507 F.Supp.3d 482
United States District Court, S.D. New York.

10012 HOLDINGS, INC. d/b/a Guy Hepner, Plaintiff,
v.
SENTINEL INSURANCE COMPANY, LTD., Defendant.

20 Civ. 4471 (LGS)
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Signed 12/15/2020

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Synopsis
Background: Insured, owner and operator of an art gallery and dealership, which had purchased a business property insurance policy, brought an action against property insurer seeking coverage for business losses allegedly resulting from government restrictions on non-essential business during the COVID-19 pandemic. Insurer moved to dismiss for failure to state a claim.

Holdings: The District Court, Lorna G. Schofield, J., held that:

insured failed to state a claim against insurer for "loss" of the insured property;

business property insurance policy required some form of "direct physical loss of or physical damage" to insured premises to trigger loss of business income coverage;

business property insurance policy was not an all-risk policy;

business property insurance policy required some form of "direct physical loss of or physical damage" to insured premises to trigger extra expense coverage; and

business property insurance policy required some dangerous condition on neighboring premises to force a shutdown of insured premises, to trigger the civil authority coverage.

Motion granted.

Procedural Posture(s): Motion to Dismiss for Failure to State a Claim.

Attorneys and Law Firms

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... to plausible." *Twombly*, 550 U.S. at 570, 127 S.Ct. 1955. "To survive dismissal, the plaintiff must provide the grounds upon which his claim rests through factual allegations sufficient 'to raise a right to relief above the speculative level.' " *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007) (quoting *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955).

Under principles of New York contract interpretation, [1] "the court's initial task is to attempt to ascertain the parties' intent from the language of the insurance contract itself ... construe[ing] the policy as a whole; all pertinent provisions of the policy should be given meaning, with due regard to the subject matter that is being insured and the purpose of the entire contract." *Westchester Fire Ins. Co. v. Schorsch*, 186 A.D.3d 132, 129 N.Y.S.3d 67, 74 (1st Dep't 2020) (internal citation omitted). Courts must take care not to "make or vary the contract of insurance to accomplish its notions of abstract justice or moral obligation." *Keyspan Gas East Corp. v. Munich Reinsurance Am., Inc.*, 31 N.Y.3d 51, 73 N.Y.S.3d 113, 96 N.E.3d 209, 216 (2018). "[A]n unambiguous policy provision must be accorded its plain and ordinary meaning, and the court may not disregard the plain meaning of the policy's language in order to find an ambiguity where none exists." *Chiarello ex rel. Chiarello v. Rio*, 152 A.D.3d 740, 59 N.Y.S.3d 129, 131 (2d Dep't 2017) (alteration in original). "[T]he issue of whether a provision is ambiguous is a question of law," and "focuses on the reasonable expectations of the average insured upon reading the policy." *Hansard v. Fed. Ins. Co.*, 147 A.D.3d 734, 46 N.Y.S.3d 163, 166 (2d Dep't 2017) (internal quotation marks and citations omitted).

III. DISCUSSION

A. Business Interruption Coverage

The Policy provides Business Interruption coverage for loss of "Business Income" sustained due to "necessary suspension" of operations, where such suspension is caused by "direct physical loss of or physical damage to property." "Business Income" is income that Plaintiff would have earned "if no direct physical loss or physical damage had occurred."

The Complaint alleges that the Civil Orders caused a "direct physical loss" of Plaintiff's business premises, thus triggering the Policy's Business Interruption provisions.

New York courts interpreting substantially identical language -- "loss of, ***487** damage to, or destruction of property or facilities" -- have found it "limited to losses involving *physical damage to the insured's property.*" *Roundabout Theatre Co. v. Cont'l Cas. Co.*, 302 A.D.2d 1, 751 N.Y.S.2d 4, 8 (1st Dep't 2002) (emphasis added); *see also RSVT Holdings, LLC v. Main St. Am. Assur. Co.*, 136 A.D.3d 1196, 25 N.Y.S.3d 712, 714 (3d Dep't 2016) (noting that policy covering "direct physical loss of or damage to" provided coverage only for "direct damage to plaintiffs' property"); *Soc. Life Magazine, Inc. v. Sentinel Ins. Co. Ltd.*, No. 20 Civ. 3311, Transcript of Show Cause Hearing at 15, 2020 WL 2904834 (S.D.N.Y. May 14, 2020), *available at* Dkt. No. 21-5 (in declining to provide business interruption coverage for shutdowns resulting from the Civil Orders, noting "New York law is clear that this kind of business interruption needs some damage to the property to prohibit [a person] from going [there]"); *Newman Myers Kreines Gross Harris, P.C. v. Great N. Ins. Co.*, 17 F. Supp. 3d 323, 331 (S.D.N.Y. 2014) (applying *Roundabout Theatre* to find no "direct physical loss or damage" of or to the premises, where access was lost due to a government utility shutting off power during hurricane recovery); *Philadelphia Parking Auth. v. Fed. Ins. Co.*, 385 F. Supp. 2d 280, 288 (S.D.N.Y. 2005) (construing New York law and the phrase "direct physical loss or damage" to require that "the interruption in business must be caused by some physical problem with the covered property"); *United Airlines, Inc. v. Ins. Co. of State of Pa.*, 385 F. Supp. 2d 343, 349 (S.D.N.Y. 2005), *aff'd* 439 F.3d 128 (2d Cir. 2006). In so holding, courts have declined to interpret such language to include "loss of use" of the property under New York law. *Roundabout Theatre*, 751 N.Y.S.2d at 6. Nothing in the Complaint plausibly supports an inference that COVID-19 and the resulting Civil Orders physically damaged Plaintiff's property, regardless of how the public health response to the virus may have affected business conditions for Plaintiff. The Complaint does not state a claim for "loss" of the insured property.

Plaintiff claims the Policy is ambiguous because it covers both "loss of" and "damage to" Covered Property. Plaintiff argues that "loss" and "damage" cannot mean the same thing, as New York law requires contracts to be interpreted to give each term effect. While that principle is true, the term "loss" is unambiguous in this case in light of New York law which interprets such language as not including the "loss of use" alleged by the Complaint. *Id.* at 8; *see also Newman Myers*, 17 F. Supp. 3d at 331 ("The words 'direct' and 'physical,' which modify the phrase 'loss or damage,' ordinarily connote actual, demonstrable harm of some form to the premises itself, rather than forced closure of the premises for reasons exogenous to the premises themselves, or the adverse business consequences that flow from such closure.").

Plaintiff argues that *Roundabout Theatre* is factually distinct, claiming that the policy in that case was limited to "property or facilities," including the insured theater building, but that the Policy in this case sweeps more broadly to cover loss of business generally. Plaintiff cites the fact that the Policy covers "Covered Property" rather than "property." As relevant here, "Covered Property" is defined as "Property you own that is used in your business." From that definition, Plaintiff claims that while the Policy includes loss of physical items -- "buildings, structures, fixtures, and the like" -- it also includes "much more," including, presumably, loss of customer access to Plaintiff's premises and concomitant loss of business due to the public health crisis. Plaintiff does not explain, nor does the Policy's plain language ***488** support, the conclusion that insurance against loss of "Property you own that is used in your business" encompasses business loss due to...

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... or physical damage ... caused by or resulting from a Covered Cause of Loss." Plaintiff argues that because a "Covered Cause of Loss" includes "risks of direct physical loss," Defendant agreed to cover business lost due to the risk of COVID-19 on Plaintiff's premises. Plaintiff does not explain how this language implicates the Business Interruption provisions cited in the Complaint. This provision only provides coverage for "direct physical loss of or physical damage," which the Complaint does not allege for the reasons given above.

Finally, Plaintiff notes that the Policy is an all-risk policy, under which "losses caused by any fortuitous peril not specifically excluded under the policy will be covered." *Parks Real Estate Purchasing Grp. v. St. Paul Fire & Marine Ins. Co.*, 472 F.3d 33, 41 (2d Cir. 2006). This argument is unpersuasive because, as described above, the Policy's plain language unambiguously does not cover business lost due to the Civil Orders.

B. Extra Expense Coverage

The Policy's "Extra Expense" coverage applies to expenses incurred during a period of restoration of the premises following a "direct physical loss or physical damage to" the covered property. Because, as described above, the Complaint does not allege a direct physical loss, the Complaint fails to state a claim for Extra Expense coverage.

C. Civil Authority Coverage

The Policy's "Civil Authority" coverage applies to losses sustained when access to Plaintiff's premises is "prohibited by order of a civil authority *as the direct result of a Covered Cause of...*

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... would survive dismissal, opportunity to replead is rightfully denied." *Hayden v. Cty. of Nassau*, 180 F.3d 42, 53 (2d Cir. 1999); *accord Olson v. Major League Baseball*, 447 F. Supp. 3d 174, 177 (S.D.N.Y. 2020). Leave to amend also may be denied where the plaintiff "fails to specify either to the district court or to the court of appeals how amendment would cure the pleading deficiencies in its complaint." *TechnoMarine SA v. Giftports, Inc.*, 758 F.3d 493, 505 (2d Cir. 2014). Leave to amend is denied because the Policy does not provide coverage for the loss Plaintiff suffered.

IV. CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss is GRANTED with prejudice. The Clerk of Court is respectfully directed to close the motion at Docket Number 19 and the case.

All Citations

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Footnotes

1 The Policy does not explicitly state what law governs its interpretation and enforcement. The parties apply New York law in their moving papers. Accordingly, this decision is based on New York Law. *See Arch Ins. Co. v. Precision Stone, Inc.*, 584 F.3d 33, 39 (2d Cir. 2009); *accord PetEdge, Inc. v. Garg*, 234 F. Supp. 3d 477, 486 (S.D.N.Y. 2017).

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