

SUPREME COURT
STATE OF NEW YORK COUNTY OF ONONDAGA

6593 WEIGHLOCK DRIVE, LLC and 6580 WEIGHLOCK
DRIVE COMPANY, LLC,

Plaintiffs,

DECISION

v.

Index No.: 4799/2020

SPRINGHILL SMC CORPORATION, FAIRFIELD FMC, LLC
MARRIOTT INTERNATIONAL, INC. and ZURICH
AMERICAN INSURANCE COMPANY,

Defendants.

APPEARANCES:

Kelsey W. Shannon, Esq.
LYNN LAW FIRM
750 M&T Bank Building
101 South Salina Street
Syracuse, New York 13202

Philip C. Silverberg, Esq.
MOUND COTTON WOLLAN & GREENGRASS, LLP
One New York Plaza, 44th Floor
New York, New York 10004

Karen G. Felter, Esq.
SMITH SOVIK KENDRICK & SUGNET, P.C.
250 South Clinton Street, Suite 600
Syracuse, New York 13202

Jonathan Jacobs, Esq.
ZOBRIST LAW GROUP, PLLC
The Willard Office Building
1455 Pennsylvania Avenue, N.W., Suite 400
Washington, DC 20004

D

H

K

KARALUNAS, D.:

This constitutes the Court's decision regarding the CPLR § 3211(a)(1) and (7) pre-answer motion of defendant Zurich American Insurance Company ("Zurich") seeking dismissal of plaintiffs' amended complaint. Plaintiffs oppose the motion. In the alternative, plaintiffs request that any dismissal be without prejudice.

Plaintiff 6593 Weighlock Drive, LLC is the owner of the Fairfield Inn and Suites Carrier Circle ("Weighlock-FF") which is operated by defendant Fairfield FMC, LLC ("Fairfield"). Plaintiff 6580 Weighlock Drive Company, LLC is the owner of SpringHill Suites Carrier Circle ("Weighlock-SHS") which is operated by defendant SpringHill SMC Corporation ("SpringHill"). Defendants Fairfield and SpringHill (collectively "the Marriott defendants") are affiliated with defendant Marriott International, Inc. ("International"). Defendant Zurich issued insurance to International covering plaintiffs' hotels.

By amended verified complaint filed January 5, 2021, plaintiffs assert causes of action against the Marriott defendants for breach of contract, against International for negligence, and against Zurich for breach of contract and declaratory judgment.¹ Plaintiffs claim that as additional insureds under two "all risk" insurance policies issued by Zurich to International they are entitled to monetary damages for losses caused by the novel coronavirus ("coronavirus," "virus" or "COVID-19") and governmental orders issued to reduce the virus's spread in the community.

Plaintiffs submitted claims to Zurich for "losses as covered under their policy." Amd. Compl. ¶ 7. In support of their claims, plaintiffs allege that COVID-19 began spreading in New

¹ By Decision and Order dated December 18, 2020, this Court denied the Marriott defendants' motion to dismiss plaintiffs' breach of contract cause of action, granted the Marriott defendants' motion to dismiss plaintiffs' negligent procurement and negligence causes of action, and granted plaintiffs' cross-motion for leave to file an amended complaint.

York State in January 2020, and the “virus spreads through droplets and aerosols and can, according to scientists, live on surfaces for up to several days,” Amd. Compl. ¶¶ 2 and 3. Plaintiffs’ further allege this “foreign substance caused damage that threatened the entire economic foundation of their businesses.” Id. ¶ 6.

By letter dated July 13, 2020, Zurich denied plaintiffs’ claims “in their entirety.” Id. ¶ 99. Zurich denied coverage on grounds that plaintiffs did not “demonstrate the prerequisite to coverage” in that the presence of COVID-19 did not constitute “direct physical loss or damage.” Id. ¶¶ 101, 104. Zurich further maintained that even if the presence of coronavirus constituted direct physical loss, plaintiffs were not entitled to coverage based on various policy exclusions including a contamination exclusion, a mold, mildew, fungus or microorganism exclusion, and a communicable disease exclusion. Id. ¶¶ 102-103. Zurich denied plaintiffs’ claim under the “Cancellation of Bookings” coverage on grounds that “the \$2.5 million sublimit [for that coverage] had been eroded by claims by other Marriott hotels in Chile in late 2019.” Id. ¶ 100.

BACKGROUND

On March 7, 2020, New York Governor Andrew Cuomo issued Executive Order 202 declaring a public emergency in New York State due to public health concerns associated with the COVID-19 pandemic. Amd. Compl. ¶ 22. On March 20, 2020, Cuomo issued Executive Order 202.8 ordering all non-essential businesses to reduce their in-person workforces by 100 percent no later than March 22, 2020. Id. ¶ 23. These closures were extended by subsequent Executive Orders through at least May 15, 2020. Id. ¶ 24.

On March 14, 2020, Onondaga County Executive J. Ryan McMahon declared a state of emergency due to COVID-19 and ordered all schools closed as of March 20, 2020, and all extracurricular activities canceled. Id. ¶ 29. On March 27, 2020, McMahon ordered that all non-

essential gatherings of any size for any reason be cancelled or postponed. Id. ¶ 31. Onondaga County's state of emergency was extended through at least August 11, 2020. Id. ¶ 30.

The State and County Executive Orders were intended to mitigate and slow the spread and impact of the coronavirus. Id. ¶ 32.

While hotels were declared essential and permitted to remain open, they were required to alter their business by, for example, closing various customer amenities such as pools and fitness centers. Amd. Comp. ¶ 33. Although authorized to operate, plaintiffs argue "the travel that sustains the hotels was effectively barred: business travel became for most illegal and the events that brought many visitors to the hotels were cancelled because of the virus and government edict." Id. ¶ 34.

It was not until May 15, 2020, pursuant to Executive Order 202.31, that the State authorized certain industries to open on a region-by-region and industry-by-industry basis. Id. ¶ 25.

DISCUSSION

When a court rules on a CPLR § 3211 motion to dismiss, "it must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord the plaintiff the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory." Lots 4 Less Stores, Inc. v. Integrated Props., Inc., 152 A.D.3d 1181, 1182 (4th Dep't 2017).

The grounds for dismissal under CPLR § 3211(a)(7) are strictly limited; the court is constrained in its review to examine the plaintiff's pleading and affidavits only to determine whether the pleader has a cause of action. See Rovello v. Orofino Realty, Co., 40 N.Y.2d 633, 636 (1976). An affidavit submitted by a plaintiff may be considered to remedy any defects in the

complaint, but affidavits submitted by a defendant “rarely warrant dismissal of the complaint unless they conclusively establish that plaintiff has no cause of action.” Divito v. Fiandach, 160 A.D.3d 1356, 1357 (4th Dep’t 2018); see Rovello, 40 N.Y.2d at 636.

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.” Scheer v. Elam Sand & Gravel Corp., 177 A.D.3d 1290, 1291 (4th Dep’t 2019); see, Lots 4 Less Stores, Inc., 152 A.D.3d at 1182; Carbone v. Brenizer, 148 A.D.3d 1806 (4th Dep’t 2017). “[T]o be considered documentary, evidence must be unambiguous and of undisputed authenticity.” Fontanetta v. Doe, 73 A.D.3d 78, 86 (2d Dep’t 2010). “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, deed[s], contracts, and any other papers, the contents of which are essentially undeniable.” Carr v. Wegmans Food Mkts., Inc., 182 A.D.3d 667, 668 (3d Dep’t 2020). An insurance policy may be documentary evidence to support a CPLR § 3211(a)(1) motion to dismiss. See, J.P. Morgan Securities, Inc. v. Vigilant Ins. Co., 21 N.Y.3d 324, 334 (2013).

Plaintiffs assert claims against Zurich for breach of contract and declaratory judgment under five separate coverage provisions seeking payment for losses allegedly caused by the limitations on their operations due to COVID-19 and governmental orders issued to restrict the spread and impact of coronavirus.

The Policies

Zurich issued to International two “all-risk” policies, specifically:

- (1) property insurance policy No. PPR 3700638-17, for the period April 1, 2019 through April 1, 2020 (“First Policy”) and

- (2) property insurance policy No. PPR 3700638-18 for the period April 1, 2020 through April 1, 2021 (“Second Policy”).

Amd. Compl. ¶¶ 57-64, Forster Aff. ¶¶ 1-2 and Exhs. 1 and 2.

According to plaintiff, the “First Policy is an all risk policy that covers property, as described in this Policy, against all risks of direct physical loss or damage, except as hereafter excluded, while located as described in this Policy occurring during the policy period.” Amd.

Compl. ¶ 69. More specifically, plaintiffs assert the First Policy affords coverage for: (1) business interruption; (2) rental insurance for loss of rents; (3) impairment of ingress/egress; (4) cancellations of bookings; and (5) interruption by civil and military authority. Id. ¶¶ 71-76.

The First Policy includes Endorsement No. 4, a Mold, Mildew and Fungus Clause and Microorganism Exclusion. Id. ¶ 78.

The Second Policy is substantially identical to the First Policy except it does not contain coverage for cancellation of bookings and it includes Endorsement No. 11 which excludes coverage for communicable diseases. Id. ¶¶ 80-83.

Relevant provisions of the policies, with the exception of cancellation of bookings coverage (only in the First Policy), all require “*direct physical loss or damage*” to trigger coverage.

More particularly, for “Business Interruption” the “Policy insures TIME ELEMENT loss, as provided in the TIME ELEMENT COVERAGES, directly resulting from *direct physical loss or damage* of the type insured by this Policy.” “Business Interruption” is an enumerated TIME ELEMENT COVERAGE, that provides coverage for the “Actual Loss Sustained by the Insured . . . during the PERIOD OF LIABILITY.” The PERIOD OF LIABILITY for building and equipment, is defined as “the period: a) starting from the time of *direct physical loss or*

damage of the type insured against; and b) ending when with due diligence and dispatch the building and equipment could be: (1) repaired or replaced; and (ii) made ready for operations, under the same or equivalent physical and operating conditions that existed prior to the damage [; and] c) not to be limited by the expiration of this Policy. First Policy pp. ZAIC_WL_000000051-52 and 65-66, Second Policy pp. ZAIC_WL_000000186-187 (emphasis added).

D
H
“Ingress/Egress” provides coverage for losses “incurred by the Insured due to the necessary interruption of the Insured’s business due to impairment of ingress to or egress from an Insured Location, whether or not the premises or property of the Insured is damaged, provided that such impairment is a *direct result of direct physical damage* of the type insured by this Policy, to the kind of property not excluded by this Policy. First Policy p. ZAIC_WL_000000060, Second Policy p. ZAIC_WL_000000195 (emphasis added).

H
K
Under the “Interruption by Civil and Military Authority” portion of the policy, losses are covered “when, as a result of *physical loss or damage* not otherwise excluded herein[,] . . . access to the property of the insured is impaired by order or action of civil or military authority.” First Policy p. ZAIC_WL_000000064, Second Policy p. ZAIC_WL_000000197 (emphasis added).

“Rental Insurance” insures “TIME ELEMENT loss, as provided in the TIME ELEMENT COVERAGES, directly resulting from *direct physical loss or damage* of the type insured by this Policy.” Rental Insurance is an enumerated TIME ELEMENT COVERAGE, that provides coverage for the “Actual Loss Sustained by the Insured of the following during the PERIOD OF LIABILITY.” The PERIOD OF LIABILITY for building and equipment, is defined as “the period: a) starting from the time of *direct physical loss or damage* of the type insured against; and b) ending when with due diligence and dispatch the building and equipment could be: (1)

repaired or replaced; and (ii) made ready for operations, under the same or equivalent physical and operating conditions that existed prior to the damage[; and] c) not to be limited by the expiration of this Policy. First Policy pp. ZAIC_WL_000000051, 55, 65-66, Second Policy pp. ZAIC_WL_0000000186 and 190 (emphasis added).

The Exclusions

The First Policy and Second Policy contain Endorsement No. 4, a “Mold, Mildew and Fungus Clause and Microorganism Exclusion” which provides in pertinent part:

A. This policy only insures *physical loss or damage* to insured property by mold, mildew or fungus when directly caused by a peril insured by this policy occurring during the policy period.

B. Except as set forth in the foregoing Section A, this policy does not insure any loss, damage, claim, cost, expense or other sum directly or indirectly arising out of or relating to:

Mold, mildew, fungus, spores or other microorganism of any type, nature, or description, including but not limited to any substance whose presence poses an actual or potential threat to human health.

This exclusion applies regardless whether there is (i) any physical loss or damage to insured property; (ii) any insured peril or cause, whether or not contributing concurrently or in any sequence; (iii) any loss of use, occupancy, or functionality; or (iv) any action required, including but not limited to repair, replacement, removal cleanup, abatement, disposal, relocation or steps taken to address medical or legal concerns.

First Policy p. ZAIC_WL_000000099, Second Policy p. ZAIC_WL_000000232 (emphasis added).

In addition to Endorsement No. 4, the Second Policy contains Endorsement No. 11 regarding “Communicable Disease” which:

1. . . . covers losses attributable to *direct physical loss or physical damage* occurring during the period of insurance. . . . *[T]his policy does not insure any loss, damage, claim, cost, expense or other sum, directly or indirectly arising out of, attributable to, or occurring concurrently or in any sequence with a*

Communicable Disease or the fear or threat (whether actual or perceived) of a Communicable Disease.

3. . . . a Communicable Disease means any disease which can be transmitted by means of any substance or agent from any organism to another organism where:

1) the substance or agent includes, but is not limited to, a virus, bacterium, parasite or other organism or any variation thereof, whether deemed living or not,

2) the method or transmission, whether direct or indirect, includes but is not limited to, airborne transmission, bodily fluid transmission, transmission from or to any surface or object, solid, liquid or gas or between organisms, and

3) the disease, substance or agent can cause or threaten damage to human health or human welfare or can cause or threaten damage to, deterioration of, loss of value of, marketability of or loss of use of property insured hereunder.

Second Policy p. ZAIC_WL_0000000232 (emphasis added).

ANALYSIS

As an initial matter, plaintiffs concede their losses commenced in March 2020 and therefore, “the applicable policy is the First Policy, which was effective until April 1, 2020, not the Second Policy.” Amd. Compl. ¶ 106.

A policyholder bears the initial burden of showing that an insurance contract covers the loss. Roundabout Theatre Co., Inc. v. Continental Cas. Co., 302 A.D.2d 1, 6 (1st Dep’t 2002); Borg-Warner Corp. v. Ins. Co. of N.A., 174 A.D.2d 24, 31 (3d Dep’t 1992), *lv denied* 80 N.Y.2d 753 (1992). “Labeling the policy as ‘all-risk’ does not relieve the insured of its initial burden of demonstrating a covered loss under the terms of the policy.” Roundabout Theatre Co., Inc., 302 A.D.2d at 6; Visconti Bus Serv., LLC v. Utica Nat’l. Ins. Grp., 2021 NY Slip Op 21027, **2 (Sup. Ct., Orange Co. 2020).

Zurich argues it is entitled to dismissal of plaintiffs’ breach of contract and declaratory judgment causes of action because plaintiffs’ claims for business interruption, ingress/egress,

civil and military authority and rental insurance coverage all require “direct physical loss or damage” and plaintiffs have failed to allege any direct physical loss or damage to hotel property. Zurich further argues that even if direct physical loss or damage was alleged by plaintiffs, New York courts have held the presence of coronavirus does not constitute direct physical loss or damage. The Court agrees.

Prior to COVID-19, New York courts interpreting the policy language of “direct physical loss or damage” have held that actual physical damage to the insured’s property is necessary to trigger coverage and that a mere loss of use of the property is insufficient. See, e.g., Roundabout Theatre Co., Inc., 302 A.D.2d at 7 (business interruption coverage denied to theater forced to cancel shows when municipal order closed street for safety reasons unrelated to theater property; no direct physical damage to insured’s property); Newman Myers Kreines Gross Harris, P.C. v. Great Northern Ins. Co., 17 F. Supp.3d 323, 331 (S.D.N.Y. 2014) (no coverage for loss of business income and extra expenses where access to insured law office was restricted due to preventative power shut-off during Hurricane Sandy; no physical damage).

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. See Michael Cetta, Inc. v. Admiral Indem. Co., 2020 U.S. Dist. LEXIS 233419 at *22 (S.D.N.Y. Dec. 11, 2020)(rejecting argument of insured catering business that inability to fully use insured property due to COVID-19 and related government orders satisfied prerequisite for loss or damage to property); 10012 Holdings, Inc. v. Sentinel Ins. Co., 2020 U.S. Dist. LEXIS 235565 at *7 (S.D.N.Y. Dec. 15, 2020)(finding no coverage where complaint did not plausibly support inference that COVID-19 and the resulting civil orders physically damaged plaintiff’s property); Tappo of Buffalo, LLC v. Erie Ins. Co.,

2020 U.S. Dist. LEXIS 245436 at *12 (W.D.N.Y. Dec. 29, 2020)(devastating impact COVID-19 and related governmental edicts had on restaurant industry was not direct physical loss or damage sufficient to establish coverage); Soundview Cinemas Inc. v. Great American Insurance Group, et al., 2021 N.Y. Misc. LEXIS 527 * 26 (Sup. Ct. Nassau Co., Feb. 8, 2021)(loss of use of movie theatre due to COVID-19 related governmental orders not direct physical loss or damage to property triggering coverage); Visconti Bus. Serv., LLC, 2021 N.Y. Misc. LEXIS 546 * 25 (complaint dismissed where suspension of business operations at covered premises was due to COVID-19 and government shut-down orders, not direct physical loss or damage to property); Food for Thought Caterers Corp. v. Sentinel Ins. Co., 2021 U.S. Dist. LEXIS 42828 * (S.D.N.Y. March 6, 2021)(loss of use of premises by catering business due to government-mandated closure orders not direct physical loss or damage to property sufficient to trigger coverage).

Contrary to plaintiffs' argument, this Court need not look outside New York for guidance on interpretation of an insurance clause requiring "direct physical loss or damage." "This Court is bound to apply New York law as interpreted by New York's intermediate appellate courts unless there is persuasive evidence that the New York Court of Appeals, which has not ruled on this issue, would reach a different conclusion." Michael Cetta, Inc., 2020 U.S. Dist. LEXIS 233419 at *22.

In any event, while not binding on this Court, a federal court sitting in the Northern District of Illinois examined Zurich property insurance policies with language virtually identical to that contained in the policies issued to International and found no coverage for COVID-19 related losses. Crescent Plaza Hotel Owners L.P. v. Zurich American Ins. Co., 2021 WL 633356 *2 (N.D. Ill., Feb 18, 2021). Dismissing plaintiff's breach of contract and declaratory judgment causes of action, the Northern District of Illinois court concluded that coverage was not triggered because plaintiff lacked some form of actual, physical damage to the insured property. Id.

Here, plaintiffs do not allege any direct physical loss or damage to their premises.

Rather, plaintiffs allege that as “the virus reached Onondaga County, the State and County implemented dramatic and unprecedented closure orders, bringing economic activity to nearly a complete halt . . . [causing] plaintiffs [to lose] millions of dollars.” Amd. Compl. ¶¶ 5-6. While plaintiffs argue the “virus spreads through droplets and aerosols and can, according to scientists, live on surfaces for up to several days,” there is no physical loss of or damage to property when “an item or structure . . . merely needs to be cleaned.” Tappo of Buffalo, LLC, 2020 U.S. Dist. LEXIS 245436 at *11.

For the same reasons, plaintiffs’ amended complaint fails to state a cause of action under the civil and military authority and ingress/egress policy provisions. The various government orders were not issued as a result of any physical loss or damage to the property; the directives were merely intended “to mitigate and slow the spread and impact of coronavirus.” Amd. Compl. ¶ 32. Moreover, coverage under these provisions fails because plaintiffs have not alleged access to their property was impaired. Id. ¶ 33.

In short, because plaintiffs failed to plead COVID-19 or the various governmental closure orders caused tangible physical loss or damage to their hotels, Zurich’s motion to dismiss plaintiffs’ amended complaint is GRANTED to the extent plaintiffs assert coverage under the business interruption, ingress/egress, civil and military authority and rental insurance portions of the policies.

Because the absence of any allegation of “physical loss or damage” to the insureds’ properties thwarts coverage, this Court need not reach the issue of whether coverage is vitiated by Endorsement No. 4, the “Mold, Mildew and Fungus Clause and Microorganism Exclusion” contained in the First Policy. Whether a virus is a microorganism and therefore covered by this exclusion is an interpretation that must await another day.

Likewise, because plaintiffs concede the Second Policy is not applicable, the Court declines to analyze the communicable disease exclusion except to state that its inclusion in the Second Policy is not determinative of whether the First Policy covered claims arising from COVID-19. Insurance companies may fine tune exclusions in light of current events without inferring prior policies covered such losses.

D Zurich also seeks dismissal of plaintiffs' cause of action for coverage under the "Cancellation of Bookings" portion of International's First Policy. However, in support of that portion of the motion, Zurich submits the affidavit of J.D. Foraker, Vice President and Executive General Adjuster for Zurich, introducing facts not plead in the complaint.

H The "Cancellation of Bookings" coverage, contained only in the First Policy, covers business losses caused by the "outbreak of contagious and/or infectious disease." It does not require proof of physical loss or damage to property. First Policy pp. ZAIC_WL_000000060-61. Foraker Aff. ¶¶ 3-4. Foraker maintains plaintiffs' Cancellation of Bookings claim should be dismissed because that coverage was exhausted.² Because the issue presented goes beyond the four corners of the complaint, and the Foraker affidavit is inconsistent with Zurich's initial declaration of coverage, this Court declines to convert this portion of Zurich's motion pursuant to CPLR § 3211(c). Zurich's motion to dismiss plaintiffs' amended complaint based on K "Cancellation of Bookings" coverage is DENIED without prejudice.

² It is worthy of note that the letter plaintiffs received from Zurich denying "Cancellation of Bookings" coverage claimed a \$2.5 million limit and Foraker now avers the limit is \$5 million. Compare Amd. Compl. ¶100 with Foraker Aff. ¶ 3

Counsel for Zurich is directed to prepare an order consistent with this decision to be submitted to the Court on notice within 15 days. The order shall attach a copy of this letter decision and incorporate it therein.

Dated: April 9, 2021



DEBORAH H. KARALUNAS, J.S.C.

D

H

K