

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA**

RICHARD KAHN AND AARK	:	Case No.: 1:20-cv-00781-JEJ
ENTERPRISE LLC d/b/a	:	
MAULDIN’S, individually and on	:	
behalf of all others similarly situated,	:	
	:	
Plaintiff,	:	JURY TRIAL DEMANDED
	:	
v.	:	
	:	
PENNSYLVANIA NATIONAL	:	
MUTUAL CASUALTY	:	
INSURANCE COMPANY, a	:	(Chief Judge John E. Jones III)
Pennsylvania corporation,	:	
	:	
Defendant.	:	

**DEFENDANT’S MOTION TO DISMISS PLAINTIFFS’ COMPLAINT
PURSUANT TO FED. R. CIV. P. 12(B)(6)**

Defendant, Pennsylvania National Mutual Casualty Insurance Company (“Penn National”), by and through its counsel, Cozen O’Connor, P.C., hereby moves for a dismissal of Plaintiffs’ Complaint and, in support thereof, avers as follows:

1. This is an insurance coverage dispute. Plaintiffs, Richard Kahn and Aark Enterprise, LLC d/b/a Mauldin’s, individually and on behalf of all other similarly situated, are a restaurant in South Carolina and its owner alleging that they were forced to go out of business as a result of the COVID-19 virus.

2. In this action, Plaintiffs seek coverage under a policy of general liability and property damage insurance, Commercial Lines Policy No. CL9 0732649 03, issued by Penn National to Named Insured Aark Enterprise LLC DBA Mauldin's for the period September 19, 2019 to September 19, 2020 (the "Policy").

3. Plaintiffs filed their Complaint on May 13, 2020. (Doc. 1).

4. The Complaint was served upon Penn National on June 10, 2020.

5. Plaintiffs seek to pursue a class action on account of Penn National's denial of coverage for "Plaintiff's business closure due to the COVID-19 pandemic." (*Id.*, ¶1).

6. Plaintiffs allege they suffered economic losses allegedly resulting from the COVID-19 virus. (*Id.*, ¶¶ 1-2, 34).

7. Although Plaintiffs elected not to attach the Policy as an exhibit to the Complaint, the Policy is properly before the Court, as it is invoked in Plaintiffs' Complaint and Plaintiffs' claims are based upon the Policy. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2509, 551 U.S. 308, 322 (2007); *Warren Gen. Hosp. v. Amgen, Inc.*, 643 F.3d 77, 88 (3d Cir. 2011); *Pension Benefit Guar. Corp. v. White Consol. Indus.*, 998 F.2d 1192, 1196 (3d Cir. 1993) (citations omitted). A true and correct copy of the Policy provisions is attached to this Motion as Exhibit "1".

A. Allegations of Plaintiffs' Complaint

8. Plaintiffs allege that the South Carolina government issued a series of advisories or orders directing that citizens “limit movement outside their home or place of work except for essential activities.” (Complaint, Doc. 1, ¶¶23-27).

9. Plaintiffs further allege that “patrons were initially urged to avoid and, ultimately, prohibited to dine in restaurants.” According to the Complaint, “[b]y late March 2020, Plaintiff was forced to suspend business operations at the restaurant.” (*Id.*, ¶28).

10. As a result, Plaintiffs allege, they “sustained significant financial losses, will not be able to maintain [their] lease with the restaurant building, and likely will never operate the restaurant again.” (*Id.*, ¶29).

11. Plaintiffs allege that they made an insurance claim for their alleged financial loss to Penn National, which Penn National denied because there was no “damage to property” and because the Policy contains an exclusion for loss caused by “Virus.” (*Id.*, ¶¶30, 34).

12. Plaintiffs' Complaint also seeks class certification, alleging, among other things, that common “questions of law and fact” include whether Penn National breached its insurance contracts with various insureds, and whether it did so in bad faith. (*Id.*, ¶¶40(a), (b)).

13. Plaintiffs' Complaint asserts claims for (i) breach of contract, (ii) breach of an implied duty of good faith and fair dealing; and (iii) unjust enrichment. (*Id.*, ¶¶44-58).

B. The Policy

14. The "Business Income" coverage grant provisions of the Policy state:

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 physical loss of or damage 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 or damage must be caused by or result from a Covered Cause of Loss....

(Policy, Exhibit "1", Commercial Property Form CP 00 30 0402, A.1., Page 1 of 9).

15. The "Extra Expense" coverage grant provisions of the Policy state:

"Extra Expense means necessary expenses you incur during the 'period of restoration' that you would not have incurred if there had been no direct physical loss or damage to property caused by or resulting from a Covered Cause of Loss."

(*Id.*, Commercial Property Form CP 00 30 0402, A.2.b., Page 1 of 9).

16. The "Period of Restoration" is defined in Commercial Property Form CP 00 30 0402, in pertinent part, as follows:

3. "Period of Restoration" means the period of time that:

(a) Begins:

(1) 72 hours after the time of direct physical loss or damage for Business Income coverage; or

(2) Immediately after the time of direct physical loss or damage for Extra Expense coverage;

caused by or resulting from any Covered Cause of Loss at the described premises; and

(b) Ends on the earlier of:

(1) The date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality; or

(2) The date when business is resumed at a new permanent location.

* * *

(*Id.*, Commercial Property Form CP 00 30 0402, F.3., Page 8 of 9).

17. “Covered Causes of Loss” means “Risks of Direct Physical Loss unless the Loss is: 1. Excluded in Section B., Exclusions; or 2. Limited in Section C., Limitations; ...” (*Id.*, “Causes of Loss – Special Form”, Commercial Property Form CP 10 30 0402, Page 1 of 9).

18. Plaintiffs also allude in the Complaint to business income coverage under the “Civil Authority” provisions of the Business Income Coverage Form. (Complaint, Doc. 1, ¶4). The “Civil Authority” provisions of the Policy provide, in pertinent part:

a. Civil Authority

We will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises due to direct physical loss of or damage to property, other than at the described premises, caused by or resulting from any Covered Cause of Loss.

The coverage for Business Income will begin 72 hours after the time of that action and will apply for a period of up to three consecutive weeks after coverage begins.

The coverage for Extra Expense will begin immediately after the time of that action and will end:

- (1) 3 consecutive weeks after the time of that action; or
- (2) When your Business Income coverage ends; whichever is later.

(Policy, Ex. "1", Commercial Property Form CP 00 30 0402, A.5.a., Page 2 of 9).

19. The Policy is subject, by Endorsement, to the following Exclusion, which provides in pertinent part:

EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA

This endorsement modifies insurance provided under the following:

COMMERCIAL PROPERTY COVERAGE PART

A. The exclusion set forth in Paragraph B. applies to all coverage under all forms and endorsements that comprise this Coverage Part, including but not limited to forms or endorsements that cover property damage to buildings or personal property and forms or endorsements

that cover business income, extra expense or action of civil authority.

B. We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.

* * *

(*Id.*, Endorsement 71 1355 0310).

C. Argument

20. Plaintiffs' Complaint fails, as a matter of law, to allege valid causes of action against Penn National upon which relief may be granted. It is, therefore, submitted that Plaintiffs' Complaint should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6).

21. Penn National is entitled to a dismissal of the Complaint as Plaintiffs have failed to plead "sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Santiago v. Warminster Township*, 629 F.3d 121, 128 (3d Cir. 2020) (quoting *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949, 556 U.S. 662 (2009)).

22. In the Complaint, Plaintiffs allege no "direct physical loss of or damage" to their property, as required by the Policy. Moreover, even had they so alleged, the Policy's Virus Exclusion would bar coverage for this claim.

1. Plaintiffs' Complaint fails to state a viable breach of contract claim.

23. Plaintiffs' Complaint fails to state a viable cause of action for breach of the insurance Policy, as the Complaint fails to allege the contractually required element of "direct physical loss of or damage" to Plaintiffs' property for the reasons set forth below.

(a) The transient presence of a virus in a structure does not result in any physical alteration of the structure and thus does not constitute "physical loss or damage."

24. Plaintiffs allege that: "Plaintiff's loss of business profits constitute *actual damage* to his business property." (Complaint, Doc. 1, ¶31) (emphasis supplied). Plaintiffs' Complaint fails, however, to allege that any "direct physical" loss or damage to their restaurant occurred, as required by the Business Income and Extra Expense provisions of the Policy under which Plaintiffs claim coverage, and their inability to do so precludes their claim for coverage. The absence of direct physical loss, expressly required under the Policy, precludes coverage.

25. Furthermore, an interpretation that the presence of a virus in a dwelling constitutes "direct physical loss" would contravene Pennsylvania and South Carolina law governing interpretation of insurance contracts, which requires that all provisions within a policy be given meaning, and that an interpretation should not nullify any provision under the policy. *AK Steel Corp. v. Viacom, Inc.*, 2003 Pa.

Super. 411, 835 A.2d 820, 824 (Pa. Super. 2003); *Auto Owners Ins. Co., Inc. v. Newman*, 385 S.C. 187, 684 S.E.2d 541, 545 (S.C. 2009).

26. Plaintiffs' Complaint implies that the alleged "damage" pertains to the temporary existence of viral organisms. To construe that circumstance as triggering Business Income and Extra Expense Coverage would nullify the "Period of Restoration" provisions, an interpretive result that neither Pennsylvania nor South Carolina law permits.

27. The Period of Restoration provisions become meaningless when, having fixed an end date for coverage as the date of completion of "repair," the event triggering that coverage, as here, is not susceptible to being repaired (as opposed to a virus dying on its own). Given that the property would never be "repaired" by anyone, the defined endpoint established by the "period of restoration" would be effectively stricken from the contract, making it impossible to calculate the amount of Business Income and Extra Expense payable. Such an interpretation, rendering the Period of Restoration provisions nullities, is impermissible

(b) Plaintiffs fail to allege the virus was present on their property.

28. Moreover, even if viral contamination could in theory constitute direct physical loss or damage, Plaintiffs do not allege that any virus has ever contaminated their restaurant.

29. Unless “direct” physical damage has occurred on-premises there can be no property damage coverage. *See Heller’s Gas, Inc. v. International Ins. Co. of Hannover Ltd.*, No. 4:15-CV-01350, 2017 WL 4119809 (M.D. Pa. Sept. 18, 2017).

30. Accordingly, in the absence of even an allegation of contamination to the insured property, Plaintiffs’ Complaint fails to allege “direct physical loss or damage,” as required by the Policy.

(c) Plaintiffs fail to allege their restaurant became non-functional or uninhabitable.

31. Plaintiffs’ Complaint fails to allege the restaurant became non-functional or uninhabitable. *See Port Authority of New York and New Jersey v. Affiliate FM Ins. Co.*, 311 F.3d 226 (3d Cir. 2005) (requiring the insured premises to have been rendered non-functional (or uninhabitable) to have sustained “direct physical loss” to the property).

32. Plaintiffs only allege their loss was caused because “patrons were initially urged to avoid and, ultimately, prohibited to *dine in* restaurants [so that] Plaintiff was forced to suspend business operations at the restaurant.” (Complaint, Doc. 1, ¶28) (emphasis supplied). But taken as true, this only alleges that customers were kept away from the dining room of a *functional* restaurant; *i.e.*, it is not alleged that the food-preparation equipment at the restaurant no longer worked.

(d) The allegations of Plaintiffs' Complaint do not describe a loss that qualifies for "Civil Authority" coverage.

33. Plaintiffs seek to circumvent the requirement of on-premises "direct physical loss" by asserting, incorrectly, that the narrow extension of coverage under the "Civil Authority" provision of the Policy's Business Income Coverage applies.

34. In order to trigger eligibility for Civil Authority coverage, an insured must demonstrate that its financial loss was on account of (1) "action" by a civil authority, (2) which action was caused by direct physical loss of or damage to other property, and (3) where the action of civil authority prohibited access to the property. Policy, Ex. 1, Commercial Property Form CP 00 30 0402, A.5.a., p. 2 of 9.

35. Plaintiffs allege none of these elements, though all three are required. Accordingly, Civil Authority coverage does not apply, and thus the Complaint needed to demonstrate "direct physical loss of or damage" to the insured property which, it fails to do.

(e) The Virus Exclusion bars coverage under the Policy.

36. Finally, Plaintiffs' Complaint fails to state a viable cause of action for breach of contract, as the Policy contains an exclusion for damage or loss resulting from a virus, and Plaintiffs' Complaint alleges that the damage or loss resulted from a virus, COVID-19. Plaintiffs' claim, for loss "as a result of COVID-19" (Complaint, Doc. 1, ¶¶ 1, 34), is barred by the Virus Exclusion.

2. Plaintiffs' Complaint fails to state claims for unjust enrichment and breach of the implied duty of good faith and fair dealing.

37. Plaintiffs' Complaint also fails to allege valid causes of action for unjust enrichment and breach of the implied duty of good faith and fair dealing, both of which require that the defendant improperly denied to plaintiff a financial benefit, as Plaintiffs' insurance claim is not covered and, thus, no Policy benefit is owed.

38. For all of the foregoing reasons, Plaintiffs' Complaint fails to state upon which relief can be granted. Defendant, therefore, submits that Plaintiffs' Complaint should be dismissed, with prejudice.

WHEREFORE, Defendant, Penn National, respectfully requests that this Court enter an Order in the form attached hereto granting its Motion to Dismiss.

COZEN O'CONNOR

Dated: June 19, 2020

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MUTUAL CASUALTY	:	
INSURANCE COMPANY, a	:	(Chief Judge John E. Jones III)
Pennsylvania corporation,	:	
	:	
Defendant.	:	

CERTIFICATE OF SERVICE

I, Richard C. Mason, counsel for Defendant, hereby certify that, on this day of June 19, 2020, a copy of Defendant's Motion to Dismiss Plaintiffs' Complaint Pursuant to Fed. R. Civ. P. 12(b)(6) served was upon the below parties by the Court's CM/ECF System and/or email:

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Dated: June 19, 2020

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