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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2020-010495

03/22/2021

HONORABLE DANIELLE J. VIOLA

CLERK OF THE COURT
K. Cabral
Deputy

A B T PERFORMING ARTS ASSOCIATION
INC

RYAN W ANDERSON

v.

CINCINNATI INSURANCE COMPANY, THE,
et al.

SANFORD K GERBER

JILL ANN HERMAN
JUDGE VIOLA

UNDER ADVISEMENT RULINGS RE
MOTION TO DISMISS AND MOTION FOR LEAVE TO AMEND

Motion to Dismiss

The Court has reviewed and considered Defendant The Cincinnati Insurance Company's Motion to Dismiss and Memorandum in Support of Its Motion to Dismiss Pursuant to Ariz. R. Civ. P. Rule 12(b)(6), the Response, the Reply, and the Four Supplemental Citation of Authorities In Support of Defendant's Motion to Dismiss including the Responses filed by ABT.¹ The Court has further considered the arguments of counsel presented on March 2, 2020.

Defendant asks the Court to dismiss Plaintiff's Complaint in its entirety because the property insurance policy at issue does not apply to damages caused by COVID 19. In particular, Defendant asserts that the policy's Business Income, Extra Expense, Civil Authority, and Ingress

¹ The Court expects a supplemental citation to authorities to be limited to the citation of authority without argument. To the extent that either the supplemental citations or responses contained argument, the Court disregarded the argument for purposes of ruling on the pending Motion to Dismiss.

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and Egress coverages only protect for income losses related to physical damage to property. Plaintiff has failed to allege physical damage.

Overview

Plaintiff, ABT, operates a Broadway style theater. In or around January 2020, Defendant, Cincinnati, issued and renewed an all risk commercial insurance policy for Plaintiff for the 2020 calendar year. In March, Arizona's Governor issued an executive order requiring certain businesses to close to slow the spread of COVID-19. ABT was one of those businesses that closed as a result of the executive order. At least one of ABT's employees tested positive for the virus. ABT asserts the risk of the virus rendered ABT's property unsafe. ABT alleges that the harm caused by the virus on ABT's property, along with the executive orders preventing ingress and egress establishes a direct accidental physical loss or direct accidental physical damage to property triggering coverage under the Cincinnati policy. Plaintiff presented a claim in March 2020 and alleges coverage applies under the Business Income, Extra Expense, Civil Authority and Ingress and Egress coverages. The policy has no explicit virus exclusion. As a result, ABT claims it had a reasonable expectation of coverage for losses related to a virus pandemic.

Analysis

Insurance Policy

Arizona courts interpret insurance contracts according to their plain and ordinary meaning. *Keggi v. Northbrook Prop. & Cas. Ins. Co.*, 199 Ariz. 43, 46 (App. 2000). Ambiguities are construed against the insurer, however, this rule only applies to provisions that are "actually ambiguous." *Id.* The Insured bears the burden to establish coverage under an insuring clause, and the insurer bears the burden to establish the applicability of any exclusion. *Id.* at ¶ 13. In this case, no exclusions are alleged or applicable.

The relevant policy provisions for this dispute include the following:

We will pay for the actual loss of "Business Income" and "rental Value" you sustain due to the necessary "suspension" of your "operations" during the "period of restoration". The "suspension" must be caused by direct "loss" to property at a "premises" caused by or resulting from any Covered Cause of loss.

Motion at Ex. E at 38 (emphasis added).

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We will pay for the actual loss of “Business Income” you sustain due to the necessary “suspension” of your “operations” during the “period of restoration”. The “suspension” must be caused by direct “loss” to property at “premises” which are described in the Declarations and for which a “Business Income” Limit of Insurance is shown in the Declarations. The “loss” must be caused by or result from a Covered Cause of Loss.

Motion at Ex. E at 89 (emphasis added). “Loss” is defined, in part, as “accidental physical loss or accidental physical damage.” Motion at Ex. E at 58, 97.

Covered Cause of Loss is defined as “direct ‘loss’ unless the ‘loss’ is excluded or limited in this Coverage Part.” Motion at Ex. E at 25, 90. As discussed above, loss means direct physical loss or damage. Accordingly, there is no Covered Cause of Loss unless the insured first establishes, among other things, that there is direct physical loss or damage.

To the extent ABT seeks coverage under Extra Expense, Civil Authority, or Ingress and Egress, direct physical loss or damage to property is required. *See* Motion at Ex. E at 39, 89-90, 92. The Civil Authority coverage also requires that access to the insured’s property be prohibited by an order from a civil authority. Motion at Ex. E at 39; 90. Similarly, the Ingress and Egress coverage only applies if the insured sustains actual loss of business income or extra expense “caused by the prevention of existing ingress or egress at [an insured premises] due to direct ‘loss’ by a Covered Cause of Loss at a location contiguous to such ‘premises.’” Motion at Ex. E at 92. As a result, the Ingress and Egress coverage requires both direct physical loss or damage at a location contiguous to ABT’s premises, and the prevention of access to ABT’s premises as a result of that direct physical loss.

ABT’s Allegations

The initial burden to establish coverage is on the insured. *Keggi*, 199 Ariz. at 46. ABT alleges it sustained a loss of business income from the following: 1) harm to the property by the virus located on surfaces in ABT’s premises; 2) shutdown orders; and 3) prevention of ingress/egress due to presence of the virus and risk of COVID at ABT’s premises. ABT seeks coverage for economic damages under its “all risk” property insurance policy. ABT alleges the virus was present at the premises and one of ABT’s employees had COVID-19.

Both parties cite authority from state and federal trial courts across the country that have addressed the issues presented. Neither party presented the Court with appellate authority from Arizona or elsewhere. Notwithstanding the number of recent cases reaching opposite conclusions,

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The overwhelming majority of cases to consider business income claims stemming from COVID-19 with similar policy language hold that “direct physical loss or damage” to property requires some showing of actual or tangible harm to or intrusion on the property itself.

Promotional Headwear International v. Cincinnati Insurance Company, 2020 WL 7078735 (D. Kan. December 3, 2020); see *Klos Enterprises, LLC v. The Cincinnati Insurance Company, et al.*, Superior Court, Maricopa County, Cause No. CV2020-010496, Hon. Roger Brodman (2/10/2021) and (02/25/2021) (motion for reconsideration denied) and *Street Grill and Bar LLC et al v. Cincinnati Insurance Company*, 2:20CV01326 (D. Arizona, March 8, 2021). The Court has reviewed and considered the reasoning in the cases presented by both parties.² Ultimately, the Court finds the reasoning requiring a showing of actual or tangible harm to the property to be more persuasive. See *id.*; see also *Promotional Headwear*, 2020 WL 7078735 at *5-6 (citing multiple federal circuit court decisions addressing business income claims under policies that required “direct physical loss to property” and noting that “other circuit court decisions support the interpretation that ‘physical damage requires actual, tangible damage.’”).

While *Promotional Headwear* evaluated the policy under Kansas law, the analysis is consistent with Arizona law. See e.g., *White Mountain Communities Hospital, Inc. v. Hartford Casualty Insurance Co.*, 2015 WL 1755372 (D. Ariz. 2015). In *White Mountain*, the Arizona federal district court evaluated language similar to that in the ABT policy and concluded that “coverage only applies to business income loss that results from physical property damage.” *Id.* at *4. In *White Mountain*, the insured hospital alleged economic losses as a result of a nearby fire. *Id.* at *2. The hospital failed to show that the lost income was a result of physical damage to the property as opposed to “unfavorable business conditions in the area as a result of the fire.” *Id.* at *4. As in *White Mountain*, the language in the ABT policy refers to a loss to property rather than a loss of property. The policy language is unambiguous. The policy requires direct physical loss or physical damage to property.

Based on the above, the Court concludes that coverage applies if there is direct physical loss or damage to the property. The Court’s conclusion is supported by other decisions around the country evaluating similar provisions. See e.g., *Mama Jo’s Inc. v. Sparta Ins. Co.*, 823 Fed.Appx. 868, 879 (11th Cir. 2020) (finding that an item or structure that merely need to be cleaned had not suffered a “direct physical loss”); *Pentair, Inc. v. Am. Guarantee & Liab. Ins Co.*, 400 F.3d 613,

² The Court considered the four notices of supplemental authorities filed by Cincinnati and the corresponding responses filed by ABT. As noted during oral argument, counsel for the parties should be commended for their efforts in briefing and arguing the issues as well as tracking daily changes in courts around the country.

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616 (8th Cir. 2005) (affirming the district court’s ruling that a supplier’s inability to function after the loss of power did not constitute direct physical loss or damage under an insurance contract); *Source Food Tech, Inc. v. U.S. Fid. & Guar. Co.*, 465 F.3d 834, 838 (8th Cir. 2006) (finding that a company’s inability to transport its beef products to the United States as a result of a beef embargo did not constitute “direct physical loss to property”). ABT has not alleged such loss or damage.³

Even if the virus was present or an employee had COVID-19, such risks are present in any public setting. See *Uncork and Create LLC v. Cincinnati Insurance Co.*, 2020 WL 6436948 (S.D.W.Va. 11/2/2020) (noting similar risk of exposure in any public setting and lack of threat to inanimate structures due to ability to eliminate virus on surfaces); *Mama Jo’s Inc.*, 823 Fed.Appx. at 879 (“under Florida law, an item or structure that merely needs to be cleaned has not suffered a ‘loss’ which is both ‘direct’ and ‘physical.’”). As explained in *Uncork and Create*, “[n]o repairs or remediation to the premises are necessary for its safe occupation in the event the virus is controlled and no longer poses a threat. In short, the pandemic impacts human health and human behavior, not physical structures.” *Id.* at *5.

Lack of Virus Exclusion

ABT asserts that the policy has no virus exclusion. Even if that is true, the initial burden to establish coverage is on ABT. *Keggi*, 199 Ariz. at 46. As discussed above, ABT has failed to establish coverage in the absence of physical loss to property or physical damage. As a result, the lack of a virus exclusion is irrelevant if coverage does not apply. See e.g., *Henry’s Louisiana Grill, Inc. v. Allied Ins. Co. of Am.*, No. 1:20-CV-2939-TWT, 2020 WL 5938755 at 16, n. 3 (N.D. Ga. Oct. 6, 2020).

Civil Authority Coverage

As discussed above, Civil Authority coverage applies for purposes of this case if there is a Covered Cause of Loss – direct physical loss to property, other than at ABT’s premises and access to the property was prohibited by the civil authority. The virus is the underlying basis for ABT’s claims. If the virus cannot cause physical loss to property or physical damage to property at ABT’s premises, the same is true for other property. There is no question that the government shut down orders and related restrictions required modification or elimination of certain business operations. A change in operation is distinguishable from physical loss to property or physical damage.

³ The Court does not mean to suggest that ABT did not suffer economic damage as a result of the virus – only that the harm was not the result of physical damage to ABT property giving rise to coverage under the policy at issue.

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Even if the restrictions imposed resulted in direct physical loss to property or physical damage, ABT was not prohibited from accessing its property. ABT does not allege that it was prohibited from accessing its property as opposed to being restricted in the way it operated its business on the property. *See Pappy's Barber Shops, Inc. et al. v. Farmers Group, Inc., et al.*, No. 20-CV-907-CAB-BLM, 2020 WL 5500221 at *6 (S.D. Cal. Sept. 11, 2020).

Ingress and Egress Coverage

As discussed above, the Ingress and Egress Coverage requires both a direct physical loss at a location contiguous to the insured's property and the prevention of access to the insured's property as a result of that direct physical loss. *See Motion, Ex. E.* at 91. ABT has not alleged direct physical loss nor prevention of access. *See Promotional Headwear*, 2020 WL 7078735 at *10 (explaining that plaintiff insured failed to allege direct physical loss or damage to a location contiguous to the property).

IT IS ORDERED granting Cincinnati's Motion to Dismiss with prejudice as to Plaintiff's claims asserting coverage under the language of the insurance policy.

Motion for Leave to Amend

Pending before the Court is Plaintiff's Rule 15 Motion for Leave to Amend filed January 20, 2021, the Response, and Reply. The Court has reviewed and considered the briefing and further considered the arguments of counsel.

Rule 15(a)(2) provides that "[l]eave to amend must be freely given when justice requires." Here, Cincinnati does not identify any prejudice or delay as a basis for objecting to the proposed amended complaint. Cincinnati instead asserts that the amendments are futile. To the extent that the amendments relate to whether coverage applies, the Court agrees. To the extent ABT seeks to further clarify its allegations supporting its bad faith or negligent misrepresentation claims, the Court concludes futility is not a basis to deny the Motion.

Accordingly,

IT IS ORDERED granting Plaintiff's Rule 15 Motion for Leave to Amend filed January 20, 2021 as to the bad faith and negligent misrepresentation claims.