

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION
GENERAL CHANCERY SECTION

WOLVERINE WORLD WIDE,
Plaintiffs,

v.

ZURICH AMERICAN INSURANCE COMPANY, et
al.,
Defendant.

Case No. 21 CH 4457

Calendar 11

ORDER

This matter came on to be heard on Defendants' 2-615 Motion to Dismiss Plaintiffs' Complaint. Having reviewed the Complaint, Motion, briefs, and authorities, and having considered the parties' oral and written arguments, the Court grants the Motion.

Background

This is a dispute over insurance coverage for losses related to the COVID-19 pandemic. Plaintiff Wolverine World Wide, Inc. ("Wolverine" or Plaintiff) manufactures footwear and operates retail outlets across the United States.¹ Defendants Zurich American Insurance Company, Lexington Insurance Company, Starr Surplus Lines Insurance Company, and Westport Insurance Company (collectively, the "Defendant Insurers") together issued to Wolverine several "Zurich Edge" insurance policies with total coverage of up to \$200 million for the period of June 1, 2019 to June 1, 2020 (collectively, the "Policy," Exhibits A-D to the Complaint). Plaintiff timely paid the premiums due under the Policy.

Plaintiff alleges that, in response to the COVID-19 pandemic, state and local governments issued closure orders requiring "non-essential businesses" to close in many locations. Plaintiff alleges that its mall and retail stores were required to close or curtail their business. From mid-March through the summer of 2020, business was severely restricted. Even after the stores re-opened, they did not operate at full capacity. As a result, Plaintiff alleges, it sustained substantial losses.

On March 13, 2020, Plaintiff filed a property loss notice claim under the Policy (the "Claim"). On July 27, 2020, Defendant Insurers denied the Claim, contending that COVID-19 does not cause "physical loss of or damage" to property and that the Policy's Contamination Exclusion bar coverage.

¹ The facts recited here are based on the allegations of the Complaint, which are taken as true for purposes of this §2-615 motion.

Plaintiff filed its Complaint on September, 2021. Count I, for declaratory judgment, asks the Court to declare that “Defendant Insurers are responsible for fully and timely paying Wolverine’s losses.” Count II, for breach of contract, alleges that Plaintiff performed all of its obligations under the Policy and that Defendant breached the Policy when it denied coverage. Plaintiff alleges it was damaged by Defendant Insurers’ failure to provide coverage as agreed, and seeks a judgment for the amount of the damages plus interest and attorneys’ fees.

Defendants moved to dismiss the Complaint under Section 2-615 of the Illinois Code of Civil Procedure. The parties briefed the Motion. The Court heard oral argument by Zoom on May 24, 2022 and took the Motion under advisement, advising the parties of a target ruling date of July 8. In the interim, Defendant Insurers moved to strike an exhibit Plaintiff had used at oral argument—copies of correspondence outside the four corners of the Complaint. On June 23, the Court granted that motion. On June 28, Plaintiff filed a motion for leave to amend the Complaint. The Court entered and continued that motion, advising the parties it would consider the request to amend only after ruling on the Motion to Dismiss.

Policy provisions

The following provisions of the Policy are relevant:

Property Damage and Business Interruption Coverage

The Policy “[i]nsures against *direct physical loss of or damage* caused by a Covered Cause of Loss to Covered Property, at an Insured Location[.]” Policy § 1.01. A Covered Cause of Loss is defined as “[a]ll risks of direct physical loss of or damage from any cause unless excluded.”

Covered Property includes the Insureds’ “interest in buildings (or structures) including new construction, additions, alterations, and repairs that the Insured owns, occupies, leases, or rents.”

Policy, Sections 7.11 & 3.01.01; Complaint ¶¶ 3, 97-98 (emphasis added).

Time Element and Contingent Time Element Coverages

“The Company will pay for the actual Time Element loss the Insured sustains, as provided in the Time Element Coverages, during the Period of Liability. The Time Element loss must result from the necessary Suspension of the Insured’s business activities at an Insured Location. The Suspension must be due to *direct physical loss of or damage to Property* (of the type insurable under this Policy other than Finished Stock) caused by a Covered Cause of Loss at the Location ...”

Policy, Section 4.02, 5.02.05; Complaint ¶¶ 97-109, 119-125 (emphasis added).

Civil or Military Authority Coverage

Coverage for “the actual Time Element loss sustained by the Insured, as provided by this Policy, resulting from the necessary Suspension of the Insured’s business activities at an Insured Location if the Suspension is caused by order of civil or military authority that prohibits access to the Location. That 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 or insured under this Policy and located within the distance of the Insured's Location as stated in the Declarations [1 mile].”

Policy, Section 5.02.03; Complaint ¶¶ 115-118 (emphasis added).

Ingress/Egress Coverage

Coverage “for the actual Time Element loss sustained by the Insured, as provided by this Policy, resulting from the necessary Suspension of the Insured's business activities at an Insured Location if ingress or egress to that Insured Location by the Insured's suppliers, customers or employees is prevented by physical obstruction due 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 or insured under this Policy and located within the distance of the Insured Location as stated in the Declarations. The Company will pay for the actual Time Element loss sustained, subject to the deductible provisions that would have applied had the physical loss or damage occurred at the Insured Location, during the time ingress or egress remains prevented by physical obstruction but not to exceed the number of consecutive days as stated in the Declarations following such obstruction up to the limit applying to this Coverage.”

Policy, Section 5.02.15; Complaint ¶¶ 126-127 (emphasis added).

Extra Expense Coverage

Coverage “for the reasonable and necessary Extra Expenses incurred by the Insured, during the Period of Liability, to resume and continue as nearly as practicable the Insured’s normal business activities that otherwise would be necessarily suspended, due to *direct physical loss of or damage* caused by a Covered Cause of Loss to Property of the type insurable under this policy at a Location.”

Policy, Section 4.02.03 (emphasis added).

Leasehold Interest Coverage

Coverage “for the actual Leasehold Interest loss incurred by the Insured (as lessee) resulting from *direct physical loss of or damage* caused by a Covered Cause of Loss to a building (or structure) which is leased and not owned by the Insured.”

Policy, Section 4.02.04 (emphasis added).

Miscellaneous Unnamed Locations

Coverage for “Direct physical loss of or damage caused by a Covered Cause of Loss at a Miscellaneous Unnamed Location; and [t]he actual Time Element loss sustained by the Insured, during the Period of Liability, resulting from the Suspension of the Insured's business activities if such Suspension is caused by *direct physical loss or damage* caused by a Covered Cause of Loss.”

The 2019-2020 Policy defines “Miscellaneous Unnamed Location” as “[a] [l]ocation owned, leased or rented by the Insured, but not specified in the Schedule of Locations.”

Policy, Section 5.02.19.01; 7.36; Complaint ¶ 132-134 (emphasis added).

Tenants Prohibited Access Coverage

Coverage “for the actual Gross Earnings or Gross Profit loss sustained, as provided by this Policy, resulting from the necessary Suspension of the Insured's business activities at an Insured Location if *access to that Location* by the Insured's suppliers, customers or employees *is physically obstructed due to the owner, landlord or a legal representative of the building owner or landlord, prohibiting access to the Insured Location*. This Coverage will only apply when the period of time that access is prohibited exceeds the time shown as Qualifying Period in the Qualifying Period clause of the Declarations section. If the Qualifying Period is exceeded, then this Policy will pay for the amount of loss in excess of the Policy Deductible, but not more than the limit applying to this Coverage.”

Policy, Section 5.02.28; Complaint ¶ 130-131.

Contamination Exclusion

3.03.01 This Policy excludes the following unless it results from direct physical loss or damage not excluded by this Policy. . . . 3.03.01.01 **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.

The terms “Contamination (Contaminated)” and “Contaminants” defined:

7.09. Contamination (Contaminated) - Any condition of property due to the actual presence of any foreign substance, impurity, pollutant, hazardous material, poison, toxin, pathogen or pathogenic organism, bacteria, *virus*, disease causing or illness causing agent, Fungus, mold or mildew.

Policy, Sections 3.03.01, 7.09; Complaint ¶ 137-138 (emphasis added).

Amendatory Endorsement—Louisiana

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ CAREFULLY,

The following is deleted from Section VII — DEFINITIONS

Contamination (Contaminated) – Any condition of property due to the actual presence of any foreign substance, impurity, pollutant, hazardous material, poison, toxin, pathogen or pathogenic organism, bacteria, virus, disease causing or illness causing agent, Fungus, mold or mildew.

And replaced by the following:

Contamination (Contaminated) – Any condition of property due to the actual presence of any Contaminant(s).

The following is deleted from Section VII – DEFINITIONS:

Contaminant(s) – Any solid, liquid, gaseous, thermal or other irritant, pollutant or contaminant, including but not limited to smoke, vapor, soot, fumes, acids, alkalis, chemicals, waste (including materials to be recycled, reconditioned or reclaimed), asbestos, ammonia, other hazardous substances, Fungus or Spores.

And replaced with the following:

Contaminant(s) – Any solid, liquid, gaseous, thermal or other irritant, including but not limited to smoke, vapor, soot, fumes, acids, alkalis, chemicals, waste (including materials to be recycled, reconditioned or reclaimed), other hazardous substances, Fungus or Spores.

Policy, Amendatory Endorsement ¶¶ 1, 11-12; Complaint ¶ 139.

ANALYSIS

When Defendants first filed their Motion to Dismiss in November of 2021, caselaw in Illinois was unsettled on the issue of whether insurance policies must cover losses related to the COVID-19 pandemic. Since then, the law has become much more clear. While every insurance coverage action turns on its own facts—the provisions of a specific policy and the allegations of a specific complaint—trial courts now have substantial Illinois appellate caselaw to guide them.

Defendants move to dismiss the Complaint under Section 2-615 of the Illinois Code of Civil Procedure. In a 2-615 motion to dismiss, the question presented is whether the allegations of the complaint, when taken as true and viewed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief may be granted. *Curielli v. Quinn*, 2015 IL App (1st) 143511, ¶ 16. The court must look only within the four corners of the complaint and

will not consider extraneous information. *Krueger v. Lewis*, 342 Ill. App. 3d 471 (1st Dist. 2003). The court will not dismiss a cause of action on the pleadings with prejudice unless it clearly appears that plaintiffs can prove no set of facts which will entitle them to relief. *Curielli*, 2015 IL App (1st) 143511, ¶ 16. Because Illinois is a fact-pleading jurisdiction, plaintiffs must allege facts sufficient to bring their claim within the scope of the cause of action asserted. *Babbitt Municipalities, Inc. v. Health Care Serv. Corp.*, 2016 IL App (1st) 152662, ¶ 29.

In Illinois, the construction of an insurance policy is a question of law. *Country Mutual Insurance Co. v. Livorsi Marine, Inc.*, 222 Ill. 2d 303 (2006). An insurance policy is to be construed as a whole, “giving effect to every provision, if possible.” *Valley Forge Ins. Co. v. Swiderski Elecs., Inc.* 223 Ill. 2d 352 (2006). “If the words used in the policy are clear and unambiguous, they must be given their plain, ordinary, and popular meaning.” *Cent. Ill. Light Co. v. Home Ins. Co.*, 213 Ill. 2d 141 (2004).

In an insurance coverage case, the insured has the burden of pleading and proving that a loss falls within the coverage of the policy. Once the insured has demonstrated coverage, the burden shifts to the insurer to prove that a limitation or exclusion applies. *Addison Ins. Co. v. Fay*, 232 Ill. 2d 446, 453-54 (2009).

“Physical Loss of or Damage to Property”

Most of the key coverage provisions on which Plaintiff relies require “direct physical loss of or damage to property.” Here, Plaintiff alleged that the provisions of its “all-risk” Policy, quoted above, provide coverage for their COVID-related losses. The Complaint alleged that Plaintiff experienced direct physical loss of or damage to its properties in at least three ways: the government shutdown orders that drastically limited the function and use of Plaintiff’s property and resulted in lost income; the need to modify physical behaviors through means such as social distancing and avoiding indoor spaces; and the need to mitigate the threat or actual physical presence of the virus through prevention and mitigation measures. (Complaint ¶ 13).

At least five recent Illinois Appellate Court cases have found no coverage for COVID-related losses such as those described in Plaintiff’s Complaint, because such losses do not constitute “direct physical loss of or damage to property.” *Lee v. State Farm Fire & Casualty Co.*, 2022 IL App (1st) 210105, ¶ 23; *ABW Development, LLC v. Continental Casualty Co.*, 2022 IL App (1st) 210930, ¶ 39; *Sweet Berry Café, Inc. v. Society Insurance, Inc.*, 2022 IL App (2d) 210088, ¶ 55; *Firebirds International, LLC v. Zurich American Insurance Co.*, 2022 IL App (1st) 210558, ¶ 45; *GPIF Crescent Court Hotel LLC v. Zurich American Insurance Co.*, 2022 IL App (1st) 211335-U, ¶ 23. At oral argument, Plaintiff attempted to distinguish these cases, but the distinctions were not material. The *Firebirds* and *GPIF* cases involved the very policy at issue in our case—the “Zurich Edge” policy. These cases are binding on this court.

The Court holds that Plaintiff has not stated a cause of action under any of the policy provisions that require a showing of direct physical loss of or damage to property. Moreover, because of the nature of the virus and the provisions of the Policy, it does not appear that this deficiency can be cured. See the cases cited above, all of which either entered judgment on the pleadings or dismissed the complaint with prejudice.

“Tenants Prohibited Access” Coverage

The Complaint cites one coverage provision that does not require “direct physical loss of or damage to” property—the Tenants Prohibited Access (“TPA”) provision. As shown above, that provision requires the landlord to physically obstruct access to an insured property. Plaintiff alleges that “the property owner and/or landlord physically obstruct[ed] and prevent[ed] access to Wolverine’s stores by issuing Shutdown Orders.” (Complaint ¶131). This statement is internally inconsistent. The Complaint alleges that Shutdown Orders were issued by government agencies, not landlords. For that reason, the current Complaint fails to state a claim for coverage under the TPA provision.

Whether the dismissal should be with or without prejudice requires an analysis of the exclusion arguments. If Plaintiff had met its burden of demonstrating a right to coverage under the Policy, the burden would then shift to Defendants to prove that a limitation or exclusion applies. While the burden has not yet shifted, the Court will analyze the parties’ exclusion arguments at this time. If an exclusion is shown to apply, it would be fruitless to allow Plaintiff to replead.

Contamination Exclusion

Defendants argue that the Contamination Exclusion bars coverage for Plaintiffs’ Claim. Plaintiff contends that the Contamination Exclusion does not apply because it was altered by what Plaintiff calls the “Virus Deletion Endorsement,” which is in fact entitled “Amendatory Endorsement—Louisiana.”

The Contamination Exclusion, quoted above, excludes coverage for costs due to “Contamination,” specifically defined to include “any condition of property due to the actual presence of any . . . virus.” This unambiguously includes the virus COVID-19.

The Louisiana Endorsement deletes the term “virus” from the “contamination” definition, which would have gutted the effect of the Contamination Exclusion if it applied. It does not. As the Court stated in the *Firebirds* case:

[W]e find that the amendatory endorsements of Zurich's policies, including the Louisiana endorsement, are not ambiguous. Each endorsement identifies a particular state in its title. To simply ignore the state name in the title runs counter to the requirement that we interpret an insurance policy in such a way that none of its terms are rendered meaningless or superfluous. *Pekin Insurance Co. v. Wilson*, 237 Ill. 2d 446, 466, 930 N.E.2d 1011, 341 Ill. Dec. 497 (2010). As such, the only reasonable interpretation of the endorsements is that they apply to the risks insured in the named state.

Firebirds Int'l, LLC v. Zurich Am. Ins. Co., 2022 IL App (1st) 210558, ¶ 19.

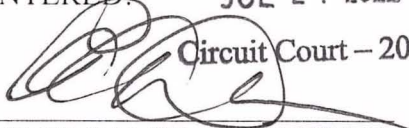
The Complaint does not allege any losses in Louisiana and does not seek coverage for any risks located in Louisiana. Therefore, the Louisiana Endorsement does not alter the Contamination

Exclusion in this case. Applying the Contamination Exclusion, the Policy does not provide coverage for Plaintiff's COVID-19-related losses. The Contamination Exclusion applies to the TPA coverage as well as all other coverages cited above.

Plaintiff has not met its burden of pleading that a loss covered by the Policy occurred. Further, even if Plaintiff were allowed to replead, the Contamination Exclusion would bar coverage. Therefore, the Court grants Defendants' Motion to Dismiss and dismisses Plaintiff's Complaint with prejudice.

The Court notes that Plaintiff requested leave to amend its Complaint to, among other things, add facts regarding the actions of its landlords in restricting access. That motion for leave to amend has been filed, but the Court deferred its presentment until after a decision on this Motion to Dismiss. Given today's ruling, the motion for leave to amend is moot and will be denied without further argument. The previously-set status date of July 22, 2022 at 10:15 a.m. will stand.

Judge Pamela McLean Meyerson

ENTERED: JUL 21 2022

Circuit Court – 2097
JUDGE PAMELA MEYERSON