

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. BARRY R. OSTRAGER PART IAS MOTION 61EFM

Justice

VMSB, LLC and VM SOUTH BEACH, LLC,

Plaintiffs,

- v -

ZURICH AMERICAN INSURANCE CO.,

Defendants.

| | |
|-----------------|-------------|
| INDEX NO. | 650590/2021 |
| MOTION DATE | |
| MOTION SEQ. NO. | 001 |

DECISION & ORDER ON MOTION

HON. BARRY R. OSTRAGER

The motion by defendant Zurich American Insurance Co. (“Zurich”) to dismiss this action in its entirety, pursuant to CPLR 3211(a)(1), (7) and (2) based on documentary evidence, failure to state a cause of action, and lack of subject matter jurisdiction, is granted in part and denied in part for the reasons that follow.

This breach of contract action involves an insurance claim for alleged business income losses arising from the COVID-19 pandemic. According to the Complaint (NYSCEF Doc. No. 1), plaintiffs VMSB, LLC and VM South Beach, LLC (“Plaintiffs”) own and operate the Villa Casa Casuarina hotel and Gianni’s restaurant, located in Miami Beach, Florida. Plaintiffs’ alleged losses purportedly stem from compliance with certain Miami-Dade County Emergency Orders that temporarily limited the operations of local businesses in order to slow the spread of the virus that causes COVID-19. As a result of these restrictions, Plaintiffs claim \$3,000,000.00 in business income damages under a property policy that Zurich issued to Plaintiffs (the “Policy”, NYSCEF Doc. No. 14).

It is now well settled that COVID-related business interruption claims do not trigger coverage under policies like the Zurich Policy at issue in this case unless the loss was caused by

“direct physical loss of or damage to property.” The cases so holding are so numerous it is unnecessary to cite them. The imposition of COVID-19 restrictions on a business simply does not constitute direct physical loss or damage to the property covered under the terms of the Business Income Coverage Form of the Policy, particularly where, as here, the Policy contains an express exclusion in Section B(12) of the Real and Personal Property Coverage Form relating to “Microorganisms”.

Therefore, the single cause of action in the Complaint for breach of contract is dismissed with respect to all claims except the claim arising out of the addendum to the policy that provides limited coverage for “Communicable Disease Suspension of Operations-Business Income” (“CD coverage”). The Court rejects Zurich’s efforts to dismiss that claim pursuant to CPLR 3211(a)(2) for lack of subject matter jurisdiction on the ground that the claim is premature. While Zurich contends it is “adjusting” that claim and that Zurich has not denied coverage for that claim, this claim has been unresolved for more than a year. Accordingly, Zurich is directed to efile an Answer to that portion of the Complaint related to CD coverage within 20 days of the date of this Decision and Order. In all other respects, the motion to dismiss is granted.

If the parties are unable to consensually resolve the issues raised by the portion of the Complaint that survives dismissal, a Preliminary Conference will be held on January 5, 2022 at 10:00 a.m. To that end, counsel are directed to meet and confer and complete the Preliminary Conference Order form available on Justice Ostrager’s web page with a Note of Issue deadline no later than 22 months after the date of the Order and interim deadlines agreed to by the parties (see <http://ww2.nycourts.gov/courts/comdiv/ny/newyork.shtml>). A compliance conference date should be included for April 5, 2022 at 10:00 a.m.. If the proposed Preliminary Conference Order is acceptable to the Court, no appearance will be necessary on January 5. If the parties are

unable to agree to a Preliminary Conference Order, counsel will provide a dial-in number for the Preliminary Conference by efiled letter no later than December 20, 2021. The December 2, 2021 oral argument date for this motion is cancelled, as the Court does not find argument necessary.

Dated: November 10, 2021


BARRY R. OSTRAGER, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: