IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LEGACY SPORTS BARBERSHOP LLC n/k/a LEGACY BRAND ENTERPRISES LLC d/b/a LEGACY SPORTS BARBERSHOP, LEGACY BARBER ACADEMY, and PANACH CORP., individually and on behalf of all persons similarly situated, Plaintiffs, v. CONTINENTAL CASUALTY COMPANY, Defendant.	No. 1:20-cv-04149 Hon. Charles P. Kocoras

DEFENDANT CONTINENTAL CASUALTY COMPANY'S MOTION FOR RECONSIDERATION AND CLARIFICATION OF THE COURT'S ORDER ON DEFENDANT'S MOTION TO DISMISS

INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 59(e), Defendant seeks reconsideration of this Court's June 1, 2021 order denying Defendant's Motion to Dismiss the Class Action Complaint (the "Order") to the extent it held that Plaintiffs have adequately alleged "direct physical loss of or damage to" their properties, as required under the policies. Defendant respectfully suggests that the Court's conclusion that Plaintiffs' *own modifications* to their properties constitute "direct physical loss of or damage to" property misapprehends both the allegations in the Plaintiffs' First Amended Class Action Complaint ("FAC") and the plain language of the policies.

Although hundreds of decisions have been issued around the country addressing similar claims under identical or materially similar policy language, Defendant is unaware of *any* court that has adopted the view that coverage is triggered by physical changes, alterations or modifications—such as building a patio—that an insured makes to its premises in response to the government orders issued in response to the COVID-19 pandemic. Rather, to survive a motion to dismiss, Plaintiffs must allege facts plausibly suggesting that *a covered cause of loss* (here, allegedly, the virus) directly caused "physical alteration or structural degradation of the propert[ies]." Order at 5. Even if SARS-CoV-2 could properly be considered a covered cause of loss, Plaintiffs' coverage claims would still fail because Plaintiffs have not alleged any such physical alteration or degradation directly caused by the virus, nor could they. Defendant thus asks this Court to reconsider its Order and dismiss the FAC with prejudice.

In the alternative, Defendant seeks clarification as to whether the claims of Plaintiffs Legacy Sports Barbershop LLC and Legacy Barber Academy (the "Legacy Plaintiffs") can survive dismissal even under the Court's holding that a plaintiff's own modifications may satisfy the requirement of "physical alteration or structural degradation of the property." Order at 5. Although the Court concluded that Plaintiffs adequately alleged physical alteration because "they needed to build a new outdoor patio, install social distancing barriers and germ sanitation stations, and remove work stations

in order to promote proper social distancing," *id.* at 6, the Legacy Plaintiffs made no such allegations. Only Plaintiff Panach Corp. claims to have altered its own property in this way. *See* FAC ¶¶ 57, 60-61. Defendant thus seeks clarification as to whether the Legacy Plaintiffs have failed to state a claim.

Defendant also seeks clarification as to the status of Plaintiffs' separate claims for coverage under the Civil Authority and so-called Sue & Labor provisions. The FAC asserts claims for breach of contract and declaratory relief under *four* policy provisions: Business Income, Extra Expense, Civil Authority, and what Plaintiffs term "Sue and Labor." However, the Order addressed, at most, only the Business Income and Extra Expense provisions. The Order did not address the question of whether Plaintiffs' allegations are sufficient to state claims under the Civil Authority and "Sue and Labor" provisions of the policies. The Order does not analyze whether Plaintiffs adequately alleged (a) that their claimed losses were due to the order of a civil authority, (b) whether any such order was due to direct physical loss of or damage to property at *other* locations, or (c) whether any such order prevented Plaintiffs from accessing their premises. Nor does the Order address the "Sue and Labor" provision, which is not, by its plain terms, a grant of coverage. Defendant thus seeks clarification as to the status of Plaintiffs' Civil Authority and "Sue and Labor" claims (Counts II, IV, VI, and VIII).

ARGUMENT

I. THE COURT SHOULD RECONSIDER ITS DENIAL OF DEFENDANT'S MOTION TO DISMISS.

A motion for reconsideration is appropriate when "[t]he Court has patently misunderstood a party ... or has made an error not of reasoning but of apprehension." *Bank of Waunakee v. Rochester Cheese Sales, Inc.*, 906 F.2d 1185, 1191 (7th Cir. 1990). Motions for reconsideration are appropriately brought under Federal Rule of Civil Procedure 59(e). *See Arendovich Invs., Inc. v. NNR Glob. Logistics, Inc.,* No. 15 C 4978, 2018 WL 10809374, at *3 (N.D. Ill. Feb. 22, 2018).

A. The Court's Holding that Plaintiffs Have Pleaded "Direct Physical Loss of or Damage to Property" Misapprehends Plaintiffs' Allegations and the Policies' Plain Language.

Consistent with courts across the country addressing similar claims involving identical or nearly identical policy provisions, this Court held that "a plaintiff needs to allege that [its] property underwent a 'distinct, demonstrable, physical alteration' as the result of COVID-19." Order at 5 (quoting *10E, LLC v. Travelers Indemn. Co. of Conn.*, 483 F. Supp. 3d 828, 836 (C.D. Cal. 2020)). A plaintiff's mere "loss of use of [its] property" does not trigger coverage. *Id.* As relevant to this analysis, the policies also limit coverage to losses sustained during a necessary suspension of operations during the "period of restoration," which, in relevant part, "[b]egins with the date of *direct physical loss or damage* caused by or resulting from any Covered Cause of Loss at the described premises; and [e]nds … when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality." FAC Ex. A at 29 (emphasis added); FAC Ex. B at 35 (emphasis added).

In concluding that Plaintiffs had stated a claim for coverage notwithstanding these requirements, the Court cited allegations in the FAC regarding the steps that Plaintiff Panach purportedly took in response to the government orders issued because of the pandemic. Relying on those allegations, the Court concluded that all Plaintiffs adequately pled direct physical loss of or damage to property because "they needed to build a new outdoor patio, install social distancing barriers and germ sanitation stations, and remove work stations in order to promote proper social distancing." Order at 6. The plain language and structure of the policies demonstrate that the Order is in error, for at least three reasons.

First, the Order conflicts with the key policy language, which provides that coverage does not apply unless the insured's property has experienced direct physical loss or damage. Defendant respectfully submits that neither an outdoor patio nor social distancing barriers are encompassed by any reasonable definition or construction of "direct physical loss of or damage to" property as that

phrase is readily understood. *E.g.*, *Crescent Plaza Hotel Owner L.P. v. Zurich Am. Ins. Co.*, No. 20 C 3463, --- F. Supp. 3d ---, 2021 WL 633356, at *3 (N.D. Ill. Feb. 18, 2021) ("direct physical loss or damage" requires "*permanent disposition of* the property" due to some other physical change, or "*physical injury* to the property requiring repair") (emphases added). A new patio (and the other modifications) is an improvement and not damage.

Notably, Plaintiffs themselves have not alleged to the contrary. Plaintiff Panach alleges that the "presence of COVID-19" "necessitate[ed] repairs and alterations such as [Panach]'s installation of a new air filtration system in their salon and of a new outdoor patio to accommodate patrons outside." FAC ¶ 57. Panach further alleges that, "in order to *repair* the physical loss or damage" (emphasis added), it "took several measures, including the installation of social distancing barriers, the removal of sixty percent (60%) of their work stations to promote and ensure proper social distancing, and the installation of germ sanitation stations throughout their salon." *Id.* ¶ 60. The FAC thus alleges that Panach's installation of the patio, barriers, and sanitation stations were *repairs* to the property—these modifications were not *themselves* the claimed "direct physical loss of or damage to property." The Order misapprehends these allegations and holds that Panach's alleged modifications trigger coverage because they constitute a "distinct, demonstrable, physical alteration" of property. Order at 6. That error warrants reconsideration.

Second, the Order overlooks the requirement that there be a direct causal nexus between the alleged cause of loss and the property loss or damage in question. The policies provide that Defendant "will pay for *direct* physical loss of or damage to Covered Property at the premises … caused by or resulting from a Covered Cause of Loss." FAC Ex. A at 12 (emphasis added); *see also* FAC Ex. B at 18. But the physical changes that Panach voluntarily made to its property are not the "direct" result

of the alleged cause of loss, *i.e.*, the virus.[1] At most, the virus *indirectly* resulted in these property improvements because it prompted California authorities to issue orders that limited Panach's use of its property, which, in turn, prompted Panach to undertake the alleged modifications. The *direct* cause of the "distinct, demonstrable, physical alteration" to the property was instead conduct that Panach itself voluntarily undertook in response to government orders. Such conduct is not a covered cause of loss within the meaning of the policies, and cannot trigger Business Income or Extra Expense coverage.

Indeed, even if these modifications could satisfy the requirements to trigger coverage (and they cannot), they still are not covered because they fall within the Policies' ordinance or law exclusion.[2] The policies expressly exclude coverage for loss or damage that is directly or indirectly caused by "[t]he enforcement of any ordinance or law regulating the construction, use or repair of any property." FAC Ex. A at 14-15; FAC Ex. B at 20-21. That exclusion applies "regardless of any other cause or event that contributes concurrently or in any sequence to the loss." FAC Ex. A at 14-15; FAC Ex. B at 20-21. The FAC makes clear that the modifications Panach made to its property were for purposes of complying with government orders that restricted the use of property. *See, e.g.*, FAC ¶ 57, 61. Thus, even if an insured's conduct could be considered a "risk[] of direct physical loss," the ordinance or law exclusion would preclude coverage. *See* FAC Ex. A at 13-15; FAC Ex. B at 19-21.

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[1] Nor did Panach undertake those remedial measures to "repair" any property physically damaged by the virus. The virus itself does not amount to "direct physical loss of or damage to" property because, as numerous courts have recognized, the virus does not alter property in any way. *See, e.g., Sandy Point Dental v. Cincinnati Ins. Co.*, 488 F. Supp. 3d 690, 694 (N.D. Ill. 2020) (dismissing complaint because "the coronavirus does not physically alter the appearance, shape, color, structure, or other material dimension of the property"); *O'Brien Sales & Mktg., Inc. v. Transp. Ins. Co.*, No. 20-cv-02951-MMC, 2021 WL 105772, at *4 (N.D. Cal. Jan. 12, 2021) (dismissing complaint against Defendant's affiliate because "'the presence of the virus itself, or of individuals infected with the virus, at [Plaintiff's] business premises or elsewhere [does] not constitute direct physical loss of or damage to property'" (citation omitted)); *see also* Mot., ECF 25 at 12-13 (citing cases); Reply, ECF 31 at 8-9 (citing cases). Defendant does not understand the Court's Order to be contrary to that conclusion.

[2] Defendant did not raise this exclusion in its motion to dismiss because Plaintiffs were not claiming the modifications to Panach's property were physical loss or damage. Given the Court's Order, however, this exclusion is directly on point and bars coverage.

Third, the relevant provisions, taken together, illustrate that the Order turns the policies' requirements to trigger coverage on their head. The policies require that the direct physical loss of or damage to property cause a suspension of the insured's business operations, necessitating a "period of restoration" in which the property can be "repaired, rebuilt or replaced." FAC Ex. A at 29; FAC Ex. B at 35. Plaintiffs do not allege that the remedial measures they purportedly undertook in response to the pandemic *themselves* caused the suspension of their operations or their resulting claimed losses; rather, the FAC makes clear that those measures were the response to any such suspension, brought about by government orders to curb the spread of the virus. Under the policies as they are correctly understood, Panach's own modifications to the property do not trigger coverage and cannot save its claims from dismissal.

Defendant has reviewed hundreds of decisions interpreting identical or nearly identical policy provisions and is aware of *no other court* that has adopted the view that coverage is triggered by physical changes or modifications the insured makes to its premises in response to the government orders issued in response to the COVID-19 pandemic. The few courts that have addressed this novel theory have soundly rejected it. *See, e.g., Rest. Group Mgmt, LLC v. Zurich Am. Ins. Co.*, No. 1:20-CV-4782-TWT, 2021 WL 1937314, at *6 (N.D. Ga. Mar. 16, 2021) (rejecting claim for coverage because "the arrival of COVID-19 did not have a direct effect on the premises, as any changes to the layout or reduction in capacity represents an 'intervening' action, taken by the Plaintiffs in response to the perceived or actual threat of contagion"); *Café La Trova LLC v. Aspen Specialty Ins. Co.*, No. 20-22055-CIV-Altonaga/Goodman, 2021 WL 602585, at *9 (S.D. Fla. Feb. 16, 2021) (insured who installed partitions, moved furniture, used chemicals for cleaning, and discarded spoiled food during the pandemic did not sustain "direct physical loss of or damage to" property); *Travelers Cas. Ins. Co. v. Geragos & Geragos*, No. 2:20-cv-03619-PSG-E, 2021 WL 1659844, at *5 (C.D. Cal. Apr. 27, 2021). ("retrofit[ting]" property in response to civil authority orders does not amount to physical damage).

Because Plaintiffs have not alleged that any covered cause of loss physically altered or degraded their properties, this Court should reconsider its Order and dismiss the FAC with prejudice.[3]

II. IN THE ALTERNATIVE, THE COURT SHOULD CLARIFY ITS ORDER.

"The general purpose of a motion for clarification is to explain or clarify something ambiguous or vague, not to alter or amend." *Resolution Trust Corp. v. KPMG Peat Marwick*, No. 92–1373, 1993 WL 211555, at *2 (E.D. Pa. June 8, 1993). Here, if the Court denies the motion to reconsider, clarification is warranted because the Legacy Plaintiffs have not stated a claim even under the above-discussed interpretation of "direct physical loss of or damage to property." While the Court held that Plaintiffs had adequately alleged "physical alteration or structural degradation of property" because they installed a patio and made other changes, the Legacy Plaintiffs have not alleged that they made any such changes to their properties. The Court's Order is also ambiguous because although Defendant moved to dismiss claims that Plaintiffs asserted under four different policy provisions, the Court's Order does not address the Civil Authority or "Sue and Labor" provisions.

A. The Order Does Not Clarify Whether the Legacy Plaintiffs Have Stated a Claim Under the Court's Interpretation of "Direct Physical Loss of or Damage to" Property.

The Court concluded that Plaintiffs' claims survived because they alleged that, "as a result of the presence of COVID-19, they needed to build a new outdoor patio, install social distancing barriers and germ sanitation stations, and remove work stations in order to promote proper social distancing." Order at 6. But only one of the three Plaintiffs—Panach—alleged that it modified its property in that

[3] Although Defendant did not move to dismiss the FAC on the basis of the microbe exclusion, defendant notes that the Court, in discussing the exclusion, relied on the definition of "microbe" in the liability policy to find that the term "microbe" is ambiguous. Plaintiffs seek coverage under the property policies, not the liability policies. The liability policies contain separate provisions defining the term "microbes," which include a carve-out for "microbes that were transmitted directly from person to person." FAC Ex. A at 96, FAC Ex. B at 104. The microbes definition in Plaintiffs' property policies makes no exception for microbes transmitted from person to person, FAC Ex. A at 97-98; FAC Ex. B at 105-06, and the liability policies' carve out cannot be read into the property policies definition.

way—there are no allegations suggesting that the Legacy Plaintiffs made any such alterations. *See* FAC ¶¶ 57, 60-61. Accordingly, even under the Court's interpretation of the policy language, the Legacy Plaintiffs have not alleged "direct physical loss of or damage to" property. The Order does not distinguish between Panach and the Legacy Plaintiffs. Defendant thus asks the Court to clarify whether the Legacy Plaintiffs have stated a claim for Business Income or Extra Expense coverage.

B. The Court's Order Does Not Address Plaintiffs' Claims Under the Civil Authority Provision.

To state a claim for Civil Authority coverage, Plaintiffs must allege that an action of a civil authority has "prohibit[ed] access to the described premises" "due to physical loss of or damage to" property at *other* locations. FAC Ex. A at 60; FAC Ex. B at 66. As Defendant explained in its Memorandum in Support of its Motion to Dismiss the FAC ("Motion"), Plaintiffs cannot recover under the Civil Authority provision because the relevant government orders were not issued due to "direct physical loss of or damage to" any other property and the orders did not prohibit access to Plaintiffs' premises. ECF 25 at 13-14; *see 10E,* 483 F. Supp. 3d at 836. To state a claim for coverage, Plaintiffs must allege facts suggesting that SARS-CoV-2 has caused a "distinct, demonstrable, physical alteration" to other properties.[4] And even if Plaintiffs had adequately alleged direct physical loss of or damage to other properties caused by SARS-CoV-2, the relevant government orders were not issued in response to such damage—they were issued prophylactically to prevent the person-to-person spread of COVID-19. *See Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 487 F. Supp. 3d 834, 844 (N.D.

[4] The FAC contains no factual allegations of loss or damage to other properties—it contains only a conclusory allegation that "COVID-19 caused direct physical loss or damage to property near the Covered Property in the same manner described above that it caused direct physical loss or damage to the Covered Property." FAC ¶ 91. Plaintiffs do not identify which nearby properties suffered loss or damage or how such properties were allegedly damaged by SARS-CoV-2. *Bradley Hotel Corp. v. Aspen Specialty Ins. Co.*, 20 C 4249, --- F. Supp. 3d ---, 2020 WL 7889047, at *4 (N.D. Ill. Dec. 22, 2020)(dismissing civil authority claim because, *inter alia*, plaintiff did not allege "damage to any property in their vicinity"). Nor could Plaintiffs satisfy this requirement, because SARS-CoV-2 does not damage property. *See supra* at 5 n.1.

Cal. 2020) (denying civil authority coverage for COVID-19-related losses because government orders "were preventative" and there were no "allegations of damage to adjacent property"); *Fink v. Hanover Ins. Grp., Inc.,* No. 20-cv-03907-JST, 2021 WL 647374, at *3 (N.D. Cal. Jan. 25, 2021) (civil authority coverage unavailable because "the complaint does not establish the requisite causal link between prior property damage and the government's closure order"). Finally, Plaintiffs fail to allege facts suggesting that "access to the premises [was] *completely* prohibited" under applicable orders. *S. Hosp., Inc. v. Zurich Am. Ins. Co.*, 393 F.3d 1137, 1140 (10th Cir. 2004) (emphasis added); *see also, e.g.*, *Pappy's Barber Shops, Inc. v. Farmers Grp., Inc.*, 487 F. Supp. 3d 937, 945 (S.D. Cal. 2020) ("[T]he civil authority coverage provision only provides coverage to the extent that access to Plaintiff[s'] physical premises is prohibited, and not if Plaintiff[s] are simply prohibited from operating their business."); *Sandy Point Dental*, 488 F. Supp. 3d at 694 (no civil authority coverage where state's "coronavirus orders … limited plaintiff's operations" but did not "prohibit[] access to plaintiff's premises").

In its Order, the Court did not address whether Plaintiffs have alleged any of these requirements for Civil Authority coverage. Defendant thus seeks clarification from the Court on whether Plaintiffs have stated claims under the Civil Authority provision (Counts II and VI).

C. The Court's Order Does Not Address Plaintiffs' Claims Under the "Sue and Labor" Provision.

The policies' "Sue and Labor" provision is not a grant of coverage. It states that "in the event of loss or damage to Covered Property," the insured must "[t]ake all reasonable steps to protect the Covered Property from further damage, and keep a record of [its] expenses necessary to protect the Covered Property." FAC Ex. A at 20; FAC Ex. B at 26. In its Order, the Court did not address Defendant's argument that the "Sue and Labor" provision does not provide coverage, but rather imposes a duty on the insured to protect the property. Mot., ECF 25 at 3; *see Promotional Headwear Int'l v. Cincinnati Ins. Co.*, 504 F. Supp. 3d 1191, 1206 (D. Kan. 2020) (claims under "Sue and Labor"

provision dismissed because it is "plainly not a coverage provision," rather, "it provides that the insured has certain duties in the event of loss or damage").

Even if the "Sue and Labor" provision did offer coverage (which it does not), the Court did not address whether Plaintiffs had alleged the elements of such a claim. Therefore, Defendant seeks clarification from the Court on whether Plaintiffs have stated claims under the "Sue and Labor" provision.

CONCLUSION

For the foregoing reasons, Defendant respectfully requests that this Court reconsider its Order and dismiss the FAC with prejudice because Plaintiffs have not alleged the requisite "direct physical loss of or damage to" their properties. In the alternative, Defendant respectfully requests that the Court clarify whether its Order: (1) dismisses the Business Income and Extra Expense claims asserted by the Legacy Plaintiffs; (2) dismisses or sustains the Plaintiffs' Civil Authority claims; and (3) dismisses or sustains Plaintiffs' "Sue and Labor" claims.

Dated: June 28, 2021

Respectfully submitted,

/s/*Brent R. Austin*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 28, 2021, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a Notice of Electronic Filing to all counsel of record that are registered with the Court's CM/ECF system.

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