NONPRECEDENTIAL DISPOSITION
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United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Argued January 10, 2024
Decided March 20, 2024

Before

DIANE S. SYKES, *Chief Judge*

DAVID F. HAMILTON, *Circuit Judge*

JOHN Z. LEE, *Circuit Judge*

No. 23-1451

Q EXCELSIOR ITALIA SRL,
Plaintiff-Appellant,

v.

ZURICH AMERICAN INSURANCE COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 1:21-cv-01166

Martha M. Pacold,
Judge.

O R D E R

Plaintiff Q Excelsior Italia, the owner of the Westin Excelsior Rome hotel, has sued its insurer, defendant Zurich American Insurance Company, alleging wrongful denial of coverage for losses the hotel suffered in the early weeks of the COVID-19 pandemic. Defendant Zurich moved to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. The district court granted Zurich's motion in all

relevant parts, and plaintiff Q Excelsior has appealed.[1] Our prior decisions in *Crescent Plaza Hotel Owner, L.P. v. Zurich American Insurance Co.*, 20 F.4th 303 (7th Cir. 2021), and *Sandy Point Dental, P.C. v. Cincinnati Insurance Co.*, 20 F.4th 327 (7th Cir. 2021), affirmed dismissal of nearly identical claims of wrongful denial of coverage. *Crescent Plaza* dealt with nearly identical claims by a hotel owner and even interpreted the same policy—not just the same policy form, but the same policy—at issue here. Our decisions in those cases foreclose Q Excelsior's arguments and control our decision. We affirm the district court's dismissal.

The Westin Excelsior Rome is a luxury hotel in central Rome, Italy. In March 2020, in response to the COVID-19 pandemic, the Italian government issued a series of orders suspending non-essential activities and limiting movement to "approved work, health or urgent needs." Other nations imposed similar orders restricting travel or imposing quarantines on travelers coming to and from Italy. Although the Italian government's orders did not mandate that hotels close, plaintiff's hotel bookings dropped to virtually zero, as most guest bookings were cancelled in response to the pandemic and new bookings ceased to be made.

Q Excelsior was an insured under a commercial property insurance policy issued by Zurich to hotel giant Marriott International. Q Excelsior alleges that it submitted two insurance claims for the lost business income and extra expenses it incurred due to the pandemic and that Zurich did not respond to either claim. Q Excelsior interpreted Zurich's failure to respond to mean that it did not intend to cover Q Excelsior's losses and filed this suit seeking damages for Zurich's alleged breach of the policy and a declaratory judgment that the policy provides coverage.

Zurich argues that Q Excelsior's claims under the policy fail for two independent reasons: (1) plaintiff fails to allege "direct physical loss," and (2) the Microorganism Exception independently bars its claims.

Considering first the question of direct physical loss, Zurich contends that Q Excelsior cannot satisfy the policy requirement to show that COVID-19 caused "direct physical loss or damage" to the hotel. In response, Q Excelsior argues that it has sufficiently pled a "direct physical loss" by alleging a "complete physical dispossession" of its property due to COVID-19, an argument it contends was left open by *Sandy Point Dental*. Q Excelsior claims the district court erred by finding that circuit

[1] The district court denied the motion only as to Q Excelsior's claim for coverage under a provision of the insurance policy concerning cancelled bookings. Q Excelsior later voluntarily dismissed that claim.

precedent "categorically forecloses a plaintiff from showing complete physical dispossession … through allegations that SARS-CoV-2 rendered a property uninhabitable."

Plaintiff's theory fails on two independent grounds. First, Q Excelsior failed to develop its "complete physical dispossession" argument in the district court, forfeiting the theory for appeal. "Dispossession" and "dispossess" are found nowhere in plaintiff's complaint and only once in Q Excelsior's opposition to Zurich's motion to dismiss, in a single sentence quoting from *Sandy Point Dental*.

Second, even if we overlooked Q Excelsior's forfeiture of this complete dispossession theory, it would immediately run aground on *Sandy Point.* Our opinion in *Sandy Point* left open the possibility that some "loss of use, unaccompanied by any physical alteration to property, might be so pervasive as effectively to qualify as a complete physical dispossession of property and thus a 'direct physical loss.'" 20 F.4th at 334. When that passage is read in context, however, it is evident that we intended to keep the door open for "complete physical dispossession" only in situations of true uninhabitability, like gas leaks or noxious fumigation. See *id.* at 334–35 (noting that, unlike gas infiltration, where contamination makes "physical entry impossible, thus barring all uses by all persons," the COVID-19 virus's "impact on physical property is inconsequential: deadly or not, it may be wiped off surfaces using ordinary cleaning materials, and it disintegrates on its own in a matter of days"); accord, *Sweet Berry Café, Inc. v. Society Insurance, Inc.*, 2022 IL App (2d) 210088, 193 N.E.3d 962, 974 (affirming dismissal of similar claims by restaurant and distinguishing asbestos and noxious gas cases because, "unlike a noxious gas, … the virus's presence is easily remediated by routine, not specialized or costly, cleaning and disinfecting or will die off after a few days").

Q Excelsior seeks to avoid *Sandy Point Dental* by arguing that it did more than that plaintiff to allege that its hotel was rendered entirely "uninhabitable" by COVID-19. The argument is simply not correct. Q Excelsior's own allegations undercut its theory of "complete physical dispossession" due to COVID-19. Q Excelsior alleged repeatedly in its amended complaint that the Westin Excelsior Rome was authorized to and did remain open for business during the pandemic. It "employ[ed] additional security staff … ensuring only staff and guests with green passes entered the premises" and implemented new sanitation, cleaning, and social distancing measures to keep hotel guests and staff safe and to "continue operations as normally as possible." Far from being sufficient to establish a theory of complete physical dispossession or

uninhabitability, Q Excelsior's allegations reveal the same theory of diminished use that we rejected in *Sandy Point Dental*. See 20 F.4th at 334.

The district court was correct that our case law categorically forecloses Q Excelsior's argument that a mere "loss of functionality" due to the presence of COVID-19 and related government closure orders can show "complete physical dispossession." In *Sandy Point Dental* and other cases, we have held repeatedly that allegations of diminished use cannot amount to direct physical loss under a property insurance policy. See *Sandy Point Dental*, 20 F.4th at 334 ("Without any physical alteration to accompany it, … partial loss of use does not amount to a 'direct physical loss.'"); *Paradigm Care & Enrichment Center, LLC v. West Bend Mutual Insurance Co.*, 33 F.4th 417, 421 (7th Cir. 2022) ("We held with respect to Illinois law that the phrase 'direct physical loss' in a commercial property insurance policy requires a physical alteration to property—that is, some alteration in appearance, shape, color or other material dimension.") (internal quotation and alteration marks omitted). Q Excelsior has not offered any plausible distinction between its allegations here and the insufficient allegations in those cases.[2]

As a second, independent grounds for dismissing Q Excelsior's case, Zurich contends that the policy's Microorganism Exclusion also defeats coverage under the policy. That exclusion bars coverage for losses "directly or indirectly arising out of or relating to: mold, mildew, fungus, spores or other microorganism of any type, nature, or description, including but not limited to any substance whose presence poses an actual or potential threat to human health." In *Crescent Plaza*, involving another hotel insured under the same Zurich policy, we held that the exclusion "independently bar[red] coverage for the hotel's claimed losses." 20 F.4th at 306. The district court correctly considered itself bound by *Crescent Plaza*'s holding that "the term 'microorganism'" in the exclusion "unambiguously applies to viruses." *Q Excelsior*, 2022 WL 17093361, at *4 (N. D. Ill. Nov. 21, 2022), quoting *Crescent Plaza*, 20 F.4th at 309–10. The Microorganism Exclusion therefore "provides a second, independent basis for denying coverage" in this case, as it did in *Crescent Plaza*. See 20 F.4th at 308.

[2] Since our holdings in *Crescent Plaza* and *Sandy Point Dental*, we have repeatedly resolved similar COVID-19 coverage appeals with non-precedential orders, underscoring that the questions raised by Q Excelsior are neither new nor unresolved. See, e.g., *Windy City Limousine Co., LLC v. Cincinnati Fin. Corp.*, No. 21-3296, 2022 WL 1965903, at *1 (7th Cir. June 6, 2022); *Green Beginnings, LLC v. West Bend Mutual Insurance Co.*, No. 21-2186, 2022 WL 1700139, at *1 (7th Cir. May 27, 2022).

We decline Q Excelsior's invitation to overrule *Crescent Plaza* on the theory that its *Erie Railroad* prediction of Illinois law was incorrect. The Illinois Appellate Court has repeatedly rejected arguments that the COVID-19 virus caused direct physical loss or damage. See, e.g., *Lee v. State Farm Fire & Casualty Co*., 2022 IL App. (1st) 210105, ¶ 16, 205 N.E.3d 915, 919 (expressly agreeing with Seventh Circuit's *Erie Railroad* prediction in *Sandy Point Dental* on the scope of "direct physical loss"). The Illinois Supreme Court has repeatedly declined opportunities to overrule state appellate courts that have arrived at the same conclusions.[3] For those same reasons, we also deny Q Excelsior's request that we certify the question to the Illinois Supreme Court. See *Nat'l Cycle, Inc. v. Savoy Reinsurance Co. Ltd.*, 938 F.2d 61, 64 (7th Cir. 1991) ("[T]he right time to certify a question is before the first federal decision on the point. Certification eliminates the need to expend judicial resources predicting how another court will decide a question. Once we have invested the time and effort to make the prediction, the costs have been sunk.").

The judgment of the district court is AFFIRMED.

[3] At least fourteen cases on property insurance coverage for COVID-19 losses have received final decisions from the Illinois appellate courts, all declining to find coverage. See, e.g., *Sweet Berry Café*, 2022 IL App (2d) 210088, ¶ 1, 193 N.E.3d 962; *Lee*, 2022 IL App. (1st) 210105, ¶ 25, 205 N.E.3d 915; *Alley 64, Inc. v. Society Insurance*, 2022 IL App (2d) 210401, ¶ 103, 206 N.E.3d 1109; *Firebirds International, LLC v. Zurich American Insurance Co.*, 2022 IL App (1st) 210558, ¶ 45, 208 N.E.3d 1187; see also Tom Baker, *Appeals in Business Interruption Cases*, Covid Coverage Litigation Tracker, Penn Carey Law School at the University of Pennsylvania, https://cclt.law.upenn.edu/appeals/ (last visited Mar. 7, 2024).