UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF NEW YORK

SALVATORE'S ITALIAN GARDENS, INC., GARDEN PLACE, INC. and THE DELAVAN HOTEL, LLC, Plaintiffs, v. HARTFORD FIRE INSURANCE COMPANY, Defendant.	)	Case No. 1:20-cv-659

ORDER ON DEFENDANT'S MOTION TO DISMISS
(Doc. 21)

Plaintiffs Salvatore's Italian Gardens, Inc., Garden Place, Inc., and The Delavan Hotel, LLC operate a restaurant and two hotels in Depew, New York. In 2019, Plaintiffs and Defendant Hartford Fire Insurance Company ("Hartford Fire") entered into a contract for commercial property insurance that includes "Civil Authority" coverage. In March 2020, in response to the coronavirus pandemic, New York Governor Andrew Cuomo issued several executive orders restricting normal business operations and gatherings in the state; Plaintiffs allege that they suffered business losses due to these orders. Plaintiffs filed a claim for these losses under their Civil Authority coverage, which Hartford Fire denied.

In June 2020, Plaintiffs sued Hartford Fire, seeking a declaration that the New York State executive orders trigger coverage under the Civil Authority and business income coverages of Plaintiffs' insurance policy. (*See* Doc. 1.) Defendant has filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6). (Doc. 21.) Plaintiffs filed a brief in opposition (Doc. 35), to which Defendant filed a reply (Doc. 38).

Factual Background

The Complaint alleges the following facts.

A. Plaintiffs' Insurance Policy

In August 2019, Plaintiffs purchased a Special Multi-Flex Business Insurance Policy from Hartford Fire. The policy provided coverage from August 1, 2019 to August 1, 2020 for three properties: the Delavan Hotel, Salvatore's, and the Garden Place Hotel. (Doc. 1 ¶¶ 12, 16.)[1] The policy includes "Special Business Income" coverage, under which Hartford Fire promises to pay, up to the policy limit,

> for the actual loss of Business Income you sustain and the actual, necessary and reasonable Extra Expense you incur due to the necessary interruption of your business operations during the period of restoration due to direct physical loss of or direct physical damage to property caused by or resulting from a Covered Cause of Loss at "Scheduled Premises."

(Doc. 21-3 at 69.) The policy also includes "Civil Authority" coverage for

> the actual loss of Business Income you sustain and the actual, necessary and reasonable Extra Expense you incur when access to your "Scheduled Premises" is specifically prohibited by order of a civil authority as a direct result of a Covered Cause of Loss to property in the immediate area of your "Scheduled Premises."

(Doc. 21-3 at 55.)

The policy's property choice coverage form defines "Covered Cause of Loss" as "direct physical loss or direct physical damage that occurs during the Policy Period and in the Coverage Territory unless the loss or damage is excluded in this policy." (Doc. 21-3 at 76; *see also id.* at 65, 70.) The property choice coverage form identifies several excluded causes of loss. (*Id.*

---

[1] Plaintiffs did not attach the policy to the Complaint but refer to it extensively throughout the Complaint. Defendant included a copy of the policy with its motion to dismiss. (Doc. 21-3.) Because the Complaint references the contract extensively throughout and Plaintiffs' claims rely heavily on the policy's terms and effect, the court may consider the entire policy in ruling on Defendant's motion. *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152–53 (2d Cir. 2002).

at 76–84.) In addition, a policy endorsement titled "New York – Exclusion of Loss Due to Virus or Bacteria" excludes coverage 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.* at 46.)

B. Effects of the Coronavirus Pandemic on Plaintiffs' Businesses

Beginning in early March 2020, New York Governor Andrew Cuomo issued several executive orders in response to the burgeoning coronavirus pandemic. These "Civil Authority" orders include:

- A Disaster Emergency declaration for the entire state, issued on March 7, 2020;
- Restrictions on large gatherings, issued on March 12, 2020;
- A stay-at-home order applicable to all non-essential orders, issued on March 20, 2020 and subsequently extended; and
- An order mandating the closure of all "non-essential businesses," issued on March 22, 2020.

(Doc. 1 ¶¶ 30–31.)

Plaintiffs allege that these orders "significantly interrupted" their businesses. (*Id.* ¶ 39.) Although the Delavan Hotel did not close, its business operations were "significantly restricted" due to the Civil Authority orders. (*Id.* ¶ 43.) Salvatore's "shut its doors to customers" on March 13, 2020 and remained closed through at least June 2, 2020. (*Id.* ¶ 44.) The restaurant furloughed 222 payroll employees. (*Id.*) The Garden Place Hotel also "shut its doors to customers" on March 16, 2020, and furloughed 78 payroll employees. (*Id.* ¶ 45.)

Plaintiffs allege that they suffered losses as a direct consequence of the Civil Authority orders. (*Id.* ¶ 37.) However, Defendant denied the claim they submitted under their Civil Authority coverage. (*Id.* ¶¶ 37–38.)

The Complaint requests only declaratory relief. Specifically,

> 51. Plaintiffs seek a Declaratory Judgement to determine whether the Civil Authority Orders "prohibit[] access to the premises" in whole or in part of Plaintiffs' Covered Properties as set forth in the Policy's Civil Authority provision.
>
> 52. Plaintiffs further seek a Declaratory Judgement to affirm that the Civil Authority Orders trigger coverage.
>
> 53. Plaintiffs further seek a Declaratory Judgment to affirm that the Policy provides coverage to Plaintiffs for any current and future Civil Authority closures of businesses in Erie County and New York State due to physical loss or damage from the Coronavirus and the policy provides business income coverage in the event that Coronavirus has caused a loss or damage at the Covered Properties.

(Doc. 1 at 11.)

Analysis

I. Legal Standard

To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), 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) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Although the court accepts all plausible allegations in the complaint as true and draws all reasonable inferences in favor of the plaintiff, *Lanier v. Bats Exch., Inc.*, 838 F.3d 139, 150 (2d Cir. 2016), "[t]hreadbare recitals of elements of a cause of action, supported by mere conclusory statements, do not suffice." *Empire Merchants, LLC v. Reliable Churchill LLLP*, 902 F.3d 132, 139 (2d Cir. 2018) (quoting *Iqbal*, 556 U.S. at 678). The court will grant a motion to dismiss where "it is clear from the face of the complaint, and matters of which the court may take judicial notice, that the plaintiff's claims are barred as a matter of law." *Parkcentral Glob. Hub Ltd. v. Porsche Auto. Holdings SE*, 763 F.3d 198, 208–09 (2d Cir. 2014) (per curiam) (quoting *Conopco, Inc. v. Roll Int'l*, 231 F.3d 82, 86 (2d Cir. 2000)).

II. Plaintiffs' Claim

The Declaratory Judgment Act, 28 U.S.C. § 2201(a), authorizes a court, "[i]n a case of actual controversy within its jurisdiction," to "declare the rights and other legal relations of any interested party seeking such declaration." The Act does not create subject matter jurisdiction but simply creates a federal remedy. *Ferretti v. Dulles*, 246 F.2d 544, 547 (2d Cir. 1957). "Before a court may issue any declaratory order under the Declaratory Judgment Act, it must satisfy itself that the matter presents an actual case or controversy." *Firemen's Ins. Co. of Washington, D.C. v. Ace Am. Ins. Co.*, 465 F. Supp. 3d 254, 261 (W.D.N.Y. 2020) (cleaned up), *aff'd sub nom. Firemen's Ins. Co. of Washington, D.C. v. Story*, No. 20-2220-CV, 2021 WL 2155037 (2d Cir. May 27, 2021).

Here, Plaintiffs seek a declaration that the New York Civil Authority orders trigger coverage under the Civil Authority provision of their insurance policy. An actual controversy exists between the parties regarding whether Hartford Fire breached Plaintiffs' contractual rights when it denied their claim for coronavirus-related business losses. There is complete diversity between Plaintiffs and Defendant, and Plaintiffs allege losses in excess of $150,000. Consequently, the court has subject matter jurisdiction over Plaintiffs' suit for declaratory relief.

The parties agree that New York law governs this contract dispute. (Doc. 21-2 at 11; Doc. 35 at 14.) "Under New York law, insurance policies are interpreted according to general rules of contract interpretation." *Olin Corp. v. Am. Home Assur. Co.*, 704 F.3d 89, 98 (2d Cir. 2012). Under this standard, "the plain language of an insurance policy, read in light of common speech and the reasonable expectations of a businessperson, will govern if the language is unambiguous." *VAM Check Cashing Corp. v. Fed. Ins. Co.*, 699 F.3d 727, 729 (2d Cir. 2012) (cleaned up) (citing *Belt Painting Corp. v. TIG Ins. Co.*, 795 N.E.2d 15, 17 (N.Y. 2003), and

Fieldston Prop. Owners Ass'n, Inc. v. Hermitage Ins. Co., 945 N.E.2d 1013, 1017 (N.Y. 2011)). In New York, an insured bears the burden of showing that its insurance policy covers a claimed loss. *Roundabout Theatre Co. v. Cont'l Cas. Co.*, 751 N.Y.S. 2d 4, 7 (N.Y. App. Div. 2002); *MBIA Inc. v. Fed. Ins. Co.*, 652 F.3d 152, 158 (2d Cir. 2011).

Plaintiffs argue that "the Policy contains specific coverage for any mandated suspension of business operation at the insured's location by order of government authority." (Doc. 35 at 11.) "Put simply," Plaintiffs argue, "in the event of a mandatory closure by order of government where access to the premises is prohibited *to any extent*, . . . Defendant is to provide coverage for Plaintiff's business income losses." (*Id.* at 12.) However, Plaintiffs' Civil Authority Coverage—which Plaintiffs quote alongside this argument in their brief—expressly restricts coverage to situations where "access to [Plaintiffs'] 'Scheduled Premises' is specifically prohibited by order of a civil authority as a direct result of a Covered Cause of Loss to property in the immediate area of [the] 'Scheduled Premises.'" (Doc. 21-3 at 55.) The policy further limits the definition of "Covered Cause of Loss" to situations involving "direct physical loss or direct physical damage" to property. (Doc. 21-3 at 76.)

Based on the plain language of the policy's text, the Civil Authority coverage is more limited than Plaintiffs imply. Under the policy's definitions, the coverage applies only where a government order issued in response to direct physical loss or damage in the vicinity of Plaintiffs' premises prevents Plaintiffs' access to those premises. As described below, the Complaint plausibly alleges neither that the New York orders were issued in response to direct physical loss or damage in the vicinity of Plaintiffs' premises nor that those orders prevented Plaintiffs from accessing those premises.

The terms of Plaintiffs' insurance policy do not define "direct physical loss or direct physical damage." Over the past year, however, several courts applying New York law have considered whether the presence of the coronavirus constitutes "direct physical loss or damage" to property, and uniformly have answered this question in the negative. *See Buffalo Xerographix, Inc. v. Sentinel Ins. Co., Ltd.*, No. 1:20-CV-520, 2021 WL 2471315, at *5 n.3 (W.D.N.Y. June 16, 2021) (citing cases); *Kim-Chee LLC v. Philadelphia Indem. Ins. Co.*, No. 1:20-CV-1136, 2021 WL 1600831, at *3 (W.D.N.Y. Apr. 23, 2021) (citing cases). Applying *Roundabout Theatre*, 751 N.Y.S. 2d at 7, these courts have concluded that "direct physical loss or damage" requires physical alteration of property. *See, e.g.*, *Buffalo Xerographix*, 2021 WL 2471315, at *4. To be eligible for Civil Authority coverage, Plaintiffs must demonstrate that property in the vicinity of their premises was physically altered due to the coronavirus, that the New York civil authority orders were issued in response to such physical loss or damage, and that the orders "specifically prohibited" Plaintiffs' access to their premises. *See Off. Sol. Grp., LLC v. Nat'l Fire Ins. Co. of Hartford*, No. 1:20-CV-4736-GHW, 2021 WL 2403088, at *7 (S.D.N.Y. June 11, 2021) (interpreting a similar civil authority coverage to require this showing).

The Complaint's factual allegations fall short of meeting this burden. The Complaint alleges that Governor Cuomo issued several orders restricting movement and gathering in the state of New York, including an order directing all non-essential businesses to close. (Doc. 1 ¶¶ 30–33.) Hotels and restaurants (for take-out or delivery service) were deemed essential. (*Id.*) The Complaint asserts that these orders "evidence an awareness on the part of both state and local governments that COVID-19 causes damage to property." (*Id.* ¶ 36.) The Complaint alleges that the coronavirus "remains stable and transmittable in aerosols for up to three hours, up to four hours on coper, up to 24 hours on cardboard, and up to two to three days on plastic and stainless

steel" (*id.* ¶ 26), and that "contamination of the Covered Property would be a direct physical loss requiring remediation to clean the surfaces of the salon [sic]" (*id.* ¶ 25).

These allegations are insufficient to state a claim for breach of Plaintiffs' Civil Authority coverage for at least three reasons. First, the Complaint lacks nonconclusory allegations regarding physical loss or damage to neighboring property. Second, over the past year, courts interpreting similar Civil Authority coverage provisions have uniformly concluded that the New York executive orders were issued not in response to specific instances of physical loss or damage to property but rather in response to the spread of the coronavirus. *See Off. Sol. Grp., LLC*, 2021 WL 2403088, at *8 (citing cases). Third, the Complaint does not allege that the executive orders "specifically prohibited" Plaintiffs' access to their premises. Because Plaintiffs have not plausibly alleged their entitlement to coverage under their policy's Civil Authority coverage, Defendant is entitled to dismissal of this claim.

For similar reasons, Plaintiffs have not demonstrated their entitlement to coverage under their policy's "Special Business Income" coverage, which limits covered losses to those caused by "direct physical loss or direct physical damage" to insured property. Apart from alleging that the coronavirus itself is deadly and can remain on surfaces for extended periods of time, the Complaint does not identify direct physical loss or damage to any of Plaintiffs' properties. Although Plaintiffs closed their premises' doors to customers, the Complaint documents Plaintiffs' intent to reopen those premises pursuant to New York reopening protocols. (Doc. 1 ¶¶ 44–45.) The Complaint does not identify physical alterations to the premises due to the coronavirus. To the extent the Complaint asserts a claim under Plaintiffs' "Special Business Income" coverage (*see id.* ¶ 53), those claims must also be dismissed.

Conclusion

Defendant Hartford Fire Insurance Company's motion to dismiss (Doc. 21) is GRANTED.

Dated this 7th day of July, 2021.

Geoffrey W. Crawford, Judge
United States District Court