UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

MCML HOLDING COMPANY, LLC
dba Galaxy Bar,

Plaintiff,

v. **Case No: 8:20-cv-2016-MSS-CPT**

COLONY INSURANCE COMPANY,

Defendant.

ORDER

THIS CAUSE comes before the Court for consideration of Defendant's Motion for Judgment on the Pleadings, (Dkt. 25), Plaintiff's Response in opposition thereto, (Dkt. 27), and Defendant's Reply. (Dkt. 30) Upon consideration of all relevant filings, case law, and being otherwise fully advised, the Court **GRANTS** Defendant's Motion for Judgment on the Pleadings.

I. BACKGROUND

Plaintiff MCML Holding Company, LLC is the owner and operator of Galaxy Bar, a tavern located at 5153 U.S. Hwy 98 N, Lakeland, Florida 33809 (the "Property"). (Dkt. 1-1 at 9) Plaintiff purchased a property insurance policy from Defendant Colony Insurance Company effective from August 29, 2019 through August 29, 2020 (the "Policy"). (Dkt. 25 at ¶ 2) According to the Complaint, Plaintiff asserts that it was forced to suspend business operations in 2020 due to the COVID-19

pandemic. (Dkt. 1-1 at 10) Specifically, Plaintiff states that "state and local governments issued executive orders, decrees, and mandates which prohibited and/or limited . . . customers . . . from going to business establishments, including Plaintiffs business, resulting in the suspension of operations at the insured premises." (Id.) As a result, Plaintiff alleges that it suffered business losses and filed a claim with Defendant for reimbursement. (Id.) On May 15, 2020, Defendant denied the claim. (Dkt. 27 at 8)

On August 6, 2020, Plaintiff filed a one-count complaint against Defendant in state court, alleging Defendant breached its contract with Plaintiff when Defendant denied Plaintiff's claim for business losses. (Dkt. 1-1) Defendant removed the case to federal court on August 28, 2020, (Dkt. 1), and answered the Complaint on September 25, 2020. (Dkt. 11) Defendant now moves for a judgment on the pleadings and requests the Court to dismiss Plaintiff's claim as a matter of law. (Dtk. 25) Specifically, Defendant argues that Plaintiff is barred from recovery because Plaintiff's claim of loss was not caused by a "direct physical loss of" the Property. (Id. at 3-4) Defendant contends that, for Plaintiff to recover under the Policy, the Plaintiff must have suffered actual damage to the Property. (Id. at 10, 12)

In response to whether its claim was caused by a "direct physical loss of" to the Property, Plaintiff argues that the plain reading of the language does not require the Property to suffer actual damage. (Dkt. 27 at 16-17) Plaintiff further asserts that, to the extent the Court finds the language ambiguous, the Court must construe the ambiguity against Defendant and find the claim is covered by the Policy. (Dkt. 27 at 19)

II. APPLICABLE LAW

Pursuant to Federal Rule of Civil Procedure 12(c), a party may move for judgment on the pleadings after the pleadings are closed. Fed R. Civ. P. 12(c). A motion under this Rule is "governed by the same standards as a motion to dismiss under Rule 12(b)(6)." United States v. Bahr, 275 F.R.D. 339, 340 (M.D. Ala. 2011). Thus, the Court "accept[s] the facts in the complaint as true and view[s] them in the light most favorable to the nonmoving party." Ortega v. Christian, 85 F.3d 1521, 1524 (11th Cir. 1996). "Judgment on the pleadings under Rule 12(c) is appropriate when there are no material facts in dispute, and judgment may be rendered by considering the substance of the pleadings and any judicially noticed facts." Horsley v. Rivera, 292 F.3d 695, 700 (11th Cir. 2002) (citing Hawthorne v. Mac Adjustment, Inc., 140 F.3d 1367, 1370 (11th Cir. 1998)). "If upon reviewing the pleadings it is clear that the plaintiff would not be entitled to relief under any set of facts that could be proved consistent with the allegations, the court should dismiss the complaint." Id. (citing White v. Lemacks, 183 F.3d 1253, 1255 (11th Cir. 1999)).

This case was removed from state court on the basis of diversity jurisdiction pursuant to 28 U.S.C. 1332. (Dkt. 1) Therefore, the Court applies the substantive law of Florida as the forum state. Mid-Continent Cas. Co. v. Am. Pride Bldg. Co., 601 F.3d 1143, 1148 (11th Cir. 2010); Sphinx Int'l, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 412 F.3d 1224, 1227 (11th Cir. 2005).

Under Florida law, interpretation of an insurance contract is a question of law to be decided by the court. Gulf Tampa Drydock Co. v. Great Atl. Ins. Co., 757 F.2d

1172, 1174 (11th Cir. 1985). Florida law requires that the plain and unambiguous language of the policy controls. Swire Pac. Holdings, Inc. v. Zurich Ins. Co., 845 So. 2d 161, 165 (Fla. 2003). Only if the language is susceptible to more than one reasonable interpretation, "one providing coverage and the other limiting coverage," will the court resolve the ambiguity, construing the policy to provide coverage. Interline Brands, Inc. v. Chartis Specialty Ins. Co., 749 F.3d 962, 965 (11th Cir. 2014) (quoting Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co., 913 So. 2d 528, 532 (Fla. 2005)). However, language is not ambiguous merely because the court engages in the act of interpreting the language. Id. (citing Gen. Star Indem. Co. v. W. Fla. Vill. Inn, Inc., 874 So. 2d 26, 31 (Fla. 2d DCA 2004)).

III. DISCUSSION

Plaintiff contends that its claim of loss is covered under the Policy as COVID-19 caused Plaintiff to suffer a direct physical loss of the Property. Plaintiff further contends its claim for business losses triggers the Business Income and Extra Expenses provision of the Policy. The Policy provides that Defendant will pay for "**direct physical loss of**" the Property caused by "any Covered Cause of Loss." (Dkt. 27-1 at 14) (emphasis added) A Covered Cause of Loss is defined as a "**direct physical loss** unless the loss is excluded or limited in this Policy." (Dkt. 27-2 at 6) (emphasis added) The Business Income and Extra Expenses provision of the Policy states, in relevant part:

> [Defendant] will pay for the actual loss of Business Income [Plaintiff] sustain[s] 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.

(Dkt. 27-1 at 29) (emphasis added). Therefore, for Plaintiff to receive coverage under the Policy, Plaintiff's claim must be caused by a "direct physical loss of" the Property.

The issue before the Court is whether Plaintiff's business losses caused by COVID-19 fall under the definition of a "direct physical loss" such that the losses would be covered under the Policy. Notably, the Policy does not define "direct physical loss." However, under Florida law, a "direct physical loss" requires an actual diminution of value of the Property. See Mama Jo's Inc. v. Sparta Ins. Co., 823 F. App'x 868, 879 (11th Cir. 2020) (citing Homeowners Choice Prop. & Cas. v. Maspons, 211 So. 3d 1067, 1069 (Fla. 3d DCA 2017).[1] As it relates to claims for losses resulting from COVID-19, courts have further stated there must be "tangible damage to property for a 'direct physical loss' to exist." Rococo Steak, LLC v. Aspen Specialty Ins. Co., No. 8:20-cv-2481-VMC-SPF, 2021 WL 268478, at *6 (M.D. Fla. Jan. 27, 2021) (quoting Prime Time Sports Grill, Inc. v. Dtw 1991 Underwriting Ltd., No. 8:20-cv-771-CEH-JSS, 2020 WL 7398646, at *6 (M.D. Fla. Dec. 17, 2020)); see also Infinity Exhibits, Inc. v. Certain Underwriters at Lloyd's London Known as Syndicate PEM 4000, 489 F.Supp. 3d 1303, 1306-07 (M.D. Fla. Sept. 28, 2020) (holding the

[1] The Court notes that "[a]lthough an unpublished opinion is not binding on this court, it is persuasive authority. See 11th Cir. R. 36-2." United States v. Futrell, 209 F.3d 1286, 1289 (11th Cir. 2000).

insured must allege "actual, concrete damage" to its property to establish a direct physical loss). Therefore, to recover losses caused by "direct physical loss of" of the insured's property, the insured must allege actual physical damage to the premises itself.

In opposition, Plaintiff urges the Court to follow the interpretation of a "direct physical loss" made by courts outside of Florida and this circuit. (Dkt. 27 at 16-18) Plaintiff argues that if courts in different circuits cannot interpret the language consistently, then that indicates that the language is ambiguous. (Dkt. 27 at 18-19) The Court disagrees. As the Court sits in diversity, it applies the substantive law of Florida, which provides the Court an interpretation of a "direct physical loss." Further, the Court notes this is not the first case in this District where an insured has attempted to receive coverage for financial losses caused by COVID-19, and in every case, coverage has been denied based on similar, or identical, language contained the insurance policies. See generally Infinity Exhibits, Inc., 489 F. Supp. 3d at 1308 (finding there is no coverage for losses caused by COVID-19 if the policy requires "direct physical loss of" to property and the insured has not alleged any physical damage to the property); R.T.G. Furniture Corp. v. Hallmark Speciality Ins. Co., No. 8:20-CV-2323-T-30AEP, 2021 WL 686864, at *3 (M.D. Fla. Jan. 22, 2021) (holding the insured's losses caused by COVID-19 is not a "direct physical loss of …. property," and the insured, therefore, is not entitled to coverage); Pane Rustica, Inc. v. Greenwich Ins. Co., No. 8:20-CV-1783-KKM-AAS, 2021 WL 1087219, at *3 (M.D. Fla. Mar. 22, 2021) (holding the insured's claims resulting from COVID-19 are not covered because the insured did not

allege physical damage to its property); First Watch Restaurants, Inc. v. Zurich Am. Ins. Co., No. 8:20-CV-2374-VMC-TGW, 2021 WL 390945, at *4 (M.D. Fla. Feb. 4, 2021) (finding no coverage existed for the loss of business due to COVID-19 if the policy required a direct physical loss of or damage to the property); Prime Time Sports Grill, Inc. v. DTW 1991 Underwriting Ltd., No. 8:20-CV-771-T-36JSS, 2020 WL 7398646, at *6 (M.D. Fla. Dec. 17, 2020) (finding the losses caused by COVID-19 were not covered due to the absence of tangible damage to the property). The Court, therefore, applies Florida's interpretation that the insured must allege tangible physical damage to receive coverage under the Policy.

The Court now turns to the Complaint to determine whether Plaintiff's claim is covered by the Policy. Accepting the allegations in the Complaint as true, Plaintiff suffered financial losses after the local and state governments issue shut down orders as the result of the spread of COVID-19. (Dkt. 1-1 at ¶¶ 9-10) The shut-down orders required Plaintiff to suspend use of its Property as intended. (Dkt. 1-1 at ¶ 9) Defendant does not dispute these material facts. Plaintiff made no allegations that the shut-down orders or COVID-19 caused physical tangible damage to the Property. Plaintiff further failed to make any allegations that the Property suffered an actual diminution of value. Because the Policy requires a "direct physical loss of" the Property, financial losses, alone, do not trigger coverage under the Policy. Plaintiff, therefore, has not, as a matter of law, sufficiently pleaded a claim that would be covered by the Policy, and Defendant's motion is due to be granted.

IV. CONCLUSION

Accordingly, it is **ORDERED** and **ADJUDGED** that:

1. Defendant's Motion for Judgment on the Pleadings, (Dkt. 25), is **GRANTED**. The Clerk is directed to **ENTER JUDGMENT** in favor of Defendant and against Plaintiff.

DONE and **ORDERED** in Tampa, Florida, this 12th day of May 2021.

MARY S. SCRIVEN
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Counsel of Record
Any Unrepresented Person