UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JS-6

CIVIL MINUTES—GENERAL

Case No. CV 20-10499-MWF (JPRx) **Date: July 2, 2021**
Title: MGA Entertainment, Inc. v. Affiliated FM Insurance Company

Present: The Honorable MICHAEL W. FITZGERALD, U.S. District Judge

Deputy Clerk:	Court Reporter:
Rita Sanchez	Not Reported
Attorneys Present for Plaintiff:	**Attorneys Present for Defendant:**
None Present	None Present

Proceedings (In Chambers): ORDER GRANTING MOTION FOR JUDGMENT ON THE PLEADINGS [15]

Before the Court is Defendant Affiliated FM Insurance Company's ("AFM") Motion for Judgment on the Pleadings (the "Motion"), filed on April 23, 2021. (Docket No. 15). Plaintiff MGA Entertainment, Inc. ("MGA") filed an opposition on May 28, 2021. (Docket No. 19). AFM filed a reply on June 14, 2021. (Docket No. 20).

The Court has read and considered the papers filed in connection with the Motion and held a telephonic hearing on June 28, 2021, pursuant to General Order 21-09 arising from the COVID-19 pandemic.

For the reasons set forth below, the Motion is **GRANTED**. Plaintiff fails to state a claim upon which relief can be granted because, under the plain meaning of the Policy's terms, Business Interruption Coverage is triggered only when Plaintiff's property suffers "a direct physical loss or damage of the type insured." Plaintiff alleges that governmental COVID-19 restrictions interfered with the use or value of its property — not that the restrictions caused direct physical loss or damage.

I. BACKGROUND

Plaintiff commenced this action in Los Angeles County Superior Court on October 16, 2020. (Complaint (Docket No. 1-1)). AFM removed this action on November 17, 2020. (Notice of Removal (Docket No. 1)).

The Complaint contains the following allegations, which the Court takes as true and construes in the light most favorable to Plaintiff. *See Lyon v. Chase Bank USA, N.A.*, 656 F.3d 877, 883 (9th Cir. 2011) ("A judgment on the pleadings is properly granted when, taking all the allegations in the pleadings as true, a party is entitled to judgment as a matter of law.") (citation omitted).

Plaintiff is a manufacturer of children's toys, with 65% of its retailers' orders coming from the United States. (Complaint ¶¶ 3-5, 52-53). Plaintiff's toys and component parts are manufactured in China, Poland, and Ohio. (*Id*. ¶¶ 4, 54). Beginning in January 2020, the United States and China issued governmental orders restricting businesses and limiting shipments due to COVID-19, which disrupted MGA's supply chain, halted manufacturing, and adversely impacted its operations. (*Id*. ¶¶ 10, 59, 66-69, 75-76). In particular, MGA was unable to timely manufacture and deliver its products, which resulted in increased expenses and lost income when retailers cancelled and/or reduced their toy orders. (*Id*. ¶¶ 11, 60). To mitigate its losses, MGA incurred extra expenses for shipping, distribution, marketing, cleaning and sanitation, and personal protective equipment. (*Id*. ¶ 60).

Plaintiff purchased an "All Risk" commercial property and general liability policy from AFM with coverage dates from August 1, 2019, to August 1, 2020 (the "Policy"). (*Id.* ¶ 6).

On April 2, 2020, MGA made a claim under the Policy, contending that the governmental orders adversely affected its business and caused business-interruption losses as covered by the Policy. (*Id*. ¶¶ 80, 85). AMF denied Plaintiff's claim except as to the Communicable Disease Coverage, for the actual presence of COVID-19 positive individuals in Plaintiff's California and Ohio headquarters. (*Id*. ¶¶ 16, 95).

Plaintiff now brings claims for breach of contract and breach of the implied covenant of good faith and fair dealing. (*See generally id.*).

II. DISCUSSION

AMF argues that Plaintiff has failed to allege a basis for Business Interruption coverage under the Policy because the Policy covers only Business Interruption losses that are the "direct result of physical loss or damage." (Motion at 8).

To state a breach of contract claim, Plaintiff must allege "(1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff." *Tribeca Companies, LLC v. First American Title Ins. Co.*, 239 Cal. App. 4th 1088, 1109, 192 Cal. Rptr. 3d 354 (2015) (citing *Bushell v. JPMorgan Chase Bank, N.A.*, 220 Cal. App. 4th 915, 921, 163 Cal. Rptr. 3d 539 (2013)). "[A]bsent an actual withholding of benefits due, there is no breach of contract." *Love v. Fire Ins. Exch.*, 221 Cal. App. 3d 1136, 1151 n.10, 271 Cal. Rptr. 246 (1990) (quotation omitted).

Under California law, the terms of an insurance policy must be given their "ordinary and popular sense," and if the policy language is "clear and explicit," it governs. *Palmer v. Truck Ins. Exch.*, 21 Cal. 4th 1109, 1115-17, 90 Cal. Rptr. 2d 647 (1999) (quotation marks omitted); Cal. Civ. Code § 1638 ("The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity.").

Here, the Policy contains a Business Interruption Coverage clause, which states:

> This Policy insures Business Interruption loss, as provided in the Business Interruption Coverage, as a direct result of physical loss or damage of the type insured:
>
> 1. To property as described elsewhere in this Policy and not otherwise excluded by this Policy;
> 2. Used by the Insured;

3. While at a **location** or while in transit as provided by this Policy; and
4. During the Period of Liability as described elsewhere in this policy.

(Complaint ¶ 29) (emphasis in original).

Plaintiff contends that the ordinary meaning of "physical loss" encompasses a business owner's loss of the full range of rights and advantages of using or accessing its business property because of COVID-related government restrictions. (Opposition at 13). According to Plaintiff, the Policy's Business Interruption Coverage provision includes the deprivation and closure of its manufacturing facilities and distribution centers, and impairment of its supply chain, resulting from the governmental orders. (*Id.*).

"Under California law, losses from inability to use property do not amount to 'direct physical loss of or damage to property' within the ordinary and popular meaning of that phrase." *10E, LLC v. Travelers Indemnity Co. of Connecticut*, 483 F. Supp. 3d 828, 835-36 (C.D. Cal. 2020). "Physical loss or damage occurs only when property undergoes a 'distinct, demonstrable, physical alteration.'" *Id.* (quoting *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal. App. 4th 766, 779, 115 Cal. Rptr. 3d 27 (2010)). "'Detrimental economic impact' does not suffice." *Id.* (quoting *MRI Healthcare Ctr.*, 187 Cal. App. 4th at 779).

In *10E, LLC*, the plaintiff, a restaurant, alleged that it suffered a physical loss triggering business interruption coverage under its insurance policy after a government order restricting in-person dining because of COVID-19 interfered with the use or value of its property. 483 F. Supp. 3d at 835-36. The court granted the insurer's motion to dismiss, determining that the plaintiff was not entitled to coverage under the plain language of the policy, which covered business operations losses "caused by direct physical loss of or damage to property at the described premises." *Id.* at 832, 836. The court reasoned that "[a] n insured cannot recover by attempting to artfully plead temporary impairment to economically valuable use of property as physical loss or damage." *Id.* at 836.

The Court is persuaded by the reasoning of *10E, LLC*. Because Plaintiff has alleged no facts showing that its property underwent a "distinct, demonstrable, physical alteration," *MRI Healthcare Ctr.*, 187 Cal. App. 4th at 779, Plaintiff has failed to plausibly demonstrate its entitlement to recover under the Policy's Business Interruption Coverage provision.

At the hearing, Plaintiff acknowledged that there would be no basis for granting leave to amend if the Motion were granted, given the nature of Plaintiff's claims. Accordingly, the Motion is **GRANTED *without leave to amend*** and the action is **DISMISSED**.

This Order shall constitute notice of entry of judgment pursuant to Federal Rule of Civil Procedure 58. Pursuant to Local Rule 58-6, the Court **ORDERS** the Clerk to treat this order, and its entry on the docket, as an entry of judgment.

IT IS SO ORDERED.