

SJ 1st St. Hotel, LLC v Sampo Am. Ins. Co.
2021 NY Slip Op 32558(U)
November 30, 2021
Supreme Court, New York County
Docket Number: Index No. 654534/2020
Judge: Margaret A. Chan
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MARGARET CHAN **PART** **49M**

Justice

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INDEX NO. 654534/2020

SJ 1ST STREET HOTEL, LLC, TNREF III BRAVO VAIL,
LLC,

MOTION DATE 03/08/2021

Plaintiff,

MOTION SEQ. NO. 003

- v -

SOMPO AMERICA INSURANCE COMPANY,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 71

were read on this motion to/for DISMISSAL

Upon the foregoing documents and oral argument held on December 30, 2021, it is granted.

Plaintiffs are hotel owners and operators in California and Colorado. Defendant Sompo America Insurance Company issued a commercial property insurance policy for plaintiffs' hotels (the "Policy"). In March 2020, when the Coronavirus Disease 2019 (COVID-19) pandemic spread to the United States, the state and local governments of California and Colorado issued civil authority orders that essentially shut down all non-essential businesses, including plaintiffs' hotels. Plaintiffs lost business and now seek a declaratory judgment entitling them to compensation under their insurance policy. Specifically, plaintiffs seek a declaratory judgment (1) stating that the civil authority orders trigger coverage; (2)(i) that the Policy at issue provides coverage for any closures of businesses due to physical loss or damages from COVID and/or the pandemic, and (ii) that the Policy provides business income coverage when COVID-19 caused a loss or damage at the insured property; and (3) that reliance on the Virus Exclusion in the Policy is estopped by the principles of regulatory estoppel (NYSCEF # 60 – Corrected First Amended Complaint, ¶¶ 131-133). Plaintiffs also seek "a Declaratory Judgment to determine whether the [civil authority] orders constitute a prohibition of access to Plaintiff's Insured Property" (*id.*, ¶ 130). Defendant moves under CPLR 3211 to dismiss plaintiffs' Corrected First Amended Complaint (Complaint), which plaintiffs oppose.

Plaintiffs' hotels were negatively impacted by the Shelter-in-Place orders since these orders eliminated most, if not all, their hotel, restaurant, bar, and convention businesses (NYSCEF # 64 – Pltfs' MOL in Opp at 1-3). Plaintiffs argue that the COVID-19 and the civil authority orders by the state and local

governments caused their losses which triggered coverage with no applicable exclusions under their commercial property insurance policy (*id.* at 2). Hence, plaintiffs looked to defendant to cover their business income and business interruption losses, the necessary and reasonable extra expenses they incurred, and other losses (*id.*; NYSCEF # 60 – Complaint, ¶¶ 17-20).

Plaintiffs claim that the Policy they have from defendant is an all-risk policy offering the broadest coverage “unless the loss is specifically and unambiguously excluded or limited in the Policy” (NYSCEF # 60, ¶ 22). Relevant to this case, the Policy provides “property, business personal property, business income and extra expense, contamination coverage, and additional coverages.” (*id.*, ¶ 17). Plaintiffs specify the following provisions as relevant to the coverage they seek: Civil Authority, Business Income, Extra Expense, Additional Time Element Coverages; Attraction Property; Contingent Time Element, and Ingress/Egress; Additional Coverages (*id.*, ¶¶ 21, 65-68). The additional coverages cover the actual loss of business income and the expenses incurred as a result of a business interruption or closure such as the shelter-in-place orders that were issued due to COVID-19 (*id.*, ¶¶ 18-21).

Plaintiffs allege that COVID-19 is not excluded under the policy’s Virus Exclusion because the pandemic is not specified (*id.*, ¶¶ 28, 47). Plaintiffs posit that the Insurance Service Office (ISO), in forming the exclusion section which defendant adopted, could not have intended to exclude coverage for a pandemic since the ISO had drafted the Virus Exclusion for the SARS situation; SARS was not a pandemic. Extending that rationale, plaintiffs conclude that since COVID-19 is a pandemic, it is not an excluded cause for their loss (*id.*, ¶¶ 32-39).

Plaintiffs add that the Virus Exclusion is also inapplicable here because their losses were caused by the civil authority orders that shut down their businesses (*id.*, ¶¶ 53-57). In that vein, plaintiffs allege that their Policy covers their business loss that has nothing to do with communicable diseases but everything to do with the civil authority orders (*id.*, ¶¶ 57-61).

Quoting from a San Francisco Mayoral Proclamation dated February 25, 2020, plaintiffs next allege that they sustained physical damage: “COVID-19 causes direct physical damage and loss to property ... because the virus attaches to surfaces for prolonged period of time” (*id.*, ¶ 96). Part and parcel to these allegations is plaintiff’s argument that defendant’s motion to dismiss is not ripe because discovery is needed as to whether there is physical loss or damage, how COVID-19 causes property damage, and how much remediation would cost.

Finally, plaintiffs sum up their position by quoting from an interview of then President Trump,¹ who professed to be “very good at reading language” -- business interruption insurance should cover the business interruption that was caused by the pandemic because he did not see “the word pandemic mentioned.” (*Id.*, ¶ 97).

Defendant denied coverage because plaintiffs did not suffer a “direct physical loss or damage” (NYSCEF # 58 – Deft’s MOL at 1). Based on the coverage provisions plaintiffs cited, defendants note that “ ‘direct physical loss or damage’ is a prerequisite to each of these coverages” (*id.* at 2). Defendant cites excerpts from the provisions plaintiffs invoked as offering coverage to support the allegations in their complaint (*id.* at 2-5). For example, the provision for Civil Authority, under section D 8 of the Policy – “Interruption by Civil or Military Authority” states:

We will pay the actual business income loss sustained by you and extra expense if an order of civil or military authority limits, restricts or prohibits access to property not insured under this Policy, provided that:

- a. Such property sustains direct physical loss or damage caused by a covered cause of loss;

....

(*Id.* at 3; NYSCEF # 61 – Policy – at 88 [bate stamped pages] [emphasis supplied].)

Defendant argues that where the policy is clear and unambiguous, the policy should be interpreted as written. Every provision plaintiffs argue as giving coverage has the language that requires the property to have sustained direct physical loss or damage. Defendants note that plaintiffs’ claims do not go to direct physical loss or damage but to loss of use. Defendant asserts that the direct physical loss or damage coverage is limited to “only where the insured’s property suffers direct physical damage” (quoting *Roundabout Theatre Co., Inc. v Continental Cas. Co.*, 302 AD2d 1, 6-7 [1st Dept 2002]). Defendant points out that “[t]o date, every single court interpreting New York law has concluded that Covid-19 and any resulting government orders may result in loss of use, but not physical loss or damage, and therefore do not constitute direct physical loss or damage.” (NYSCEF # 58 – MOL at 9 [emphasis omitted]).

Defendant is correct. Under New York law, direct physical loss or damage is a requirement to trigger the business interruption coverage under the Policy here (*see Northwell Health, Inc. v Lexington Ins. Co.*, 2021 WL 3139991, *6 [SD NY

¹ From https://youtu.be/_cMeG5C9TjU: Trump – “When I was in private [sic] I had business interruption. When my business was interrupted through a hurricane or whatever it may be, I’d have business where I had it, I didn’t always have it, sometimes I had it, I had a lot of different companies. But if I had it [,] I’d expect to be paid.” (emphasis omitted.)

2021] [granting motion to dismiss complaint seeking to recover for COVID-related costs and losses under insurance policies, noting that plaintiff's interpretation of the policies "risks impermissibly collapsing coverage for direct physical loss or damage into 'loss of use' coverage"]; *Newman Myers Kreines Gross Harris, P.C. v Great N. Ins. Co.*, 17 F Supp 3d 323, 331 [SD NY 2014] [holding that under New York law, "direct physical loss or damage... unambiguously requires some form of actual, physical damage to the insured premises to trigger loss of business income and extra expense coverage")].

The gist of plaintiffs' complaint is that the pandemic brought about by COVID-19, which prompted Shelter-in-Place orders resulted in their inability to operate their businesses or, in other words, loss of use of their businesses. Plaintiffs' attempts to fit 'loss of use' into a direct physical loss are unpersuasive at best as are plaintiffs' attempts to sway the interpretation of a clear and unambiguous policy into one infused with confusion that interplays civil authority orders and the viruses. At bottom, the Policy requires physical loss or damage to trigger the myriad of coverage provisions plaintiffs cite, and the Policy has a virus exception even if plaintiffs differentiate the SARS from COVID-19 viruses. Finally, plaintiffs' speculation that discovery is needed goes back to the physical loss or damage issue they postulate, which neither COVID-19 nor the civil authority orders caused, and plaintiffs do not point to any physical damage to their property.

In sum, plaintiffs have failed to state a cause of action warranting dismissal of their Corrected First Amended Complaint.

Accordingly, it is

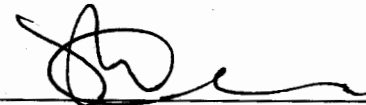
ORDERED that defendant SOMPO America Insurance Co.'s motion to dismiss plaintiffs SJ 1st Street Hotel, LLC and TNREF III Bravo Vail, LLC's Corrected First Amended Complaint is granted; it is further

ORDERED that counsel for defendant SOMPO America Insurance Co. is directed to serve a copy of this Decision and Order with notice of entry on the Clerk of the Court; and it is further

ORDERED that upon such service, the Clerk of the Court is directed to enter judgment dismissing the Corrected First Amended Complaint in its entirety.

11/30/2021

DATE



MARGARET CHAN, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED
 SETTLE ORDER

DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART
 SUBMIT ORDER

OTHER

APPLICATION: