the language of the policy" (*Keyspan Gas E. Corp. v Munich Reins. Am., Inc.*, 31 NY3d 51, 60 [2018] [internal quotation marks and citations omitted]). The "provisions of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court" (*Universal Am. Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 25 NY3d 675, 680 [2015] [internal quotation marks and citations omitted]). An "ambiguity does not arise from an undefined term in a policy merely because the parties dispute the meaning of that term" (*Hansard v Federal Ins. Co.*, 147 AD3d 734, 737 [2d Dept 2017], *lv denied* 29 NY3d 906 [2017]).

When addressing a defendant's motion to dismiss based on documentary evidence per CPLR 3211 (a) (1), "such motion may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). Insurance policies qualify as documentary evidence under CPLR 3211 (a) (1), thus the court must examine what losses are covered under the policy at issue (*see, e.g. Ralex Servs., Inc. v Southwest Mar. & Gen. Ins. Co.*, 155 AD3d 800, 802 [2d Dept 2017]).

In *Consolidated Rest. Operations, Inc. v. Westport Ins. Corp.* (205 AD3d at 78), the Appellate Division, First Department held that insurance coverage for "direct physical loss or damage" to the insured is not triggered where the policyholder's claim is based on their "inability to fully use its premises as intended because of COVID-19, without any actual, discernable, quantifiable change constituting 'physical' difference to the property from what it was before exposure to the virus." New York courts interpret "direct physical damage or loss to property" to

mean "something that directly happens to the property resulting in physical damage to it," not just mere "loss of use" (*id.* at 82).

The plaintiff in *Consolidated Rest. Operations* (205 AD3d at 78) claimed consequences from the pandemic similar to those claimed by Carrols here – it was forced to suspend indoor dining services, implemented enhanced cleaning procedures in its restaurants, and installed hand sanitizer stations and physical partitions (*id.* at 78). In some restaurants the "plaintiff was allowed to continue providing its customers with takeout, drive-through and/or delivery services" (*id.*). The plaintiff claimed that it suffered direct physical loss or damage "because the actual or threatened presence of the virus in and on its property eliminated the functionality of the restaurants" (*id.* at 79).

In its complaint in this case, Carrols alleges that

> "the SARSCoV-2 virus that causes COVID-19 is physical—it can be seen, counted, measured, and destroyed; it replicates itself and destroys other cells and organisms. Importantly, it can exist in the air and on surfaces for indeterminate but dangerously long periods of time, and can be transferred from the air and surfaces into human bodies, and from one person to another" (NYSCEF Doc. No. 7, ¶ 12).

Nonetheless, COVID-19's presence in the air and on surfaces does not constitute a direct physical loss or damage where the plaintiff "fails to identify in either its pleading or the proposed amended complaint a single item that it had to replace, anything that changed, or that was actually damaged at any of its properties" (*Consolidated Rest. Operations*, 205 AD3d at 86). Carrols does not claim that they were physically stopped from performing business operations at any of its locations, for it was still able to serve food out of its affected restaurants through takeout, drive-throughs, and delivery services. The closing of dining room space and the

addition of physical barriers and other health related items does not qualify as the type of loss or change covered (*id.* at 78).

Carrols compares its claim here to successful claims resulting from chemical contaminants such as E. coli, asbestos, ammonia, and salmonella. The First Department in *Consolidated Rest. Operations* (205 AD3d at 85-86) rejected those same arguments:

> "Although the words 'direct' and 'physical' modify or qualify the phrase 'loss or damage' to require a showing of actual, demonstrable physical harm of some form to the insured premises, plaintiff nonetheless urges us to embrace a more expansive definition of 'physical' because some courts have held that conditions rendering property 'unusable' afford coverage for business interruption losses (*Port Auth. of N.Y. & N.J. v Affiliated FM Ins. Co.*, 311 F3d 226, 230 [3d Cir 2002] [presence of asbestos in several buildings constituted a "physical loss or damage"]; *Gregory Packaging, Inc. v Travelers Prop. Cas. Co. of Am.*, 2014 WL 6675934, 2014 US Dist LEXIS 165232 [D NJ, Nov. 25, 2014, Civ No. 2:12-cv-04418 (WHW) (CLW)] [ammonia infiltration requiring extensive remediation measures]; *TRAVCO Ins. Co. v Ward*, 715 F Supp 2d 699 [ED Va 2010] [toxic gas from dry walls]). None of these cases involve COVID-19, the courts did not apply New York law and these cases are not binding on this Court. These cases and others like them are distinguishable because under New York law 'a negative alteration in the tangible condition of [the] property [insured]' is necessary in order for there to be 'physical' damage to the property (*Michael Cetta, Inc. v Admiral Indem. Co.*, 506 F Supp 3d 168, 176, 178-179 [SD NY 2020], appeal withdrawn 2021 WL 1408305, 2021 US App LEXIS 11086 [2d Cir, Mar. 23, 2021, Docket No. 21-57]). *Pepsico, Inc. v Winterthur Intl. Am. Ins. Co.* (24 AD3d 743 [2d Dept 2005]), also relied on by plaintiff, is unhelpful because the product (soda) was, in fact, physically altered so as to render it unsellable to consumers."

The court does not find that Carrols alleges a negative alteration in the tangible condition of its properties as a result of the Covid-19 pandemic and the consequential closure orders, other than in a conclusory manner. Carrols also does not sufficiently allege "imminent physical loss or damage" to its properties to trigger protection and preservation of property coverage.

With respect to the civil authority coverage, Carrols alleges that "[t]he actual presence of COVID-19 caused direct physical loss of or damage to properties near [its] headquarters and restaurants in the State of New York" and other states (NYSCEF Doc. No. 7, ¶¶ 103-104). The complaint specifically references nearby hospitals, giving examples "upon information and belief" that they needed to create "isolated COVID-19 wards," install "negative pressure COVID-19 treatment rooms," and close various areas, including "operating theaters and other areas for use in elective procedures, . . . visiting rooms, . . . [and] gift and flower shops" (*id.* at ¶ 107). Carrols further alleges that hospitals needed to set capacity limits in common areas, install hand sanitation stations, and restrict points of entry, and "[m]any hospitals experienced overcrowding in the emergency departments and other treatment areas, which limited their ability to provide emergency medical assistance and other medical care to the community" (*id.*).

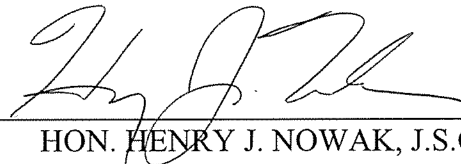
Carrols' claims under the attraction property clauses of the AGLIC policy are based upon claims of direct physical loss or damage to "[b]usiness, education, government, non-profit, cultural, retail, sports, religious, and other properties nearby [Carrols'] restaurants that attract guests to [such] restaurants," including movie theaters, colleges and universities (*id.* at ¶¶ 110-117). Carrols alleges that such nearby properties were closed either partially or completely due to the pandemic (*id.*).

While civil authority and attraction property clauses were not addressed in *Consolidated Rest. Operations* (205 AD3d at 84-85), the court finds that the essential holding of that case – that no coverage exists without direct physical loss or damage – still applies to those clauses. Similar to its own properties, Carrols has not sufficiently alleged an alteration in the tangible condition of properties close to its restaurants. While nearby hospitals may have been required to

modify treatment rooms to address the pandemic, Carrols has failed to show how such modifications affected its restaurants. The only conclusion that could be drawn from Carrols' allegations is that modification of nearby hospitals may have contributed to temporary closures and reduced capacity in those facilities, and "the forced closure of the premises for reasons exogenous to the premises themselves is insufficient to trigger coverage" (*Visconti Bus Serv., LLC v Utica Natl. Ins. Group*, 71 Misc 3d 516, 532 [Sup Ct, Orange County 2021]; *see also 10012 Holdings, Inc. v Sentinel Ins. Co., Ltd.*, 21 F4th 216, 222 [2d Cir 2021]).

Consequently, the court finds that the AGLIC policy does not cover Carrols' claims. As in *Consolidated Rest. Operations* (205 AD3d at 87), "having determined there is no coverage, we need not address whether any of the exclusions to coverage apply to bar coverage for plaintiff's claims." AGLIC's motion to dismiss the complaint is granted. Submit order.

DATED: November 4, 2022



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