

**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----X
SOUNDVIEW CINEMAS INC.,

Plaintiff,

-against-

**GREAT AMERICAN INSURANCE GROUP,
GREAT AMERICAN INSURANCE COMPANY
OF NEW YORK, JIMCOR AGENCY INC., FIVE
STAR COVERAGE CORP. and WILKINSON &
KRAUSE,**

Defendants.
-----X

TRIAL/IAS PART: 6

NASSAU COUNTY

**Index No: 605985-20
Motion Seq. Nos. 1 and 2
Submission Date: 12/15/20**

**Motion Seq. No. 4
Submission Date: 12/15/20**

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Presently pending before the Court are the motions to dismiss pursuant to CPLR § 3211(a)(1) and (a)(7) filed by 1) defendants Five Star Coverage Corp. (“Five Star”) and Wilkinson & Krause Agency Inc. (“Wilkinson” and collectively, the “Insurance Brokers”), 2) defendants Great American Insurance Group (“GAIG”) and Great American Insurance Company

of New York (“GANY” and collectively, “Great American”), and 4) defendant Jimcor, Inc. (“Jimcor” and, collectively with Five Star, Wilkinson, and Great American, “Defendants”). For the following reasons, Defendants’ motions are granted.

BACKGROUND

A. The Parties’ History

Plaintiff Soundview Cinemas, Inc. (“Plaintiff” or “Soundview”), a corporation organized under New York law with a principal place of business in Port Washington, New York, operates a movie theatre. GAIG and GANY are foreign corporations authorized to do business in New York. Jimcor is a foreign corporation organized under New Jersey law with a principal place of business in Montvale, New Jersey and a place of business in Plainview, New York. Jimcor is a managing general agent and an agent of Great American. Five Star and Wilkinson are domestic business corporations with principal places of business in Blue Point, New York.

On or about April 10, 2019, Soundview was issued a commercial insurance policy from GAIG, underwritten by GANY (the “Policy”). Soundview paid \$4,601 as a deposit to Wilkinson and the premium balance of \$11,062.98. The Policy had dates of coverage from April 10, 2019 to April 10, 2020, and covered the Port Washington, New York premises where Plaintiff operated its movie theatre (“Premises”). The Policy had limits of \$1.15 million for Business Personal Property and \$600,000 for Business Income and Extra Expense. In addition to these limits, the Policy had supplemental coverage for various enumerated items. The Policy was issued through Jimcor as agent of Great American, Five Star, and Wilkinson.

From 2013 through 2019, Five Star performed a wide range of professional insurance services for Soundview. In consideration of Five Star’s services and actions on Soundview’s behalf, Soundview purchased considerable sums of insurance, which generated substantial premium dollars and commissions and income for Five Star. At all relevant times, Soundview reasonably relied upon Five Star’s purported skill and knowledge of business insurance, evaluation of Soundview’s insurance needs, and recommendations as to the type and amount of coverage necessary for Soundview’s protections.

Without Soundview’s knowledge or consent, Five Star delegated its duty to provide Soundview with an appropriate insurance policy to Jimcor and Wilkinson. At the request of Five Star and without knowing or evaluating Soundview’s insurance requirements or consulting

Soundview, Jimcor – a managing general agent for Great American — issued the Policy to Soundview as agent for the Great American.

On or about March 7, 2020, the Governor of New York issued Executive Order 202 declaring a disaster emergency for the entire State of New York. On or about March 16, 2020, Soundview was closed for business pursuant to New York State Executive Order 202.3. To date, Soundview remains closed pursuant to New York State Executive Orders. Soundview suffered a loss under the terms of the Policy due to the forced closure. Pursuant to a letter dated May 11, 2020 from Great American to Soundview, Soundview suffered a loss and the date of loss is March 16, 2020, during the term of the Policy. To date, Great American has not made any payment to Soundview under the terms of the Policy.

The Complaint asserts nine causes of action. These claims are unlabeled and Plaintiff's opposition papers do not clarify the precise nature of each claim. The Court construes the causes of action as follows: 1) against Great American for breach of the Policy, 2) against Five Star for negligence, 3) against Wilkinson for negligence, 4) against Five Star for failure to properly procure insurance, 5) against Wilkinson for failure to properly procure insurance, 6) against Jimcor and Great American for Five Star and/or Wilkinson's negligence, 7) against Jimcor and Great American for Five Star and/or Wilkinson's failure to properly procure insurance, 8) against Five Star for breach of fiduciary duty, and 9) against Wilkinson for breach of fiduciary duty.

1. The Policy

With respect to loss of business income, the Policy, *see* Buckley Affm. at Exh. 4, provides, in relevant part:

We will pay for the actual loss of Business Income you sustain 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 locations 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[.]

See id. at GAIC000067.

The Policy also provides coverage for Civil Authority:

We will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the location described in the Declarations due to direct physical loss of or damage to

property, other than at the described location, caused by or resulting from any Covered Cause of Loss, provided that both of the following apply:

- (a) access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described location is within that area but is not more than five miles from the damaged property; and
- (b) the action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

Id. at GAIC000069.

The Policy contains an endorsement entitled “New York – Exclusion of Loss Due to Virus or Bacteria,” (“Virus Exclusion”) which states:

- A. The exclusion set forth in paragraph B applies to all coverage under all forms and endorsements that comprise this Coverage Part, including but not limited to forms or endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority.
- B. We will not pay 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 GAIC000099.

2. Jordan Desner Affidavit

Jordan Desner affirms that he is the principal of Soundview.¹ Desner purchased the Policy, as well as many others for his other business, from Five Star and Wilkinson (collectively, “Insurance Brokers”). Desner has purchased insurance policies from Five Star since 2007. In total, he has purchased at least twenty insurance policies from the Insurance Brokers. The relationship was such that Desner would contact Five Star for all of his professional insurance needs and insurance questions.

¹ Mr. Desner submitted three affidavits in opposition to the respective motions. The Court summarizes the affidavits in opposition to the motions filed by the Insurance Brokers and Great American, which are virtually identical. The affidavit in opposition to Jimcor’s motion echoes Mr. Desner’s prior affidavits and will not be summarized by the Court.

Desner's main contact at Five Star was Stuart Schuster, who would answer all of Desner's insurance questions and advise him regarding the type and amount of insurance his businesses required. After purchasing a policy, Desner's payments were paid to Wilkinson at the same address as Five Star. When Desner asked Schuster about this, Schuster advised that Five Star and Wilkinson are one and the same with common ownership.

During the fourteen years he worked with the Insurance Brokers, Desner developed an extremely close relationship with them and, specifically, Schuster. Desner came to rely upon Schuster and the Insurance Brokers as experts in insurance that would only sell him the insurance he needed in the amount and type he needed. Schuster became a friend as well as a trusted advisor. Desner and Schuster went out for lunch to discuss insurance. Desner trusted Schuster so much that they discussed opening a business together.

Each time he renewed his insurance, Desner would ask if he had the proper coverage and if he was sufficiently insured for both known and unknown business risks. The Insurance Brokers and Schuster, specifically, repeatedly assured him that he had nothing to worry about. Desner was often told that the Insurance Brokers represented only the best insurance companies, including Great American. Desner was also told on multiple occasions that he would not have any problems if he needed to make use of any of the insurance policies purchased through the Insurance Brokers. Desner was led to believe that he had purchased insurance for Soundview if it had to close due to a fire, and insurance to cover the property if any property was damaged.

B. The Parties' Positions

1. Five Star and Wilkinson's Motion

The Insurance Brokers argue that their duty to Soundview was to obtain the requested coverage or to advise Soundview that they were unable to obtain coverage. The documentary evidence conclusively establishes that the Insurance Brokers bound Soundview's fifth renewal of the Business Income Policy. The Complaint is devoid of any allegation that Soundview made a specific request for any other insurance coverage that was not obtained by the Insurance Brokers, and Plaintiff fails to identify the alleged coverage Soundview claims it wanted. Thus, the Insurance Brokers were not negligent, as a matter of law. Moreover, there was no special relationship between Plaintiff and the Insurance Brokers. The Complaint fails to allege anything beyond an ordinary commercial relationship between a business and an insurance broker.

Indeed, the Insurance Brokers' insurance procurement services took place over the course of six years, an insufficient amount of time to create a special relationship.

The Insurance Brokers contend that even if Plaintiff could establish the existence of a duty, the Complaint fails to allege any facts relating to proximate causation. Plaintiff's inability to recoup its COVID-19 losses from its insurer has nothing to do with anything the Insurance Brokers did or did not do for Plaintiff. Plaintiff does not even allege what business income policy existed that would have afforded coverage for a business interruption claim arising from something other than a direct physical loss of or damage to property. Plaintiff also does not allege that any carrier has taken the position that a client's business income claim arising from the COVID-19 pandemic is a covered peril. Accordingly, Plaintiff fails to plead that it made a request to the Insurance Brokers for coverage that actually even existed. Further, Plaintiff cannot look to the Insurance Brokers when it received and reviewed the Policy. Plaintiff was on notice of the amount, type, and extent of coverage obtained and did not object to the insurance coverage obtained within the Policy.

Plaintiff argues that the Virus Exclusion does not modify the entire Policy and, thus, the documentary evidence does not resolve all factual issues as a matter of law or conclusively dispose of Plaintiff's claim. Additionally, Mr. Desner has a special relationship with Five Star, Wilkinson, and Mr. Schuster based on their long-term relationship extending over fourteen years and at least twenty insurance policies. Moreover, Mr. Schuster told Mr. Desner that Five Star and/or Wilkinson represent Great American, as well as many other insurance companies, and created reliance on the part of Mr. Desner in their apparent agency. The Insurance Brokers are liable to Plaintiff based on their special relationship with Mr. Desner and the representations made to Mr. Desner.

On reply, the Insurance Brokers contend that Plaintiff has not refuted that the Insurance Brokers procured the requested insurance coverage. Plaintiff asserts that it asked the Insurance Brokers if it had proper coverage and was sufficiently insured for both known and unknown business risks, however, such a general inquiry concerning the type and amount of coverage is insufficient to establish a viable claim against an insurance broker. Additionally, Mr. Desner's affidavit does not create a special relationship between Plaintiff and the Insurance Brokers. While Plaintiff argues that a business relationship existed for approximately fourteen years, Soundview was not formed until 2012. Even if Plaintiff's recitation of the length of the business

relationship is accepted as true, an alleged long-standing relationship does not constitute a special relationship. Plaintiff also fails to address proximate cause or identify alternate insurance that was available to cover a COVID-19 peril. Plaintiff further does not refute that it received and had an opportunity to review the subject Policy.

2. Great American's Motion

Great American argues that Plaintiff's first claim for breach of contract fails because the Policy does not provide coverage for the closure of Soundview's theater. Plaintiff does not allege direct physical damage to any property and only pleads that it was forced to close due to the Executive Orders that closed non-essential businesses to slow the community spread of COVID-19. New York law rejects the notion that economic loss unaccompanied by physical damage to property triggers coverage for loss of business income. Moreover, the Policy's coverage for business income loss is limited to that incurred during the period of restoration. It would be senseless to tie an end date for coverage to the completion of repair or resumption of operations at a new location if no amount of repair would result in the end of the claimed losses incurred as a result of the government's orders.

Great American contends that Plaintiff is not entitled to Extra Expense Coverage because that coverage also requires direct physical loss of or damage to property. Additionally, the Policy limits Extra Expense coverage to necessary expenses incurred by the insured during the period of restoration. Here, there is no period of restoration. The Policy's Civil Authority Additional Coverage also does not apply because it, too, requires direct physical loss of or damage to property. Moreover, Soundview was not prohibited from accessing its property at any time, as Executive Order 202.3 did not prohibit owners or employees from entering the Premises. Even if access was prohibited, it was not due to direct physical loss or damage to nearby property. Both the Policy and the law require a causal connection between the alleged property damage to a nearby property and the civil authority's action for coverage to be invoked.

Great American argues that the Virus Exclusion clearly and unambiguously bars coverage. The Executive Orders were issued to limit the spread of COVID-19. Thus, even if Plaintiff can establish that it meets the requirements of direct physical loss of or damage to property, such loss or damage would be the result of the virus and would fall within the Virus Exclusion. The Southern District of New York, along with several other courts, has ruled on whether business interruption coverage is applicable to COVID-19 government order-related

losses. With two exceptions, those decisions have conclusively held that coverage does not exist. Each of those cases found no coverage under comparable policies because tangible, physical damage is needed to trigger coverage and COVID-19 related government restrictions on business activity do not amount to such damage. The outlier decisions rendered by courts in Missouri and New Jersey were based on the conclusion that a loss of use of property constitutes a direct physical loss. New York courts, however, have rejected such an interpretation of this policy language.

Great American avers that Plaintiff has not sufficiently pled its sixth and seventh claims seeking to hold Great American vicariously liable for the purported acts of Soundview's agents, Five Star and Wilkinson. Soundview's conclusory statement that Great American was a principal of the Insurance Brokers does not suffice to survive a motion to dismiss. Further, it is uncontested that Five Star was Soundview's insurance broker. Absent exceptional circumstances, an insurance broker is an agent of the insured, not the insurance company. Similarly, Soundview alleges that Five Star retained Wilkinson to assist with these broker duties as an intermediary or a wholesale broker. It is also well established that such an intermediary is an agent of the insured's agent and thus acts on behalf of the insured. Even assuming that the Insurance Brokers were agents of Great American, Plaintiff fails to state a claim for their purported misrepresentation as to coverage and, in fact, does not allege any specific representation by the brokers that Soundview allegedly relied upon. Soundview had the Policy for almost a year before the alleged loss and is presumed to have read its insurance policies. Soundview also has not alleged any special relationship such that its brokers might be held to have assumed duties in addition to merely obtaining the requested coverage.

Great American argues that the Policy was clearly and unambiguously issued by GANY, not GAIC. In fact, no such entity exists, as it is merely a trade name and not itself a company or an underwriter of insurance coverage. Even if GAIC was an actual entity, Plaintiff has not pled a basis to impose liability on a company with whom it had no contract. Accordingly, all claims against GAIG should be dismissed.

Plaintiff argues that the Virus Exclusion only modifies specific, enumerated portions of the Policy. Particularly, the Virus Exclusion modifies coverage under the 1) Select Business Policy Building and Personal Property Coverage Form, 2) Select Business Policy Business Income and Extra Expense Coverage Form, and 3) Select Business Policy Extra Expense

Coverage Form. The Virus Exclusion does not amend the 1) Select Business Policy Enhanced Plus Declarations, 2) Supplementary Declarations, 3) Select Business Policy, Business Income Operational Coverage, and 4) Equipment Breakdown Coverage, as well as several other portions of the Policy. Conspicuously absent from the coverages amended by the Virus Exclusion is the Business Income Additional for Civil Authority. Accordingly, Great American's CPLR § 3211(a)(1) motion must be denied.

Plaintiff argues that a special relationship existed between Plaintiff and the Insurance Brokers, who are agents of Great American. Additionally, the fact that Mr. Schuster of Five Star and/or Wilkinson specifically told Mr. Desner that they represent Great American, as well as many other insurance companies, created reliance on the part of Mr. Desner in their apparent agency. Great American is liable to Plaintiff based upon the actions of their agents as alleged in the sixth and seventh claims.

On reply, Great American contends that Plaintiff has not met its burden of establishing that its claim is covered by the Policy. Plaintiff offers no argument that there was direct physical loss of or damage to the property, and under well-established New York law, economic loss unrelated to any demonstrable physical alteration to the property is not covered. As of the filing of the reply, nine of the eleven courts that have addressed coverage for COVID-19 government order-related losses have conclusively found no coverage under similar policy language.

Great American argues that even if Plaintiff demonstrated that its claim fell within a coverage grant, the Virus Exclusion unquestionably bars coverage. Plaintiff argues that the Virus Exclusion does not apply because the Virus Exclusion endorsement states that the exclusion applies to four coverage forms in the Policy, but does not state that it applies to the declaration pages of the Policy. The Policy's declaration pages, however, are not insuring agreements. A declarations page does not define the scope of insurance coverage. There is no dispute that the Virus Exclusion is applicable to the Business Income, Extra Expense, and Civil Authority coverage grants, as the Virus Exclusion specifically states that it modifies the insurance provided under the Select Business Income and Extra Expense Coverage Form and the Select Business Policy Extra Expense Coverage Form, and further states that it applies to all forms or endorsements that cover Business Income, Extra Expense, or Action of Civil Authority.

Great American avers that Plaintiff fails to present any facts supporting its claim that Great American is vicariously liable for the acts of the Insurance Brokers. Mr. Dessner's

affidavit only addresses Plaintiff's relationship with the Insurance Brokers and does not establish that either Five Star or Wilkinson was an agent of Great American. Actual agency authority is determined and limited by the terms of an existing agreement, which has not been pled and does not exist. Apparent authority is also lacking as Soundview does not assert that Great American or any other party made a representation to Soundview regarding either Five Star or Wilkinson's authority to act on Great American's behalf. Moreover, even if the brokers were agents of Great American, Soundview still fails to identify any specific representation that Soundview allegedly relied upon. Mr. Desner states that he was led to believe that he had insurance in the event his cinema had to close due to fire and insurance in case of property damage. He does not allege that the brokers represented he would have coverage for losses due to a virus or a government-ordered closure due to a virus, or that he asked about this risk.

3. Jimcor's Motion

Jimcor argues that the Complaint must be dismissed because it does not sufficiently allege an agency relationship between Jimcor and Five Star or Wilkinson. The sixth and seventh causes of action allege that Jimcor is vicariously liable for the negligent acts of the Insurance Brokers. Plaintiff, however, does not allege any facts that could establish a principal-agent relationship between Jimcor and the Insurance Brokers. Moreover, the wholesale broker, as the insurer's agent, is not liable for the retail broker's negligence. There is no allegation of any promises made by Jimcor to Plaintiff or any conduct establishing a fiduciary duty. Jimcor did not alter the Policy terms in any way, and as a wholesale agent, it had no obligation to explain the terms of the Policy. Jimcor merely received the application as a submission to be provided to the various insurance markets accessible to Jimcor as a wholesale agent. All of Jimcor's communications were with the Insurance Brokers, not Plaintiff.

Jimcor contends that even if the Court finds that Plaintiff alleges an agency relationship, the sixth and seventh claims must be dismissed because Plaintiff does not allege facts supporting negligence or breach of contract claims against the Insurance Brokers. Jimcor is not vicariously liable for Plaintiff's loss because the Insurance Brokers obtained a renewal of Plaintiff's policy as requested and, accordingly, were not liable. Jimcor is also not vicariously liable because Plaintiff did not plead a special relationship with the Insurance Brokers. Even if Plaintiff could establish that the Insurance Brokers breached their duty to Plaintiff, the Complaint fails to allege any facts relating to proximate cause, as Plaintiff's damage was caused by Plaintiff's selection of

coverage. Plaintiff does not and cannot assert that another insurance coverage was available and would have covered its loss. Further, Plaintiff had an opportunity to review the Policy and did not raise any objection to the policy coverage.

Plaintiff argues that an agency relationship is established because the Policy states that Jimcor is the agent. As to breach of contract, Plaintiff presumes that Jimcor claims the Virus Exclusion applies. The Virus Exclusion, however, only modifies specific enumerated portions of the Policy and thus the documentary evidence does not resolve all factual issues as a matter of law. Further, a special relationship existed between Plaintiff and the Insurance Brokers. As the agent of its co-defendants, Jimcor is liable for the Insurance Brokers' breaches, negligence, actions, and inactions. Additionally, Mr. Schuster of the Insurance Brokers told Mr. Desner that they represented Great American, which created apparent agency upon which Plaintiff and its principal relied.

On reply, Jimcor argues that the Insurance Brokers are not Jimcor's agents in the subject transaction. The Insurance Brokers are agents of and represent Plaintiff, while Jimcor is the agent of and represents Great American. The Policy declaration page declaring Jimcor as Great American's agent confirms this relationship. Because the Insurance Brokers are not Jimcor's agents, their purported negligence would not be imputed to Jimcor. Jimcor avers that its moving brief does not argue that there is no breach of contract because of the Virus Exclusion. Rather, the moving papers contend that even if this Court found that the Insurance Brokers were Jimcor's agents, no liability would be imputed to Jimcor because the Insurance Brokers did not breach a contract or commit negligence. Moreover, there is no allegation in the Complaint or basis in law that a breach by Great American would somehow create a cause of action against Jimcor. To the extent Plaintiff contends that a special relationship exists between Soundview and the Insurance Brokers, there is no relationship, let alone a special relationship, between Soundview and Jimcor.

RULING OF THE COURT

A. Motion to Dismiss

A motion to dismiss pursuant to CPLR § 3211(a)(1) may only be granted where "the documentary evidence utterly refutes the plaintiff's factual allegations, thereby conclusively establishing a defense as a matter of law." *Karpovich v. City of N.Y.*, 162 A.D.3d 996, 997 (2d Dept. 2018), quoting *Mawere v. Landau*, 130 A.D.3d 986, 987 (2d Dept. 2015). Documentary

evidence must be “unambiguous, authentic, and undeniable.” *Karpovich*, 162 A.D.3d at 997, quoting *Granada Condominium III Ass’n v. Palomino*, 78 A.D.3d 996, 996-97 (2d Dept. 2010).

On a motion to dismiss pursuant to CPLR § 3211(a)(7), the court is required to “accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” *Connaughton v. Chipotle Mexican Grill, Inc.*, 29 N.Y.3d 137, 141 (2017), quoting *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). Dismissal is warranted where the non-movant “fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery.” *Connaughton*, 29 N.Y.3d at 142.

B. Relevant Legal Principles

An insurance broker may be liable on a breach of contract or negligence theory for failing to procure insurance upon a demonstration that the agent or broker “failed to discharge the duties imposed by the agreement to obtain insurance, either by proof that it breached the agreement or because it failed to exercise due care in the transaction.” *Da Silva v. Champ Constr. Corp.*, 186 A.D.3d 452, 453 (2d Dept. 2020). The plaintiff must demonstrate that a specific request was made to the broker for coverage that was not provided in the policy. *Brannigan v. Christie Overhead Door*, 149 A.D.3d 892, 893-94 (2d Dept. 2017).

An insurance broker has a common-law duty to obtain the requested coverage within a reasonable amount of time, or to inform the client that he or she is unable obtain the requested coverage. Accordingly, the insurance broker’s duty is defined by the nature of the client’s request. *Broecker v. Conklin Prop., LLC*, 189 A.D.3d 751, 752 (2d Dept. 2020). Nevertheless, where the broker and client share a special relationship, the broker may be liable for failing to advise or direct the client to obtain additional coverage even in the absence of a specific request. *Waters Edge @ Jude Thaddeus Landing, Inc. v. B&G Group, Inc.*, 129 A.D.3d 706, 707 (2d Dept. 2015). The Court of Appeals has identified three such exceptional situations that may create a special relationship: “1) the agent receives compensation for consultation apart from payment of the premiums, 2) there was some interaction regarding a question of coverage, with the insured relying on the expertise of the agent; or 3) there is a course of dealing over an extended period of time which would have put objectively reasonable insurance agents on notice

that their advice was being sought and specifically relied on.” *Id.*, quoting *Voss v. Netherlands Ins. Co.*, 22 N.Y.3d 728, 735 (2014).

In determining an insurance coverage dispute, the court first looks to the language of the policy and construes the policy in a manner that gives fair meaning to the language contained in the contract and leaves no provision without force and effect. *140 Grist, Inc. v. Privilege Underwriters Reciprocal Exch.*, 185 A.D.3d 636, 637 (2d Dept. 2020). Federal courts in New York and throughout the country have almost uniformly held that loss of use of premises due to COVID-19 related government orders does not trigger business income coverage based on physical loss to property. *Michael Cetta, Inc. v. Admiral Indem. Co.*, --- F. Supp. 3d ---, 2020 WL 7321405, at *8 (S.D.N.Y. Dec. 11, 2020) (collecting cases). *See also 10012 Holdings, Inc. v. Sentinel Ins. Co., Ltd.*, --- F. Supp. 3d ---, 2020 WL 7360252, at *2 (S.D.N.Y. Dec. 15, 2020) (noting that New York courts interpreting insurance policy language with respect to “loss of, damage to, or destruction of property or facilities” have limited such language to losses involving physical damage to the property) (collecting cases).

C. Application of the Principles to the Instant Action

The Insurance Brokers’ motion is granted. Plaintiff does not allege that it made any inquiries about specific insurance coverage that might apply to these unprecedented times, and certainly does not allege that it inquired about coverage for pandemic-related government closures. Mr. Desner’s vague assertion that he asked if Soundview was sufficiently insured for known and unknown business risks does not suffice to allege that a specific request was made to the Insurance Brokers for coverage that was not provided in the Policy. And even assuming, *arguendo*, that Mr. Desner’s long-term friendship with Mr. Schuster of Five Star gave rise to a special relationship, Plaintiff has not plausibly alleged that the Insurance Brokers breached their duty by failing to direct Plaintiff to obtain additional coverage. Indeed, Plaintiff does not allege that any such insurance coverage for pandemic-related government closures existed prior to March 2020.

Plaintiff’s claims against Jimcor and Great American based on the Insurance Brokers’ conduct fails in the absence of underlying negligence and/or a failure to properly procure insurance by the Insurance Brokers.

Plaintiff’s claim against the Great American Defendants for breach of the Policy is dismissed. While the Court is sympathetic to the economic consequences resulting from the

closure of Plaintiff's movie theater, the Court concurs with the majority view that loss of use of the Premises due to COVID-19 related government orders does not constitute "direct physical loss of or damage to the property" that would trigger Business Income coverage under the Policy. *See* Buckley Affm. at Exh. 4, GAIC000067. Extra Expense coverage is also inapplicable, as it requires a showing that Business Income coverage applies, and is defined as expenses incurred during the period of restoration that the insured would not have incurred "if there had been no direct physical loss or damage to property caused by or resulting from a Covered Cause of Loss." *Id.* at GAIC000068. Finally, Civil Authority coverage is not triggered because access to the Premises was not prohibited due to direct physical loss of or damage to neighboring property. *See id.* at GAIC000069.

CONCLUSION

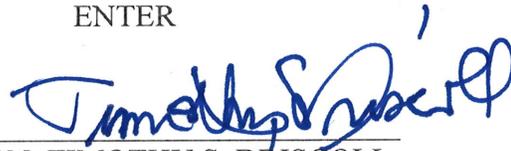
Defendants' motions are granted. Settle judgment on ten (10) days notice.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

DATED: Mineola, NY
February 8, 2021

ENTER



HON. TIMOTHY S. DRISCOLL
J.S.C.

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