United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

644 BROADWAY LLC,

Plaintiff,

v.

FALLS LAKE FIRE AND CASUALTY COMPANY, et al.,

Defendants.

Case No. 20-cv-08421-JST

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

Re: ECF No. 13

Before the Court is a motion to dismiss brought by Defendants Falls Lake Fire and Casualty Company and Falls Lake National Insurance Company. ECF No. 13. The Court will grant the motion.

I. BACKGROUND

The complaint alleges the following: Plaintiff 644 Broadway LLC owns and rents out space at two commercial properties in San Francisco. Government closure orders related to the COVID-19 pandemic prevented Plaintiff's tenants – including a restaurant and an immersive theatrical experience – from operating their businesses, which, in turn, caused the tenants to be unable to pay rent. A local eviction moratorium made it impossible for Plaintiff to evict the non-paying tenants.

Plaintiff is insured by commercial property insurance policies issued by Defendants, who denied Plaintiff's claim for benefits.[1] Plaintiff contends that Defendants breached their contract to provide coverage for "the actual Loss of Income sustained by the Named Insured resulting directly from the necessary untenantability caused by direct physical loss, damage, or destruction by any of

[1] As discussed below, Defendants contend that only Falls Lake National, and not Falls Lake Fire, issued the policies.

the perils covered herein during the term of the policies to real or personal property." ECF No. 1-1 ¶ 29. Plaintiff also contends that it is entitled to benefits under the "Interruption by Civil or Military Authority" and "Ingress/Egress" policy provisions. The former extends coverage to include "the actual loss sustained and necessary Extra Expense incurred during the period of time when, as a direct result of physical damage within five (5) miles of the premises by a peril insured against, access to the 'described premises' is prohibited by order of civil or military authority." *Id.* ¶ 31 (footnote omitted). The latter extends coverage to include "the actual loss sustained and necessary Extra Expense during the period of time when, as a direct result of physical damage within five (5) miles of the premises by a peril insured against, ingress or egress from the 'described premises' is thereby prevented." *Id.* ¶ 32. The policies define "Extra Expense" as "reasonable and necessary expenses incurred by the Named Insured during the period of interruption that the Named Insured would not have incurred if there had been no direct physical loss or damage to property caused by or resulting from a peril insured against." *Id.* at 6 n.1.

Defendants move to dismiss the complaint in its entirety.

II. JURISDICTION

The Court first considers whether it has diversity jurisdiction over this case. The parties do not dispute that the amount-in-controversy requirement is satisfied; that Plaintiff and Falls Lake National are citizens of different states; and that Plaintiff and Falls Lake Fire are both citizens of California. Defendants argue that diversity jurisdiction exists because Falls Lake Fire was fraudulently joined, and its citizenship must therefore be disregarded. The Ninth Circuit has explained that:

> There are two ways to establish fraudulent joinder: (1) actual fraud in the pleading of jurisdictional facts, or (2) inability of the plaintiff to establish a cause of action against the non-diverse party in state court. Fraudulent joinder is established the second way if a defendant shows that an individual joined in the action cannot be liable on any theory. But if there is a *possibility* that a state court would find that the complaint states a cause of action against any of the resident defendants, the federal court must find that the joinder was proper and remand the case to the state court.

Grancare, LLC v. Thrower by & through Mills, 889 F.3d 543, 548 (9th Cir. 2018) (quotation marks, alterations, and citations omitted).

Although Plaintiff has not filed a motion to remand, it argues that Falls Lake Fire is a proper defendant because the "Schedule of Participating Insurance Companies" for "one of the Policies and Defendants' denial letter specifically reference Falls Lake Fire." ECF No. 16 at 12. It "contends both Defendants had a role in issuing the policy, or, at a minimum that it is unclear which entity issued the policy based on the documents." ECF No. 28 at 3.

The Court disagrees. The cited schedule references Falls Lake Fire as the insurer for "Other than Homestate CA" under policy number CIBA-000001-00; Falls Lake National is listed as the insurer for "Homestate CA" under policy number CIBA-000002-00. ECF No. 1-1 at 97. The insured properties are located in California. In addition, the policy documents relied on by Plaintiff are for policy number CIBA-000002-00, which corresponds to Falls Lake National in the schedule of insurance companies. *E.g.*, ECF No. 1-1 at 21, 116. The policy declarations and endorsements also all list Falls Lake National, without any reference to Falls Lake Fire. *E.g.*, *id.* at 20-21, 57-63, 115-16, 152-58.

The denial letter does contain one reference to Falls Lake Fire: "We hope that the foregoing fully and plainly explains why Falls Lake *Fire & Casualty* Insurance Company has decided to deny your claim." *Id.* at 191 (emphasis added). But the letter begins by stating, "Claims Adjusting Group, Inc. (CAG) is the authorized claims administrator for Falls Lake *National* Insurance Company," and it also states on the first page that "Falls Lake *National* Company provides a policy of insurance to 644 Broadway LLC" for the listed properties. *Id.* at 183 (emphasis added). Based on the policy documents and the single appearance of "Falls Lake Fire" in the denial letter, the Court concludes that the reference to Falls Lake Fire is a typographical error.

Plaintiff requests discovery "to determine whether Falls Lake Fire played a role in issuing the Policies, handling the claim at issue, or denying the claim," but the only case it relies on is distinguishable. ECF No. 16 at 12. In *Access Biomedical Diagnostic Labs, Inc. v. American States Insurance*, the court denied summary judgment against Safeco after Defendants "argue[d] all claims against Safeco should be dismissed because it did not issue the policy and is not the insurer." No. 04cv1979-LAB (CAB), 2006 WL 8455248, at *2 (S.D. Cal. Feb. 2, 2006). The

court explained that Defendants' "argument is based entirely on Defendants' statements in their memorandum of points and authorities, and is unsupported by any evidence. A brief review of the insurance policy shows numerous references to Safeco." *Id.* Here, by contrast, the only place Falls Lake Fire appears in the policy documents is in the schedule of participating insurance companies, where it is listed with a different policy number and for properties outside California.

Plaintiff does not contend that Falls Lake Fire can be liable for breaching the insurance policy contract if it was not the entity that issued the insurance policy. For the reasons discussed above, the policy documents attached to the complaint by Plaintiff demonstrate that Falls Lake National was the insurer. Accordingly, there is no possibility that Plaintiff can state a claim against Falls Lake Fire, and the Court disregards the citizenship of Falls Lake Fire as having been fraudulently joined. The Court has diversity jurisdiction pursuant to 28 U.S.C. § 1332.

III. LEGAL STANDARD

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). Dismissal under Federal Rule of Civil Procedure 12(b)(6) "is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). A complaint need not contain detailed factual allegations, but facts pleaded by a plaintiff must be "enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation marks and citation omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* In determining whether a plaintiff has met this standard, the Court must "accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable" to the plaintiff. *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005).

IV. DISCUSSION

The policy provisions at issue cover loss of income due to untenantability only where that

untenantability is "caused by direct physical loss, damage, or destruction . . . to real or personal property." ECF No. 11 at 29, 124. For the reasons discussed below, the Court concludes that Plaintiff has not adequately alleged that any untenantability was caused by direct physical loss, damage, or destruction to property.[2]

The Court previously considered an insurance policy that provided coverage for loss of income resulting from suspension of operations "caused by direct physical loss of or damage to property." *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 487 F. Supp. 3d 834, 838 (N.D. Cal. 2020). The Court determined that "direct physical loss of or damage to property" requires an "intervening physical force" that "induced a detrimental change in the property's capabilities."[3] *Id.* at 840-43 (emphasis omitted). It was not sufficient for the plaintiff to rely on government orders "that have prevented it from opening, a distinctly less physical phenomenon." *Id.* at 842. Likewise, the plaintiff could not rely on the policy's Civil Authority coverage provision because it "cannot establish that the civil authority action – the closure orders in this case – were issued 'due to direct physical loss of or damage to' any property." *Id.* at 843. Because there were no allegations of physical damage to any nearby property that caused a civil authority to issue its orders, the Court held that the complaint did "not establish the requisite causal link between prior property damage and the government's closure order." *Id.* at 844.

The same is true in this case. According to the complaint's own allegations, "Plaintiff has made no claim of any type of contamination, and is in fact unaware of any contamination by SARS-CoV-2 or any other virus on its premises." ECF No. 1-1 ¶ 56. Nor does Plaintiff allege

[2] The Court need not and does not decide whether Plaintiff has adequately alleged untenantability, regardless of its cause.

[3] The policy language in this case is arguably even more restrictive than that in *Mudpie*. In that case, the language was "direct physical loss *of* or damage to property," whereas here it is "direct physical loss, damage, or destruction . . . *to* real or personal property." Courts have taken a broader view of "direct physical loss *of*," compared to "direct physical loss *to*." *E.g.*, *Total Intermodal Servs. Inc. v. Travelers Prop. Cas. Co. of Am.*, No. CV 17-04908 AB (KSx), 2018 WL 3829767, at *4 (C.D. Cal. July 11, 2018) (distinguishing *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal. App. 4th 766 (2010)). The Court need not determine whether the policy language in this case required a "distinct, demonstrable, physical alteration of the property," *MRI Healthcare Ctr.*, 187 Cal. App. 4th at 779, because the complaint fails even under the broader interpretation adopted in *Mudpie*.

any other intervening physical force that has rendered the property untenantable. To the contrary, similar to Mudpie, Plaintiff argues that the untenantability was caused by government orders. *E.g.*, ECF No. 16 at 2 ("Plaintiff's property became 'untenantable' *due to the government orders*, and Plaintiff has properly alleged coverage under the Policies." (emphasis added)); *id.* at 8 ("Plaintiff's properties were rendered unfit for the purpose for which they were leased *due to both the government stay-at-home orders and the moratoriums on eviction. . . .*" (emphasis added)). Those orders might have prevented Plaintiff's tenants from operating their businesses, but an "inability to occupy [a] storefront" does not equate to physical loss or damage. *Mudpie*, 487 F. Supp. 3d at 840. As in *Mudpie*, "there is nothing to fix, replace, or even disinfect" for the property to be rendered tenantable. *Id.* Without physical loss, damage, or destruction to the property, untenantability does not give rise to any coverage under the policies.

Similarly, because Plaintiff does not allege physical damage to any nearby properties, it also fails to allege coverage under the Civil Authority or Ingress/Egress provisions. Both provisions provide coverage only if access is "prohibited by order of civil or military authority," or ingress or egress is prevented, "as a direct result of physical damage within five (5) miles of the premises." ECF No. 1-1 at 32, 127. Without physical damage, "the requisite causal link" to trigger coverage is absent, and the provisions do not apply. *Mudpie*, 487 F. Supp. 3d at 844.

Plaintiff relies on three out-of-state trial court decisions that reached a contrary conclusion, but the Court does not find these cases persuasive. "Every California court that has addressed COVID-19 business interruption claims to date has concluded that government orders that prevent full use of a commercial property or that make the business less profitable do not themselves cause or constitute 'direct physical loss of or physical damage to' the insured property." *Protégé Rest. Partners LLC v. Sentinel Ins. Co., Ltd.*, No. 20-cv-03674-BLF, 2021 WL 428653, at *4 (N.D. Cal. Feb. 8, 2021). The Court is aware of no California decisions that have reached a contrary conclusion since the *Protégé* court decided the question. To the contrary, courts continue to reach the same result. *E.g.*, *Barbizon Sch. of San Francisco, Inc. v. Sentinel Ins. Co.*, No. 20-cv-08578-TSH, 2021 WL 1222161, at *6-9 (N.D. Cal. Mar. 31, 2021); *Baker v. Or. Mut. Ins. Co.*, No. 20-cv-05467-LB, 2021 WL 1145882, at *2-4 (N.D. Cal. Mar. 25, 2021). Plaintiff's cited authority

does not persuade the Court to depart from this unanimity.

Finally, Plaintiff argues that the policies' inclusion of exclusions that do not require physical damage, such as those for fraudulent or dishonest acts by the named insured or its employees, requires interpreting "direct physical loss, damage, or destruction to property" to include non-structural damage. Under any contrary interpretation, Plaintiff asserts, "there would be no need for exclusions for non-structural damage because those damages would not be included to begin with." ECF No. 16 at 12. This argument is unavailing. First, although the untenantability provision requires physical loss, damage, or destruction, other policy provisions do not. *E.g.*, ECF No. 1-1 at 32-33 (provisions covering accounts receivable and electronic data processing equipment and media, referring to "direct loss or damage," and not "direct *physical* loss or damage"). Second, even if the policy did not include these other provisions, Defendants correctly observe that "the dishonest or fraudulent act exclusion could apply to loss of income coverage where an insured deliberately causes physical damage to property." ECF No. 17 at 6. Thus, the exclusions do not dictate the result Plaintiff suggests.

Plaintiff's failure to allege physical loss, damage, or destruction that caused the alleged untenantability, or inability to access its property, is fatal to all of its claims. Although it appears unlikely that Plaintiff will be able to cure this deficiency by amendment, the Court will allow Plaintiff an opportunity to amend if it so chooses.

CONCLUSION

Defendants' motion to dismiss is granted. Plaintiff may file an amended complaint, solely to correct the deficiencies identified above, within 21 days of the date of this order. If Plaintiff opts not to file an amended complaint, it may file a notice of such election by the same deadline. Failure to file a timely amended complaint will result in dismissal of this case with prejudice.

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The case management conference currently scheduled for May 25, 2021 is continued to July 27, 2021 at 2:00 p.m. An updated joint case management statement is due July 20, 2021.

IT IS SO ORDERED.

Dated: May 21, 2021

JON S. TIGAR
United States District Judge

United States District Court
Northern District of California